VOLUME I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1964

N[redacted] 48

UNITED MINE WORKERS OF AMERICA,
PETITIONER,

vs.

JAMES M. PENNINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 17, 1964
CERTIORARI GRANTED MAY 18, 1964

Joint Appendix

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 14,809

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admrx. of the Estate of Burse Phillips, deceased,
Cross-Plaintiffs-Appellees,

v.

UNITED MINE WORKERS OF AMERICA,
Cross-Defendant-Appellant.

No. 14,810

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, as Trustees of the UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND,
Plaintiffs-Appellees,

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admrx. of the Estate of Burse Phillips, deceased,
Defendants-Appellants.

Appeals from Judgments and Orders of the United States District Court for the Eastern District of Tennessee, Northern Division

---

VOLUME I
Pages 1a-512a

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.



TABLE OF CONTENTS OF APPENDIX

	Page
Caption in District Court	1a
Relevant Docket Entries	2a
Complaint	9a
Answer of Defendants	11a
Counterclaim	18a
Cross-Claim against Plaintiffs and United Mine Workers of America	19a
Order, February 19, 1958	21a
Amendment to Answer	21a
Motion of Cross-Defendant, United Mine Workers of America, to Dismiss Action	23a
Motion to Vacate Order Granted Under Rule 13(h) and to Dismiss Cross-Claim as to Plaintiff Trustees	25a
Answer to Counter-Claim	25a
Motion to Amend Answer, Counter-Claim and Cross-Claim filed by Defendants	26a
Motion to Add a Party Plaintiff	28a
Order, August 11, 1958	29a
Additional Motion to Amend Answer, Counter-Claim and Cross-Claim filed by Defendants	30a
Memorandum (Delivered from the Bench), July 1, 1959	34a
Order, July 2, 1959	36a
Answer of United Mine Workers of America to Amended Cross-Claim filed Against It and Others	38a
Motion of Cross-Plaintiffs to Amend the Cross-Claim or Counter-Claim to Specify Period of Time Encompassed by the Cross-Claim or Counter-Claim	40a

Order of Substitution of Parties, September 30, 1960 41a

Order, November 25, 1960 42a

Amended Answer to Counter-Claim 42a

Order, January 16, 1961 44a

Motion of Defendants and Cross-Plaintiffs for Order Consolidating Claims for Trial and Dismissing Claim of Cross-Plaintiffs Against Cross-Defendants 44a

Response of United Mine Workers of America to Motion of Defendants and Cross-Plaintiffs to Consolidated Claims and Motion to Dismiss 46a

Order, April 10, 1961 47a

Order Pursuant to Pre-Trial, April 10, 1961 48a

Motion of United Mine Workers of America for Judgment in Accordance with Motions for Directed Verdict or in the Alternative Motion For a New Trial 64a

Motion of Trustees for Judgment in Accordance with Motions for Directed Verdict or in the Alternative Motion For a New Trial 73a

Judgement, August 2, 1961 82a

Opinion Rendered From the Bench, July 31, 1961 85a

Notice of Appeal filed by Cross-Defendant 100a

Notice of Appeal filed by Defendants 101a

Order, August 28, 1961 101a

Order, October 2, 1961 102a

TRANSCRIPT OF PROCEEDINGS

Caption in District Court 103a

Court's Statement of Case 104a

Defendants' Opening Statement 108a

Stipulation 117a

Defendants' and Cross-Plaintiffs' Evidence

Jack Shattuck
- Direct Examination 118a
- Cross Examination 129a
- Redirect Examination 130a

Andrew Frost
- Direct Examination 130a
- Cross Examination 137a

H. B. Wicks
- Direct Examination 138a
- Cross Examination 145a
- Redirect Examination 146a

Will Hood Wender
- Direct Examination 146a
- Cross Examination 152a
- Redirect Examination 154a

Alonzo Cox
- Direct Examination 155a
- Cross Examination 159a
- Redirect Examination 163a
- Recross Examination 164a

John Van Huss
- Direct Examination 164a
- Cross Examination 169a

Raymond E. Phillips
- Direct Examination 173a
- Cross Examination 211a

James M. Pennington
Direct Examination ---- 220a
Cross Examination ---- 225a

Albert Pass
Direct Examination ---- 231a
Cross Examination ---- 242a
Redirect Examination ---- 243a

United Mine Workers of America
Interrogatories ---- 244a

John L. Lewis (Deposition)
Direct Examination ---- 251a
Cross Examination ---- 493a

United Mine Workers of America
Interrogatories (resumed) ---- 495a

Judge Charles I. Dawson (Deposition)
Direct Examination ---- 518a
Cross Examination ---- 527a

George H. Love (Deposition)
Direct Examination ---- 530a

Robert L. Kaiser (Deposition)
Direct Examination ---- 550a

Cyrus S. Eaton (Deposition)
Direct Examination ---- 556a

Mark Eastin (Deposition)
Direct Examination ---- 586a
Cross Examination ---- 613a
Redirect Examination ---- 619a

Barnum L. Colton (Deposition)
Direct Examination ---- 623a

James W. Haley (Deposition)
Direct Examination ---- 646a

William B. Sturgill (Deposition)
Direct Examination ---- 656a

Albert B. Hill (Deposition)
Direct Examination ---- 667a
Cross Examination ---- 686a

J. S. Routh, Jr.
Interrogatories ---- 689a

R. H. Hughes
Interrogatories ---- 696a

Herbert C. McCollum (Deposition)
Direct Examination ---- 699a
Cross Examination ---- 710a
Redirect Examination ---- 710a

Merle C. Kelce (Deposition)
Direct Examination ---- 711a
Cross Examination ---- 746a
Redirect Examination ---- 751a

R. J. Snider (Deposition)
Direct Examination ---- 753a

Raymond Dupee (Deposition)
Direct Examination ---- 757a

Dino Fratiglioni (Deposition)
Direct Examination ---- 764a

George Schmidt (Deposition)
Direct Examination ---- 766a
Cross Examination ---- 770a

Frank Kreitner (Deposition)
Direct Examination ---- 770a

J. L. Hamilton
Interrogatories ---- 774a

H. D. Waters
Interrogatories ---- 777a
Cross Interrogatories ---- 779a

Michael F. Widman, Jr. (Deposition)
Direct Examination ---- 780a

Elmer C. Hill (Deposition)
Direct Examination 787a
Cross Examination 806a
Redirect Examination 830a

Martin Hochdorf (Deposition)
Direct Examination 834a
Cross Examination 838a
Redirect Examination 839a

Taylor Maddox, Sr. (Deposition)
Direct Examination 841a
Cross Examination 844a
Redirect Examination 855a

I. E. Schmidt
Direct Examination 856a
Cross Examination 888a

John H. Amos
Direct Examination 907a

Leon Day
Direct Examination 964a
Cross Examination 970a

Arlow Hutson
Direct Examination 971a

Richard A. Hutson
Direct Examination 975a

Ralph Phillips
Direct Examination 980a
Cross Examination 983a

John H. Amos (testimony resumed)
Cross Examination 984a
Redirect Examination 990a
Recross Examination 993a

Plaintiffs' and Cross-Defendants' Evidence

Josephine Roche
Direct Examination 1005a
Cross Examination 1045a

H. G. Schmidt
Direct Examination 1048a
Cross Examination 1061a
Redirect Examination 1066a

Val J. Mitch
Direct Examination 1066a
Cross Examination 1083a
Redirect Examination 1092a
Recross Examination 1093a

John L. Lewis
Direct Examination 1093a
Cross Examination 1140a
Redirect Examination 1175a

John Owens
Direct Examination 1178a
Cross Examination 1225a

S. L. Jewell
Direct Examination 1249a
Cross Examination 1270a

T. Reed Scollon
Direct Examination 1280a
Cross Examination 1310a

Patrick B. C. Smith
Direct Examination 1318a
Cross Examination 1349a
Redirect Examination 1377a
Recross Examination 1381a

T. J. Hoffman
Direct Examination 1382a
Cross Examination 1406a

Albert Pass
Direct Examination 1415a
Cross Examination 1420a
Redirect Examination 1421a

Mark E. Eastin
Direct Examination 1422a
Cross Examination 1446a

R. E. Phillips (Deposition)
Cross Examination 1466a

Elliott D. Adams
Direct Examination 1467a
Cross Examination 1471a

Welly K. Hopkins
Direct Examination 1472a
Cross Examination 1501a
Redirect Examination 1505a
Recross Examination 1507a

Statements of Counsel 552a

Statements of Counsel 697a

Statements of Counsel 994a

Trustees' Motion for Directed Verdict 1003a

UMW's Motion for Directed Verdict 1004a

TVA Annual Reports 1508a

Rebuttal Evidence 1513a

Trustees' Renewal Motion for Directed Verdict 1523a

UMW's Renewal Motion for Directed Verdict 1524a

Arguments on Motions 1525a

Motions for Mistrial 1532a

Arguments on Motions 1533a
Trustees' Renewal Motion for Directed Verdict 1535a
Closing Arguments 1535a
Court's Charge to the Jury 1537a
Forms of Verdict 1577a
Objections to Court's Charge 1579a
Court's Further Charge to the Jury 1585a
Verdict of the Jury 1588a

EXHIBITS

No.		Page
13-21	Resume of Phillips Brothers Coal Company income tax returns for the years 1953-1958 (composite of Exhibits Nos. 13 thru 21)	1591a
22	Profit or loss, rail tons, etc., years 1955-1958	1592a
23	Check Letter of Advice, Phillips Bros. Coal Co., 11-12-53	1593a
24	Check Letter of Advice, Phillips Bros. Coal Co., 1-5-54	1594a
25	Check Letter of Advice, Phillips Brothers Coal Co., July 29, 1955	1595a
26	Check Letter of Advice, Phillips Brothers Coal Co., 12-17-55	1596a
27	Check Letter of Advice, Phillips Brothers Coal Co., August 4, 1956	1597a
34	Application Forms for Fund Benefits	1598a
39	List of cases brought by Trustees	1607a
40	List of Coal Companies	1619a
41	Walsh-Healey Act, Minimum Wage Determinations	1620a
42	United Mine Workers Journal, February 15, 1955	1625a
44	United Mine Workers Journal, February 15, 1958	1634a
48	Interests of United Mine Workers of America in West Kentucky Coal Company and Nashville Coal Company	1639a
72	Statement of Condition, The National Bank of Washington, October 3, 1960	1640a

EXHIBITS

No.		Page
73	Interest of United Mine Workers of America in National Bank of Washington	1642a
92	Table, "FACTS ABOUT TVA STEAM PLANTS"	1643a
98	Phillips Bros. Coal Co., TVA bids, 1956-1958	1644a
99	Average BTU Cost, 1956-1958 (Eastern plants & TVA system)	1645a
100	Total Tons purchased, 1956-1958 (Eastern & Western plants)	1646a
101	Pittsburgh-Midway Mines and Peabody Mines, table, 1956-1958	1647a
102	Table, West Kentucky & Nashville Coal Co., 1956-1958	1652a
103	Table, Debardeleben Coal Corp. & Traux-Traer Coal Co., 1956-1958	1656a
104	Table, Term Contract Awards, 1956-1959	1658a
107	Table, TVA Weighted Averages 1954-1958	1659a
110	Purchase Order from Tampa Electric Co. to Love & Amos Coal Co., December 23, 1957	1660a
111	Table, Love & Amos shipments to Tampa Electric Co., 1959-1961	1661a
115	Summary charts, "Tons of Coal For Steam—Electric Utilities" (United States, Tennessee, Virginia and Top Six States)	1662a
117	Summary chart showing National Average Price of coal, and Phillips' Average Price, 1956, 1957 and 1958	1663a
118	"Thickness of Bituminous Coal and Lignite Seams"	1664a

EXHIBITS

No.		Page
119	"Summary of method of haulage", etc.	1665a
120	"Number and production of bituminous coal and lignite strip mines", etc.	1666a
121	Chart, "Tennessee Mines Number and Production by Class", 1955 and 1959	1667a
123	"Supplementary Summary Chart" showing State, Delivered Price and Utility Tonnage	1668a
138	Excerpts from UMW Welfare & Retirement Fund File, re: Clem Terreo	1669a
139	Excerpts from UMW Welfare & Retirement Fund File, re: Steve Molnar	1678a
140	Excerpts from UMW Welfare & Retirement Fund File, re: John Shenkarik	1684a
141	Excerpts from UMW Welfare & Retirement Fund File, re: Rico Boggio	1694a
142	Excerpts from UMW Welfare & Retirement Fund File, re: Robert Taylor	1699a
143	Excerpts from UMW Welfare & Retirement Fund File, re: Thomas Liddle	1708a
145	Map of TVA	1713a
146A	Table 1, "UNITED STATES CONSUMPTION OF ENERGY FUELS", etc.	1714a
147A	Table 2, "UNITED STATES CONSUMPTION OF BITUMINOUS COAL", etc.	1715a
148A	Table 3, "TRENDS IN BITUMINOUS COAL PRODUCTION", etc.	1716a

EXHIBITS

No.		Page
149A	Table 4, "UNITED STATES TOTAL PRODUCTION OF BITUMINOUS COAL", etc. (by size of annual output)	1717a
150A	Table 5, "TENNESSEE TOTAL PRODUCTION OF BITUMINOUS COAL", etc. (by size of annual output)	1718a
151A	Table 6, "NUMBER OF BITUMINOUS COAL MINES", etc. (in United States)	1719a
152A	Table 7, "NUMBER OF BITUMINOUS COAL MINES", etc. (in Tennessee)	1720a
153A	Table 8, "UNITED STATES TOTAL PRODUCTION OF BITUMINOUS COAL", etc. (by method of mining)	1721a
154A	Table 9, "TENNESSEE TOTAL PRODUCTION OF BITUMINOUS COAL", etc (by method of mining)	1722a
155A	Table A, "UNITED STATES EXPORTS OF BITUMINOUS COAL"	1723a
156A	Table B, "SALIENT STATISTICS ON BITUMINOUS COAL IN THE UNITED STATES"	1724a
157A	Table C, "SALIENT STATISTICS ON BITUMINOUS COAL IN TENNESSEE"	1725a
165	Table, "AVERAGE PRICE F.O.B. MINE"	1726a
166	Chart, TVA "ANNUAL CONSUMPTION OF COAL IN TONS", 6-30-56 thru 6-30-59	1727a
167	"COAL—BITUMINOUS AND LIGNITE, PRICES"	1728a
168	Table, "COAL SHIPPED TO T.V.A. FROM WEST KENTUCKY & NASHVILLE", etc.	1729a

EXHIBITS

No.		Page
169	"BIDS ON COAL TO TVA FROM UNIONTOWN MINE", West Kentucky and Nashville, Table	1730a
170	Table, "BARGE LOADINGS AT UNIONTOWN 1958"	1731a
171	Table, "COMPARISON OF TOTAL COAL PRODUCTION" (West Kentucky, Nashville and Total National production)	1732a
173	Table showing Phillips' tonnage shipped by rail, etc.	1733a

	Original	Print
See Supplemental Appendix, pages 1735-1741 for Excerpts from Exhibit 77		
Proceedings in the United States Court of Appeals for the Sixth Circuit	1743	1743
Minute entry of argument and submission (omitted in printing)	1743	1743
Opinion, Miller, J.	1745	1743
Judgment	1769	1768
Clerk's certificate (omitted in printing)	1770	1768
Order allowing certiorari	1771	1769

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 14,809

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS* and LILLIAN GOAD PHILLIPS, Admrx. of the Estate of Burse Phillips, deceased,**
Cross-Plaintiffs-Appellees,

v.

UNITED MINE WORKERS OF AMERICA,
Cross-Defendant-Appellant.

No. 14,810

JOHN L. LEWIS, HENRY G. SCHMIDT*** and JOSEPHINE ROCHE, as Trustees of the UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND,
Plaintiffs-Appellees,

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS* and LILLIAN GOAD PHILLIPS, Admrx. of the Estate of Burse Phillips, deceased,**
Defendants-Appellants.

Appeals from Judgments and Orders of the United States District Court for the Eastern District of Tennessee, Northern Division

---

*On January 16, 1961, an order was entered correcting the name of "Ralph E. Phillips" to "Raymond E. Phillips".

**On September 30, 1960, Lillian Goad Phillips, Administratrix of the Estate of Burse Phillips, deceased, was substituted as defendant and cross-plaintiff in the place and stead of Burse (inaccurately called "Bruce" in the original complaint) Phillips, deceased.

***On August 11, 1958, an order was entered naming Henry G. Schmidt as an additional party plaintiff.

Caption

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

CIVIL ACTION No. 3431

JOHN L. LEWIS and JOSEPHINE ROCHE, as TRUSTEES of the UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND.

HENRY G. SCHMIDT, Trustee (amended 8-11-58), *Plaintiffs,*

VS.

JAMES M. PENNINGTON, RALPH E. PHILLIPS and *BRUCE PHILLIPS, Individually and trading as PHILLIPS BROTHERS COAL COMPANY, A Partnership,**

*LILLIAN GOAD PHILLIPS, Admrx, as defendant and cross plaintiff in the place and stead of Bruce Phillips (substituted 9-30-60) *Defendants,*

VS.

UNITED MINE WORKERS OF AMERICA,

Cross Defendant.

**The name of "Ralph E. Phillips" was corrected to "Raymond E. Phillips" on January 16, 1961.

Relevant Docket Entries

1958

Jan. 6 Complaint filed.

Feb. 14 Answer of defendants, counterclaim, and cross-claim against plaintiffs and United Mine Workers of America, filed.

Feb. 19 Order that summons be issued for service upon the United Mine Workers of America, entered in Civil Order Book 14 page 284, and filed.

March 5 Amendment to Answer filed.

March 14 Motion of Cross-Defendant, United Mine Workers of America, to dismiss the cross-claim, filed.

March 17 Motion to Vacate Order Granted under Rule 13(h) and to Dismiss the Cross-Claim as to the plaintiff Trustees filed.

March 17 Plaintiffs' Answer to Counter-Claim filed.

March 24 Motion to amend the answer, counterclaim and cross-claim filed by the defendants, filed.

June 2 Motion to add a party plaintiff, filed.

Aug. 11 Order that Henry G. Schmidt be named additional party plaintiff without prejudice, entered in Civil Order Book 15 page 319, and filed.

1959

June 26 Additional Motion to Amend the Answer, Counterclaim and Cross-Claim filed by the Defendants, filed.

July 2 Order that the motion to dismiss filed by the cross-defendant, United Mine Workers of America, is overruled except with respect to grounds Numbers V and XI, which are sustained; the Cross-defendant, UMW is given leave to renew at the pretrial conference, without prejudice, the grounds in said Motion to

Dismiss numbered III, IV, VI and VII; the motion of the plaintiffs filed March 17, 1958, to vacate the order granted under Rule 13(h) and to dismiss the cross-claim as to the plaintiff Trustees, is denied but the right is reserved to plaintiffs to renew such motion at the time of the pretrial conference. The motions of the defendants and cross-plaintiffs to amend the answer, counterclaim and cross-claim, filed on March 24, 1958 and June 26, 1959, are allowed and the amendments proposed in said motions shall be considered as having been added to and made a part of the pleadings referred to in said motions. The cross-defendant, UMW is allowed 15 days from June 30, 1959, to attempt to work out a stipulation with respect to the motions of defendants and cross-plaintiffs for the production of documents for inspection, copying or photographing, or to file objections to said motion but the cross-defendant, UMW, is urged to comply with this portion of the order within 10 days if reasonably possible, entered in Civil Order Book 17, page 158, and filed.

Aug. 15 Answer of the United Mine Workers of America to the amended cross-claim filed against it and others, filed.

1960

July 6 Motion for Partial Summary Judgment filed.

Aug. 8 Reply of defendants and cross-plaintiffs to plaintiffs' motion for partial summary judgment, filed.

Sept. 13 Motion of the Cross-Plaintiffs, James M. Pennington, et al, to Amend the Cross-Claim or Counter-Claim in this case to specify the period of time encompassed by the Cross-Claim or Counterclaim, filed.

Sept. 30 Order substituting Lillian Goad Phillips, Admrx. as defendant and cross plaintiff in the place and

stead of Burse Phillips entered in Civil Order Book 19, page 453, & filed.

Nov. 25 Order granting plaintiffs to file an answer to the counterclaim as amended, such answer to stand in lieu of answer heretofore filed, entered in Civil Order Book 20, page 89, & filed.

Nov. 25 Amended answer to counterclaim filed.

1961

Jan. 16 Agreed Order that the record show the correct name of the defendant and cross plaintiff to be Raymond E. Phillips, entered in Civil Order Book No. 20, page 194, and filed.

April 5 Motion of defendants for an order consolidating the claim of plaintiffs against defendants and the claim of cross plaintiffs against the cross defendant, for trial and dismissing the claim of cross plaintiffs against the cross defendant, filed.

April 6 Response of United Mine Workers of America to Motion of defendants and cross-plaintiffs to dismiss their claim against the plaintiffs and to consolidate plaintiffs' case with cross-plaintiffs' claim against United Mine Workers of America and Motion to Dismiss, filed.

April 6 Objections of the plaintiff trustee to the entry of an order consolidating the claim asserted by the Trustees in this action with the cross-claim asserted by the defendants against the cross-defendant, United Mine Workers of America, filed.

April 10 Order that the claim of cross-plaintiffs, James M. Pennington, et al, against cross-defendants, John L. Lewis, et al, Trustees of UMW of America Welfare and Retirement Fund is dismissed; (2) claims of plaintiff, John L. Lewis, et al. in the original com-

plaint against defendants, James M. Pennington, et al. and of the cross-plaintiffs James M. Pennington, et al against cross-defendant, UMW of America, are consolidated for trial, the issues to be decided by the jury; (3) Motion of cross-defendant, UMW of America to dismiss this action is hereby overruled; The exception of the plaintiff Trustee to the action of the Court in consolidating the cases as noted in paragraph 2 hereof is hereby noted and reserved; the exceptions of the cross-defendant United Mine Workers of America to the consolidation of the cases as noted in paragraph 2 hereof and to the action of the Court in overruling its motion to dismiss filed on April 6, 1961, are hereby noted and reserved, entered in Civil Order Book 20, page 495, and filed.

April 10 Order Pursuant to Pretrial, Filed.

May 29 Motion of United Mine Workers of America for Judgment in Accordance with Motions for Directed Verdict or in the Alternative Motion for a New Trial, filed.

May 29 Motion of John L. Lewis, Henry G. Schmidt and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund, for Judgment in accordance with Motions for Directed Verdict or in the Alternative Motion for a New Trial filed.

June 20 Petition of Cross-Plaintiffs, James M. Pennington, et al, for allowance of attorneys' fees, filed.

June 20 Affidavit of John A. Rowntree in support of petition of Cross-plaintiffs, James M. Pennington, et al, for attorneys' fees, filed.

June 20 Affidavit of Claude K. Robertson in support of petition of cross-plaintiffs, James M. Pennington, et al, for attorneys' fees, filed.

Relevant Docket Entries

June 20 Affidavit of Jerome Templeton, attorney for the defendants and cross-plaintiffs, filed.

June 20 Affidavit of Jerome G. Taylor, attorney for the defendants and cross-plaintiffs, filed.

July 31 Motion of United Mine Workers of America for judgment in accordance with motions for directed verdict or in the alternative motion for a new trial, heard by the Court and overruled; Motion of John L. Lewis, Henry G. Schmidt and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement fund, for judgment in accordance with motions for directed verdict heard by the Court and sustained; the Court found that Phillips Brothers Coal Company, were liable from April 1955 thru 1958 for royalties; further found that said company was not liable from October 1953 to April 1955; Petition of cross-plaintiffs, James M. Pennington, et al. for allowance of attorneys' fees heard by the Court and fixed in the sum of $55,000.00, entered in Civil Order Book 21, page 157.

August 2 Judgment that portion of verdict of jury be set aside and Court awards the plaintiffs trustees judgment for royalty upon quantity of coal produced for period from April 25, 1955 to and including December 31, 1958, or a total of 108,560.56 tons at the rate of 40¢ per ton, or the sum of $43,424.22; the Court overruled the motion for judgment notwithstanding the verdict of the jury and in the alternative for a new trial; Order that cross-plaintiffs recover of cross-defendant, United Mine Workers of America, the sum of $270,000.00, being three times the amount of damages awarded by the jury and that they also recover the sum of $55,000.00 attorneys fees, making a total of $325,000.00; further Order dismissing the counterclaim filed against the Trustees by defendants and cross-plaintiffs; also ordered that costs be taxed

after the time for appeal expires or after the disposition of cause on appeal; further Ordered that execution issue in favor of plaintiffs-trustees, against defendants for $43,424.22 and that execution issue in favor of cross-plaintiffs for the sum of $325,000.00, entered in Civil Order Book No. 21, page 170, and filed.

August 4 Opinion of Robt. L. Taylor rendered from the bench July 31, 1961 that since a general conspiracy was charged such evidence was clearly competent as bearing on the question of whether a conspiracy existed during the crucial period; the Court is of the opinion and holds that the motion of U.M.W. for a judgment notwithstanding the verdict of the jury and the alternative motion of U.M.W. for a new trial, and all of the grounds urged in support of these motions, are without merit and are therefor overruled; there is no substantial evidence to support the verdict of the jury that a majority of the Trustees participated in the alleged conspiracy. There is no evidence that either Miss Josephine Roche or Mr. Henry G. Schmidt or Mr. Charles A. Owen, now deceased, (those being the only parties, except Mr. John L. Lewis, who served the trust fund after 1950), had any dealings with large coal operators from which it could be inferred that they agreed, combined or conspired to stablize coal prices in the bituminous coal industry in interstate commerce; there is no evidence to support the verdict of the jury that Mr. Lewis, for himself and another of the Trustees, entered into the conspiracy so as to bind the Trustees either individually or in their capacity as trustees or to bind the Trust Fund. It follows as a matter of contract that the Trustees are entitled to recover unpaid royalties due them under the contract signed by Phillips Brothers, but the Trustees are not entitled to recover the royalties that accrued before a

majority of the employees of Phillips Brothers became members of the Union. The Court fixes the attorneys' fees in this case at $55,000.00, filed.

Aug. 28 Notice of Appeal by United Mine Workers of America, cross-defendant, filed.

Aug. 28 Bond for Costs on appeal by United Mine Workers of America, filed.

Aug. 28 Order that pursuant to agreement that execution shall not issue upon judgment during the pendency of appeal, entered in Civil Order Book 21 page 197 and filed.

Aug. 28 Notice of appeal by defendants filed.

Aug. 28 Cost bond on appeal by defendants filed.

Oct. 2 Order extending time 90 days from date of filing first notice of appeal, which was August 28, 1961, entered in Civil Order Book 21 page 260, and filed.

Nov. 21 Certified record on appeal mailed to U. S. Court of Appeals, Cincinnati, Ohio. (Exhibits retained U. S. District Court)

Complaint

Filed January 6, 1958

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

CIVIL ACTION No. 3431

JOHN L. LEWIS and JOSEPHINE ROCHE, as TRUSTEES of the UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND, *Plaintiffs*,

v.

JAMES M. PENNINGTON, RALPH E. PHILLIPS *and* BRUCE PHILLIPS, Individually and trading as PHILLIPS BROTHERS COAL COMPANY, A Partnership, *Defendants*.

Complaint

I.

Plaintiffs are Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, a trust with its residence and place of business at 907 Fifteenth Street, Northwest, in Washington, District of Columbia. Trustee John L. Lewis is a citizen of the State of Illinois. Trustee Josephine Roche is a citizen of the State of Colorado. The Defendants, James M. Pennington, Ralph E. Phillips and Bruce Phillips, are citizens of the State of Tennessee and are engaged in certain coal mining operations in the State of Tennessee, operating as Phillips Brothers Coal Company, a partnership. Defendants are sued in their own right and as partners in the Phillips Brothers Coal Company. The principal place of business of the Phillips Brothers Coal Company is Oneida, Scott County, Tennessee, with its mailing address at Post Office Box 56, Oneida, Tennessee.

II.

The amount in controversy, exclusive of interest and costs, exceeds Three Thousand Dollars ($3,000.00).

III.

The United Mine Workers of America Welfare and Retirement Fund of 1950 was created by the National Bituminous Coal Wage Agreement of 1950.

IV.

Between October 1, 1953 and November 30, 1957, the Defendants, James M. Pennington, Ralph E. Phillips and Bruce Phillips, individually and trading as Phillips Brothers Coal Company, a partnership, of Oneida, Scott County, Tennessee, were engaged in the operation of certain coal mines in and about Oneida, Scott County, Tennessee. On or about October 1, 1953, the Phillips Brothers Coal Company, a partnership, and the United Mine Workers of America entered into the National Bituminous Coal Wage Agreement of 1950 as Amended September 29, 1952. On or about September 8, 1955 said Phillips Brothers Coal Company and the United Mine Workers of America entered into the National Bituminous Coal Wage Agreement of 1950 as Amended effective September 1, 1955. On or about October 22, 1956 said Phillips Brothers Coal Company and the United Mine Workers of America entered into the National Bituminous Coal Wage Agreement of 1950 as Amended effective October 1, 1956. Pursuant to the terms of said Amendment dated September 29, 1952, said Amendment effective September 1, 1955 and said Amendment effective October 1, 1956, the Defendants were required to pay unto the United Mine Workers of America Welfare and Retirement Fund the sum of Forty Cents (40¢) per ton on each ton of coal produced for use or sale.

V.

Between July 1, 1954 through and including November 30, 1957, the said Defendants produced approximately 39,000 tons of coal for use or sale, and as a result thereof, and in accordance with the terms of said National Bituminous Coal Wage Agreement of 1950 as Amended Septem-

ber 29, 1952, said National Bituminous Coal Wage Agreement of 1950 as Amended effective September 1, 1955 and said National Bituminous Coal Wage Agreement of 1950 as Amended effective October 1, 1956, referred to in Paragraph IV of this Complaint, there became due and owing by said Defendants to the Plaintiffs the sum of $15,600.00. Said Defendants made payment on this amount in the sum of $1,713.51. Said Defendants made payment on this amount in the sum of $1,713.51, thereby leaving a balance due and owing by the Defendants to the Plaintiffs of $13,886.49. The Defendants have neglected or failed to pay such amount.

VI.

Plaintiffs have demanded that the Defendants pay unto them said sum referred to in Paragraph V of this Complaint, but the Defendants have refused and continue to refuse to make said payment.

WHEREFORE, the Plaintiffs pray this Honorable Court to grant them judgment against James M. Pennington, Ralph E. Phillips and Bruce Phillips, individually and trading as Phillips Brothers Coal Company, a partnership, in the amount of Thirteen Thousand Eight Hundred Eighty-six Dollars and Forty-nine Cents ($13,886.49) with interest, and an additional sum equivalent to Forty Cents (40¢) per ton for all coal produced for use or sale in excess of 39,000 tons covering the period July 1, 1954 through and including November 30, 1957 and subsequent thereto with interest, plus the costs of this action.

Filed February 14, 1958

Answer of Defendants

I.

The partnership referred to in this Complaint is a partnership composed of James M. Pennington, Raymond E.

Phillips, and Burse Phillips. Ralph E. Phillips is not a member of the partnership but is an employee of the partnership, and he responds for the purpose of denying all allegations of the bill, including the averment that he is a member of said partnership.

II.

Respondents are without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph I of the complaint respecting the residence of John L. Lewis and Josephine Roche and respecting the residence and the place of business of the Trust therein referred to. Respondents do not admit that plaintiffs have a right under the terms of said Trust agreement to maintain this suit.

III.

The averment in Paragraph II contained respecting the amount in controversy is admitted.

IV.

Respondents are without knowledge or information sufficient to form a belief as to the truth of the averment contained in Paragraph III respecting the time and manner of the establishment of the United Mine Workers of America Welfare and Retirement Fund.

V.

In response to the averments contained in Paragraph IV, these respondents say that the Phillips Brothers Coal Company did execute the agreements therein referred to, but deny that it was the understanding between the parties that respondents were to pay unto the United Mine Workers of America Welfare and Retirement Fund the sum of forty cents (40¢) per ton on each ton of coal produced for use or sale.

VI.

Respondents do not deny the averment contained in

Paragraph V of the Complaint to the effect that respondents produced approximately 39,000 tons of coal for use or sale, but deny that they are indebted to the plaintiffs in the amount alleged.

VII.

And now further responding to the Complaint, these defendants say:

1. That they deny the right of the plaintiffs to maintain this suit alone and show to the Court that the so-called Trust agreement sued upon was a part of the National Bituminous Coal Wage Agreement of 1950, which agreement was entered into by and between respondents and United Mine Workers of America and was, by its express terms, an integrated contract containing the express statement that "this agreement is an integrated instrument and its respective provisions are interdependent and shall be effective from and after March 5, 1950." Accordingly, the United Mine Workers of America is a necessary party plaintiff to this action, particularly so as the provision just quoted affords respondents the benefit of all available rights of setoff growing out of the breach of said contract by said United Mine Workers of America, which rights of setoff are not available should plaintiff Trustees alone be permitted to maintain this cause of action.

2. These respondents plead that the agreements entered into by them and all payments made and action taken thereunder by these respondents were performed by reason of the duress practiced upon them by the United Mine Workers of America. The contracts referred to were executed as a result of a program of terrorism conducted by the United Mine Workers of America in the section in which the defendants' mine was located during the time the United Mine Workers of America, through its members, was, by threats of violence and intimidation, forcing the mines to sign and perform their agreements. These agree-

ments were signed by these respondents because of their knowledge that they would be closed down by the United Mine Workers of America and would not be permitted to operate their coal mine unless said agreements were signed. Accordingly, these respondents plead that said contracts were signed unwillingly and were not in accordance with the will of these respondents but constituted the imposition of the will of the United Mine Workers upon their respondents, which these respondents involuntarily assumed through fear, which deprived them of their self-control in this respect. The fear under which respondents dwelt in signing said contracts, and of which the officers of the United Mine Workers of America had full knowledge, not only constituted a duress of property but duress of person in that the methods employed by the United Mine Workers of America embraced the infliction of bodily punishment upon those who did not adhere to its will.

3. It is shown to the Court that these respondents and the other operators of coal mines in the general community in which said mine was located were engaged in the mining and shipping of coal in interstate commerce and to various agencies of the United States Government, particularly the Tennessee Valley Authority and the Atomic Energy Commission at Oak Ridge, Tennessee. The said contract was forced upon defendants by the plaintiffs for the purpose of restraining the shipment of coal by respondents and other of said coal mines in interstate commerce and to the governmental agencies before referred to. To attain their purpose, the United Mine Workers used coercion, threats and intimidation. The purpose of the United Mine Workers in this treatment of respondents and other small operators was to suppress them to the end that said coal might be supplied by certain large operators who were amenable to the wishes of the United Mine Workers of America. It is shown to the Court that there was cooperation amounting to a conspiracy between the United Mine Workers of Amer-

ica and certain large producers of coal, the purpose of which was to place such financial burdens upon respondents and other small operators similarly situated that could not possibly be paid out of funds realized from the operation of the mine, and thus respondents, being unable to meet the demands, would, either through violence, or action such as this in the courts, be closed down, leaving the business of shipping coal in interstate commerce and to the governmental agencies to the said large coal operators. Respondents were not only placed under the burdens as provided by the contracts before referred to, but the United Mine Workers of America and the large companies hereinbefore referred to continually conspired together to increase the burdens of defendants by increasing the wage scale, both by virtue of modifications of the contracts between said mines and the United Mine Workers of America and by co-operating together in having the Walsh-Healey Act apply to the coal industry and having the minimum wage determined thereunder. After the Walsh-Healey Act became applicable to the coal industry, respondents state on information and belief that representatives of the Wage and Hour Division of the Labor Department of the United States Government co-operated with the United Mine Workers of America in harassing small operators so situated for the purpose of suppressing their business to the end, as stated, that the shipments of coal in interstate commerce and to the agencies aforesaid might be monopolized by the said large operators. It is, accordingly, plead that the United Mine Workers of America, in the entering into of said contract and its conduct aforesaid, was acting in violation of an act passed by Congress known as the Sherman Antitrust Act appearing in 2C Stat. 209, incorporated in Title 15, USCA, Sections 1, 2, and 3.

4. In addition to the violation of the Act in the manner aforesaid, that is, by conspiring with others to restrain the shipment of coal in interstate commerce, it is further plead that the United Mine Workers of America and the Trustees

aforesaid are not exempt from the terms of said antitrust act as provided by Title 15, USCA, Section 16, as they are conducting various businesses for profit and are, therefore, independent of any conspiracy with others, through violence, intimidation, and other coercive methods, of which their dealings with respondents are a part, engaged in the restraining of the mining and shipping of coal in interstate commerce, and that, therefore, the United Mine Workers and its members constitute an illegal combination in restraint of trade under the antitrust laws aforesaid. Accordingly, the contract sued upon is illegal and unenforceable, as it is a part of their scheme to restrain said trade.

5. It is further plead that the conspiracy and agreement entered into between the United Mine Workers of America and large coal operators is in violation of Section 69-112 of the Code of Tennessee, which reads as follows:

> "69-112. Conspiracy or agreement to limit the output or to raise the price of coal—Penalty—Any person who, directly or indirectly, enters into a conspiracy or agreement with intent to limit the output of coal in this state, for the purpose of raising the price to the consumer, or to any intermediate dealer, or who enters into any conspiracy or agreement, directly or indirectly, of any nature whatsoever to so raise the price of coal to the consumer or to any intermediate dealer, shall be guilty of a misdemeanor, and fined not less than one thousand dollars ($1,000)."

6. It was a part of the agreements alleged in the Complaint that the respondents would employ only persons who were members of the United Mine Workers of America, which was an unlawful contract entered into in violation of Sections 50-209 and 50-210 of the Tennessee Code Annotated, which sections read as follows:

> "50-209. Contracting for exclusion from employment because of affiliation or nonaffiliation with labor union

unlawful.—It shall be unlawful for any person, firm, corporation or association of any kind to enter into any contract, combination or agreement, written or oral, providing for exclusion from employment of any person because of membership in, affiliation with, resignation from, or refusal to join or affiliate with any labor union or employee organization of any kind."

"50-210. Exclusion from employment for payment of or failure to pay union dues unlawful.—It shall be unlawful for any person, firm, corporation or association of any kind to exclude from employment any person by reason of such person's payment of or failure to pay dues, fees, assessments, or other charges to any labor union or employee organization of any kind."

In this connection defendants plead Section 164(b), Title 29, USCA, which reads as follows:

"(b) Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

Therefore, said alleged contract is illegal and unenforceable—it having been entered into with reference to the law of Tennessee.

It is plead that the United Mine Workers of America not having complied with the National Labor Relations Act with respect to the matter of filing certain reports, etc., as required by Title 29, USCA, Section 159 (f), (g), and (h), the execution of said contract was in violation of Title 29, USCA, Section 158, particularly subsection (3) thereof, and is therefore illegal.

7. For further defense to this action, these respondents plead that the United Mine Workers of America breached

the contracts sued upon in that its members, acting with due authority, did, by threats and intimidation, force the respondents to close their mine and to cease operations over a period of time and that the United Mine Workers and its members have for years inaugurated and maintained a reign of fear and dread in the minds of the defendants and their employees, which also is inconsistent with and violative of the aim and purpose of said agreement as expressed therein that "the rules and practices of the industry pertaining to management" would not be changed and that "the mine workers intend no intrusion upon the rights of management as heretofore practiced and understood." The agreement sued upon by plaintiffs is a part of the agreements alleged in the Complaint which provides that it "is an integrated instrument and its respective provisions are interdependent."

8. Respondents further plead that at the time the alleged contract was entered into, the employees of the respondent partnership were not members of the United Mine Workers of America but that some time thereafter said employees, through coercion, intimidation and fear, were persuaded to become members of said Union and that the acts and conduct of the United Mine Workers of America in thus attaining the result of said employees becoming members of said Union violated Title 29, USCA, Section 158(b).

9. These respondents plead the damages occasioned to them by reason of the acts and conduct of the United Mine Workers of America as herein alleged as a setoff against all demands made against them in the Complaint herein filed.

Counterclaim

It is further plead that if said contract was legal, the plaintiff trustees have not fulfilled their obligations to the employees of the respondent partnership in the manner and to the extent as said Trust Agreement provided and

that, accordingly, the said Trustees and the United Mine Workers of America have in this way breached their alleged contract with the respondent partnership. Plaintiff Trustees and the United Mine Workers of America not having fulfilled their obligations as in said contract provided, the respondents are entitled to recover the full amount paid into said Welfare Fund, as would be true, also, if said contract was void from the beginning.

Filed February 14, 1958

Cross-Claim Against Plaintiffs and United Mine Workers of America

I.

The amount in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000).

II.

The jurisdiction of this Court is invoked under Title 15, USCA, Sections 1, 2 and 3, and if the validity of the contract mentioned in the foregoing answer is sustained, then in that event, the jurisdiction of the Court is invoked also under Title 29, USCA, Section 185. Jurisdiction is further invoked under Title 29, USCA, Section 158(b).

III.

Cross-plaintiffs here show that after entering into the contracts alleged in the Complaint and during the time that said contracts were in full force and effect, the United Mine Workers of America forcibly closed down the cross-plaintiffs' mining operation and forcibly kept said mine closed over a period of time, which was accomplished by the presence of a mob comprised of the members and/or agents of the United Mine Workers of America and was done for the purpose of fulfilling the conspiracy in which the United Mine Workers of America was engaged of re-

straining the shipment of cross-plaintiffs' coal in interstate commerce.

It is further shown that throughout practically the entire time that the alleged contracts were alleged to be in force, the United Mine Workers of America conducted what amounted to a reign of terror which rendered cross-plaintiffs and their employees in a constant state of fear of bodily harm, as armed mobs composed of the members of the United Mine Workers of America intermittently marched through the countryside, closing numerous mines on their forays.

All of the above was to cross-plaintiffs' damage in the amount of One Hundred Thousand Dollars ($100,000), which amount cross-plaintiffs say should be trebled under the provisions of the Sherman Antitrust Act hereinbefore referred to, being Title 15, USCA, Section 15.

And the cross-plaintiffs say that the acts and deeds aforesaid of the United Mine Workers of America constitute a just claim at common law against said United Mine Workers of America in the amount of One Hundred Thousand Dollars ($100,000), together with punitive damages in the amount of Two Hundred Thousand Dollars ($200,000).

WHEREFORE, in accordance with Rule 13(h), cross-plaintiffs pray for an order requiring that the United Mine Workers of America be brought in as cross-defendants hereto and that judgment be entered against the cross-defendants dismissing their complaint herein and that cross-plaintiffs have judgment against the United Mine Workers of America adjudging said agreements ineffective and awarding judgment against the United Mine Workers of America and in favor of cross-plaintiffs in the amount of Three Hundred Thousand Dollars ($300,000), together with cost of suit, including a reasonable attorneys' fee; and pray for service of process upon Ed Daniels, James Goddard, and Tom Taylor, residents of Campbell County,

Tennessee, as members of the United Mine Workers of America as a class representing said United Mine Workers of America and all members thereof.

Filed February 19, 1958

Order

The defendants having filed their answer and having plead in cross-claim against the United Mine Workers of America, an unincorporated association, and having applied to the Court under Rule 13(h) for an order to bring such organization before the Court and representing to the Court that jurisdiction can be obtained by service upon members of such organization as a class and also through service upon the organization through the Secretary of State of the State of Tennessee under the provisions of Section 20-223, Tennessee Code Annotated, it is ordered that summons be issued for service upon the United Mine Workers of America in such particulars and as plead by the cross-claim. The summons will bear the address of the cross-defendant, United Mine Workers of America, which, as furnished by the cross-plaintiffs, is 900 Fifteenth Street N. W., Washington, D. C., and the summons will direct the Secretary of State to forward the summons and the cross-complaint to said cross-defendant by registered mail with return receipt requested, and the summons should direct that the return should be made by the Secretary of State after receipt of the return receipt by him, all in accordance with the provisions and intent of the Tennessee Code.

Filed March 5, 1958

Amendment to Answer

Pursuant to Rule 15(a) of the Rules of Civil Procedure, the defendants hereby amend the answer and counterclaim

heretofore filed by them on the 14th day of February, 1958, as follows:

There is added to the answer Paragraph 10, which reads as follows:

"10. It is further plead that the portion of the agreement which embraced provisions relative to the Welfare Fund, both in its terms and in the manner in which it was interpreted and administered by the parties, is violative of the following sections of the Taft-Hartley Act: 29 U.S.C.A., Section 158(a)(3); 29 U.S.C.A., Section 158(b)(1), (2) and (3); and 29 U.S.C.A., Section 186(a) and (b) as limited by Section 186(c)(5), in that only members of the United Mine Workers of America are entitled to receive benefits from the said fund. It is particularly true that the language of the Welfare Fund provisions of the contract and the manner in which it has been interpreted and administered insofar as it encourages union membership must be taken into consideration with the language of the contract which provides that the employer will require that employees become members of the United Mine Workers of America, and that both of these two parts of the contract must be construed together and cannot be segregated in determining whether or not the contract is violative of 29 U.S.C.A., Section 158(a)(3) and Tennessee Code Annotated, Sections 50-209 and 50-210. The trust fund referred to in the contract sued upon was further invalid because the said fund was used to benefit and further the purposes of the United Mine Workers of America and not used exclusively for the benefit of the employees, because the persons receiving pensions from said trust fund were required or requested by the Union or Union representatives from time to time to do picket line duty and perform other services for the Union in return for the receipt of said pensions."

A new paragraph of the counterclaim is inserted, which shall be the first paragraph therein and which reads as follows:

> "By reason of the illegality of the trust agreement sued upon, all sums of money paid thereunder by defendants to the plaintiffs were improper and were made without consideration, and, accordingly, defendants aver that they have a right to recover of the plaintiffs the full amount thereof and so pray."

Filed March 14, 1958

Motion of the Cross-defendant, United Mine Workers of America

Comes the cross-defendant, United Mine Workers of America, appearing specially for the purpose of filing this motion to dismiss the cross-claim filed herein, and moves the Court as follows:

* * * * * * * * * *

III.

To dismiss this action because this cross-defendant is not a necessary or proper party to the original complaint filed herein and because neither Rule 13 nor any of the other Federal Rules of Civil Procedure authorizes the issuance of an order bringing in an additional party as the cross-plaintiffs have attempted to do with respect to this cross-defendant in this action.

IV.

To dismiss this action because this Court is without jurisdiction of the action in that no substantial or colorable cause of action is stated under the Constitution, laws or treaties of the United States.

V.

To dismiss this action insofar as it is based upon and jurisdiction is invoked under Title 29, U.S.C., Section 158(b). This section of the United States Code defines unfair labor practices and companion sections of the same statute vest exclusive jurisdiction of hearings for causes arising thereunder in the National Labor Relations Board. Neither Title 29, U.S.C., Section 158(b) nor any provision of the United States Code related thereto vests jurisdiction of such purported causes of action in the United States District Courts.

VI.

To dismiss this action insofar as it is based upon an alleged violation of the Sherman Act, Title 15, U.S.C., Sections 1, 2, 3, and 15 because no colorable cause of action is alleged thereunder.

VII.

To dismiss this action insofar as it is based upon an alleged violation of Title 29, U.S.C., Section 185, because no colorable cause of action is alleged thereunder.

VIII.

To dismiss this action insofar as it is based upon the common law of the State of Tennessee because this Court is without jurisdictional basis for the determination of any common law rights or cause of action averred to exist in the cross-plaintiffs as against this cross-defendant.

IX.

To dismiss this action insofar as it is based upon alleged violations of the common law of the State of Tennessee because no cause of action is alleged thereunder.

* * * * * * * * * *

Filed March 17, 1958

Motion to Vacate Order Granted Under Rule 13(h) and to Dismiss the Cross-Claim as to the Plaintiff Trustees

Come the plaintiffs and move the Court to vacate the order under Rule 13(h), whereunder process was issued bringing the United Mine Workers of America before the Court as a cross-defendant to a cross-claim filed herein because neither Rule 13 nor any other Federal Rule of Civil Procedure authorizes the issuance of an order bringing in an additional party as a cross-defendant as the original defendants have attempted to do with respect to the United Mine Workers of America in this action.

The plaintiffs further move the Court to dismiss the cross-claim as to the plaintiffs on the following grounds:

(1) Such a cross-claim is not contemplated under the Federal Rules of Civil Procedure; and

(2) The cross-claim fails to state a claim against the plaintiffs on which relief may be granted.

Filed March 17, 1958

Answer to Counter-Claim

Come the plaintiffs, and for answer to the counter-claim, as amended, filed against them in this cause say:

1. They deny that they have in any way whatsoever failed to fulfill their obligations as Trustees of the United Mine Workers of America Welfare and Retirement Fund.

2. They deny that there is any legal or factual basis, alleged or referred to in the counter-claim, as amended, which would afford a basis for the defendants to recover monies heretofore paid into said Fund by the defendants.

3. They deny that the trust agreement, either as it is written or administered, is in conflict with applicable statutes; and in this connection specifically deny that the trust

agreement requires or that it is administered so as to require membership in the United Mine Workers of America as a condition precedent to eligibility for benefits paid by the Fund.

4. The Trustees further deny the other allegations of the counter-claim, as amended, not specifically denied hereinabove.

Filed March 24, 1958

Motion to Amend the Answer, Counterclaim and Cross-Claim Filed by the Defendants

Come the defendants and move the Court that they be allowed to amend their answer, counterclaim and cross-claim in the respects mentioned hereafter and for grounds for said motion defendants show to the Court that the amendments involve subject matter covering a period of several years, facts that are unknown to the public generally but are known only after a research of the records and history of the United Mine Workers of America and the Welfare Fund represented by the plaintiffs; and it has only been after time-consuming research that the matters allegedly in the proposed amendments have become available to the defendants. The amendments sought are as follows:

That there be added three additional paragraphs to the answer, to be paragraphs 11, 12, and 13 of Section VII of the answer, which paragraphs read as follows:

> "11. The Welfare Fund, which is the subject matter of the plaintiffs' action, has heretofore been enjoined in an action of the National Labor Relations Board because of the use of the Fund to benefit members of the United Mine Workers of America exclusively, and there has been no change in the policies, interpretations or administration of the said Fund since said injunction.

"12. The Welfare Fund, which is the subject matter of the plaintiffs' complaint, is entirely dominated by the United Mine Workers of America and is carefully designed to eliminate the possibility of the employers exercising the powers and duties which they are directed to perform under 29 USCA 186(c)(5), and the Fund is in violation of said section and therefore illegal so long as the Fund is a Union-dominated fund.

"13. The Welfare Fund, which is the subject matter of the plaintiffs' complaint, is an instrumentality or tool used by the Union to carry on and participate in the illegal purposes referred to in Section VII, Paragraphs 2, 3, 4, 5, 7, and 8, all of which was accomplished with the full cooperation of the plaintiff Trustees. These things were accomplished by using the Fund to increase the cost of producing coal so as to impose oppressive economic requirements upon employers, forcing small operators out of the business, thus contributing to the conspiratorial arrangement between the International Union and the large coal-producing operators and the monopolistic plan and program of the Union; also, the Fund contributed a large, controlled source of manpower to use on picket line and mob duty to put pressure and force upon employers who would not submit to the Union, such practice being allowed by the Trustees and being reprehensible because it put the recipients of benefits under the Fund to the necessity of participating in these illegal enterprises under threat of losing benefits under the Welfare Fund. This factor has been of material benefit to the Union in monopolizing the labor field in the industry and in carrying on the restraint of trade practices averred in the answer."

There is added to the counterclaim herein filed by the defendants a third paragraph following the paragraph

added by the amendment dated March 5, 1958, said paragraph reading as follows:

> "Defendants make reference to Paragraph 13 of the answer, as amended, hereinabove set forth and adopt the same in this counterclaim. The defendants aver that the plaintiff Trustees have damaged the defendants by participating in the activities and illegal scheme, plan, and program of the Union which has resulted in the closing down of defendants' mines and has caused them to pay funds into the said Welfare Fund under illegal compulsion in the amount of $100,000.00, and the defendants sue for triple said amount or for $300,000.00 under the Sherman Antitrust Act, Title 15 USCA Section 15."

There is added to the cross-claim filed herein a paragraph following the second paragraph of Section III of said cross-claim, said added paragraph reading as follows:

> "The defendants and cross-plaintiffs here refer to and adopt in this cross-claim the averments contained in Section VII, Paragraph 13, of the answer herein filed, as amended. Reference is also made to the averments contained in Section VII, Paragraphs 2, 3, 4, 5, 7, and 8, of the answer, and the same are adopted in this cross-claim. The defendants and cross-plaintiffs here aver that this cross-claim is necessary for the granting of complete relief in the determination of the counterclaim herein filed, as amended."

Filed June 2, 1958

Motion to Add a Party Plaintiff

John L. Lewis and Josephine Roche, Plaintiffs herein, as Trustees of the United Mine Workers of America Welfare and Retirement Fund, join with Henry G. Schmidt, a Trustee of the United Mine Workers of America Welfare and Retirement Fund, in moving this Honorable Court for

an order allowing Plaintiffs and Henry G. Schmidt to amend the Complaint filed in this action, adding Henry G. Schmidt as a party Plaintiff, without prejudice to the proceedings already had in this action, on the grounds that:

1. Charles A. Owen, operator-Trustee of the United Mine Workers of America Welfare and Retirement Fund, died on July 20, 1957.

2. Pursuant to the terms of the trust instrument contained in the National Bituminous Coal Wage Agreement of 1950, and the amendments thereto, Henry G. Schmidt was nominated to succeed the deceased Charles A. Owen and was duly qualified on April 28, 1958.

3. Henry G. Schmidt is a citizen of the State of Ohio.

4. This is an action to recover trust property of the United Mine Workers of America Welfare and Retirement Fund and as Trustee, succeeding Charles A. Owen. Henry G. Schmidt is charged with the fiduciary duty, along with the remaining Plaintiffs, John L. Lewis and Josephine Roche, of reducing trust property to possession.

WHEREFORE, Plaintiffs John L. Lewis and Josephine Roche, join with Henry G. Schmidt in praying for an order of this Honorable Court adding Henry G. Schmidt as Trustee of the United Mine Workers of America Welfare and Retirement Fund to this action as a party Plaintiff.

Entered August 11, 1958

Order

In this cause on motion of the plaintiffs, John L. Lewis and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund, and Henry G. Schmidt, recently appointed additional Trustee of said Fund, it is ordered by the Court that said Henry G. Schmidt,

a resident of the State of Ohio, be named as an additional party plaintiff to the action, the adding of such additional party plaintiff being made without prejudice to any and all proceedings heretofore had in this action, the proceeding standing in the same plight and condition as heretofore, the said Henry G. Schmidt being bound by all action heretofore taken herein.

This order is entered without prejudice to the right of defendants to deny by answer or other appropriate procedure that the said Henry G. Schmidt, Trustee, was properly appointed an additional Trustee of said Fund or that he is empowered with the authority of an additional Trustee or to deny the right of the defendants to present other defenses available to them by reason of the said Henry G. Schmidt's having been made a party plaintiff.

Filed June 26, 1959

Additional Motion to Amend the Answer, Counterclaim and Cross-Claim Filed by the Defendants

Come the defendants and move the Court that they be allowed to amend their answer, counterclaim and cross-claim so as to state more specifically and in more detail the nature of the conspiracy and restraint of trade alleged to have been engaged in by the plaintiffs and the cross-defendant, United Mine Workers of America. As grounds for this motion, defendants assert that the allowance of the motion will facilitate the trial of the case by more specifically designating the issues involved under the present allegations concerning the conspiracy and restraint of trade. The amendments sought are as follows:

That there be added at the end of Section VII, paragraph 3, the following:

"In contrast to the disputes which existed between the large coal-producing companies of the country and

the cross-defendant United Mine Workers of America during the period of World War II and the postwar period, there has been no dispute of any consequence between these parties since 1950. The conspiracy herein alleged commenced in 1950 and has been in effect since that time and has been implemented by additional understanding between the parties to make more effective the activities in restraint of trade. The cross-defendant Union agreed that it would not protest the closing down of mines of the large companies which could not be mechanized and would be willing to submit to the termination of employment for thousands of its members because of the mechanization of mines, and the cross-defendant agreed to go along with the understanding that the coal industry would be confined to a comparatively few companies and the miners employed would be reduced drastically. As a consequence of this phase of the understanding, membership of the United Mine Workers has decreased from 500,000 to 150,000. The United Mine Workers further agreed that it would not make special agreements with operators, such as the small operators in the Kentucky and Tennessee region, which would give consideration to local conditions and the particular coal seams mined by the operators, but it was agreed that the Union would have a standard agreement for all operators. This phase of the understanding existed before 1958 but it was formally inserted in the National Bituminous Wage Agreement in that year. The Union further agreed that it would do all things within its power to keep the non-union coal from being mined and marketed and would restrain the trade of the non-union operators and those operators who did not abide by the terms of the National Bituminous Coal Wage Agreement in order that the large Union operators would have the business which the smaller non-union oper-

ators were then enjoying or might enjoy in the future. The Union further agreed that in the planned mechanization program, the Union would aid in the financing which would become necessary to attain the mechanization of the mines of the large companies. On the other hand, the large coal-producing companies agreed with the Union that they would not protest the demands of the Union with respect to wage increases so long as the companies were able to match those increases by increased productivity through mechanization. These companies further agreed that there would be no protests from them over the Union's use of the Welfare Fund for its own purposes and in furtherance of the Union's organizing efforts, and these operators, having virtual control with the Union over the terms inserted in the National Bituminous Coal Wage Agreement, agreed that the employer representative on the Trustees of that Fund would be amenable to the demands of the Union representative on the Board of Trustees of the Fund. Furthermore, these large coal companies agreed that there would be no retaliation for the use of the employees in the mines of those large companies by the Union to supplement the mobs and caravans which the Union used in its organizing efforts, even though it meant that the mines would be closed down from time to time as these Union employees went out on their forays. These large companies agreed that they, too, would do all things possible to restrain the production, marketing, and sale of non-union coal. To this end marketing facilities, including large brokerage firms, and coal transportation facilities, particularly on the waterways of the country, fell into the hands of the owners of the large coal companies, and the non-union coal has been effectively blocked from entering the great markets of coal except for sales to government agencies and to some

of the larger consumers in the South. This phase of the understanding required implementation in 1958, and in the 1958 Wage Agreement it was required that all signatory operators refrain from buying or marketing non-union coal, and a system of enforcement with respect to this provision was inserted into the agreement with a view to ending any business dealing at all between the signatory operators and their affiliated interests with the non-union operators of the country. The companies and the Union agreed to do all things possible to bar the non-union coal from the market afforded by the coal-consuming government agencies, particularly the TVA, and the subsequent effort to impose a Walsh-Healey wage rate in the coal industry and thereafter to raise that rate was a part of the agreement for the purpose of shifting the trade from non-union operators to the large coal producers of the country. The TVA market has largely been taken from the defendants and cross-plaintiffs and other small operations in the East Tennessee and East Kentucky area by the large coal producers by reason of the combination of the Walsh-Healey wage rates and the crippling of production and efficiency of these operators by the forays of the Union mobs and caravans in these coal fields. The large Southern coal consumers, principally public power companies, remain as a market for some of the coal produced by the small Southern operators, but the large coal companies, with the assistance of the defendant Union, are now trying to take these markets over by practices which violate the Clayton Act, 15 USCA, Section 13a. Pursuant to the foregoing understanding and conspiracy the Union, pursuing its effort to drive out of the industry non-union producers, has purchased mines previously non-union and has converted them into Union operations which are taking over the business previously done by the small South-

ern operators. Likewise, the Union has invested many millions of dollars in aiding the large coal operators to mechanize their mines pursuant to the foregoing understanding. These companies have tripled or quadrupled their investment in plant, machinery, equipment, etc., during the past five or six years and have depended upon the financial aid of the Union. The Union has made itself a business interest identifiable with the large coal producers and it has a direct financial interest in the shifting of trade from the small Southern operators to the large coal producers. The use of mobs and caravans, including large numbers of organized pensioners and those holding hospital and medical benefit cards of the United Mine Workers of America Welfare and Retirement Fund has been an important factor in the carrying out of the program of suppressing the competition of the small Southern operators. This has been possible only because of the cooperation and participation of the Trustees of the Welfare Fund."

The counterclaim against plaintiff Trustees and the cross-claim against the defendant Union are amended by incorporating by reference the allegations contained in the foregoing amendment to the answer.

Filed July 1, 1959

Memorandum

(Delivered from the bench)

This case is before the Court on various motions of cross-defendant, United Mine Workers of America, which, for convenience, will be referred to as UMW, and motion to amend the answer, counter-claim and cross-claim by James M. Pennington, Ralph E. Phillips and Bruce Phillips, individually, and as Phillips Brothers Coal Company, a partnership, the original defendants. Reference will be made

first to the motion of cross-defendant, UMW, found on page 41 of the record.

* * * * * * * * * * *

It is further urged in this motion that Rule 13 is insufficient to bring the UMW before the Court by cross action. The cross complaint avers, among other things, that the UMW and the Trustees of the Union fund conspired to raise wages to such an extent that the defendants and cross-plaintiff could not pay such wages and that the alleged conspirators committed one or more overt acts towards that end; that UMW conspired with one or more businesses to raise the wages of employees to a point that cross-plaintiff could not pay and that these conspiracies were in violation of the Sherman Anti-Trust laws.

It is the theory of cross-plaintiff that UMW should be brought in the suit in order for all questions to be decided in one suit.

The Court overrules the motion to dismiss the cross action as being improperly brought under Rule 13(h), without prejudice to the cross-defendants to renew the motion at the pre-trial.

Ground No. 4 of the motion asserts that the Court is without jurisdiction in that no substantial or colorable cause of action is stated under the Constitution, laws or treaties of the United States. The Court likewise overrules this ground with the right of cross-defendants to renew at the pre-trial hearing.

Ground No. 5 is sustained as cross-plaintiff concedes that this ground is well taken.

Ground No. 6 states that no colorable action is stated under Title 15, U.S.C., Sections 1, 2, 3 and 15 of the Sherman Act. The Court at this time is of the opinion that the charges that the Union conspired with one or more employers to violate the anti-trust laws, particularly, Title

15, U.S.C., Sections 1, 2, 3 and 15 of the Sherman Act, states a prima facie cause of action, and for that reason cross-defendants' motion is overruled without prejudice to its right to renew at the time of the pre-trial.

Ground No. 7 asserts that a cause of action is not stated under Title 29, U.S.C., Section 185, which is the breach of contract section. This motion is likewise overruled with the right of the cross-defendants to renew it at the pre-trial.

Ground No. 8 relates to the common law action. The Court is of the opinion that this ground must be overruled under the authority of *United Mine Workers of America* vs. *Meadow Creek Coal Co., Inc.*, 263 F.2d 52, USCA 6 Cir., January 21, 1959.

Ground No. 9 must be overruled for the same reasons.

* * * * * * * * * *

We direct our attention at this time to the motion to vacate the order issued under Rule 13(h) and to dismiss the cross-claim as to cross-defendants' Trustees. This motion is to be found on pages 42 and 43 of the record. For the reasons heretofore indicated above, this motion is denied at the present time with the right to movants to renew at the pre-trial hearing.

* * * * * * * * * *

Let an order be presented in conformity with the above views.

Entered July 2, 1959

Order

This cause came on to be heard on June 30, 1959, on the Motion to Dismiss filed by the cross-defendant, United Mine Workers of America, on March 13, 1958, Motion of the plaintiffs filed March 17, 1958, to vacate the order

granted under Rule 13(h) and to dismiss the cross-claim as to the plaintiffs, Motion of the defendants and cross-plaintiffs filed March 24, 1958, to amend the answer, counterclaim and cross-claim, additional motion of the defendants and cross-plaintiffs filed June 26, 1959, to amend the answer, counterclaim and cross-claim and Motion of the defendants and cross-plaintiffs filed June 19, 1959, for production of documents for inspection, copying and photographing, all of which matters were considered by the Court on briefs and oral argument by Counsel for all parties.

For the reasons specified in the Opinion of the Court delivered from the bench at the conclusion of the hearing, memorandum of which Opinion has been filed in this cause —reference to such memorandum being here made,—the Court does hereby order as follows:

That the Motion to Dismiss filed by the cross-defendant, United Mine Workers of America, is overruled except with respect to grounds Numbers V and XI, which are sustained.

The cross-defendant, United Mine Workers of America, is given leave to renew at the pre-trial conference, without prejudice, the grounds in said Motion to Dismiss numbered III, IV, VI and VII.

The motion of the plaintiffs filed March 17, 1958, to vacate the order granted under Rule 13(h) and to dismiss the cross-claim as to the plaintiff Trustees, is denied but the right is reserved to plaintiffs to renew such motion at the time of the pre-trial conference.

The motions of the defendants and cross-plaintiffs to amend the answer, counterclaim and cross-claim, filed on March 24, 1958, and June 26, 1959, are allowed and the amendments proposed in said motions shall be considered as having been added to and made a part of the pleadings referred to in said motions.

The cross-defendant, United Mine Workers of America,

is allowed fifteen (15) days from June 30, 1959, to attempt to work out a stipulation with respect to the motions of defendants and cross-plaintiffs for the production of documents for inspection, copying or photographing, or to file objections to said motion but the cross-defendant, United Mine Workers of America is urged to comply with this portion of the order within ten (10) days if reasonably possible.

Filed August 15, 1959

Answer of the United Mine Workers of America to the Amended Cross-Claim Filed Against It and Others

Comes the defendant, United Mine Workers of America, hereinafter referred to as "UMWA", by its attorneys and for answer to that portion of the amended cross-complaint to which it has not directed a motion to strike, and without waiving its said motion and without waiving the right heretofore granted to it to rely upon earlier motions made by it, says:

I

It admits that the amount in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000.00) as averred in Section I of the cross-complaint.

II

It admits that cross-plaintiffs seek to invoke jurisdictions of this Court herein on the basis of the statutory provisions referred to therein, but it denies that said statutory provisions are applicable to an action based upon the facts here alleged and the situations here involved.

III

It admits that the cross-plaintiffs entered into the contracts referred to in Section III of the cross-complaint but

denies each and every other allegation and averment contained therein.

IV

To the portion of the cross-complaint that was inserted therein under the motion filed on March 24, 1958 for amendment to the cross-claim, which amendment was allowed on July 1, 1959, this defendant has heretofore filed a motion to strike a portion thereof and it relies upon said motion. It denies each and every allegation added to the cross-complaint by said amendment to which its motion to strike is not applicable.

V

To the portion of the cross-complaint that was inserted therein under the motion filed June 26, 1959 for amendment to the cross-claim, which amendment was allowed on July 1, 1959, this defendant has heretofore filed a motion to strike a portion thereof and it relies upon said motion. It denies each and every allegation added to the cross-complaint by said amendment to which its motion to strike is not applicable.

VI

As affirmative defenses to the claims set forth in the cross-claim, as amended, this defendant says:

1. This Court lacks personal jurisdiction over UMWA.

2. The amended cross-claim purports to charge in indefinite and uncertain terms violations of certain sections of the Sherman Antitrust Act, and under the averments as therein set forth no relief can be granted.

3. This Court lacks jurisdiction to grant the relief sought in the cross-claim against this defendant in that UMWA and any acts on behalf of or by UMWA which are referred to in the cross-claim, and which on the trial may be shown to have occurred, are exempt from the provisions of the sections of the Sherman Act referred to in the complaint, by virtue of the provisions of Title 15 U.S.C.A., Section 17.

4. Any acts on behalf of or by UMWA referred to in the cross-claim, and which on the trial may be shown to have occurred and to involve or affect interstate commerce of the United States, are, to the extent that there are any effects whatsoever therefrom on the interstate commerce of the United States, merely incidental, indirect or remote to such commerce.

5. This Court lacks jurisdiction to grant the relief sought in the cross-claim against this defendant in that any acts on behalf of or by UMWA referred to in the cross-claim, and which on the trial may be shown to have occurred, relate to matters within the primary jurisdiction of the National Labor Relations Board.

6. This Court lacks jurisdiction to grant the relief sought in the cross-claim against this defendant in that any acts on behalf of or by UMWA referred to in the cross-claim, and which on the trial may be shown to have occurred, were acts taken or performed pursuant to the public policy of the United States and in the public interest.

7. The cross-claim purports to state an unidentified and unspecified common law cause of action seeking claimed actual and punitive damages. Said alleged common law cause of action fails to present any substantial fundamental question upon which jurisdiction can be predicated. Hence this Court lacks jurisdiction to grant the relief sought in the cross-claim on the alleged common law cause of action.

Filed September 13, 1960

Motion of the Cross-Plaintiffs, James M. Pennington, et al., to Amend the Cross-Claim or Counter-Claim in this Case to Specify the Period of Time Encompassed by the Cross-Claim or Counterclaim.

Come the cross-plaintiffs, James M. Pennington, et al., and move the Court that the pleadings with respect to the

cross-claim or counterclaim against the cross-defendants, United Mine Workers of America and John L. Lewis, Josephine Roche and Henry G. Schmidt, Trustees of the United Mine Workers of America Welfare and Retirement Fund, be amended in the following respects:

1. The cross-plaintiffs, James M. Pennington, et al., claim damages for the period commencing four (4) years prior to the filing of the original cross-claim which was filed on February 14, 1958, the period of damage to end December 31, 1958, at which time the cross-plaintiffs ceased to do business.

* * * * * * * * * *

2. In proving the existence of the conspiracy charged in the cross-claim, cross-plaintiffs rely upon evidence of factual matters and transactions which took place up to the time of the filing of this motion, which factual matters and transactions have probative value with respect to the question of the existence of, the nature of, and the extent of the conspiracy which existed during the damage period in the case.

Entered September 30, 1960

Order of Substitution of Parties.

It being shown that the defendant and cross-plaintiff, Burse Phillips, died in July, 1960, and that his widow, Lillian Goad Phillips, has duly qualified as Administratrix of his estate in the County Court of Scott County, Tennessee, it is hereby ordered that Lillian Goad Phillips, as Administratrix of the estate of Burse Phillips, deceased, be substituted as defendant and cross-plaintiff, in the place and stead of Burse Phillips.

Order, November 25, 1960; Amended Answer to Counter-Claim

Filed November 25, 1960

Order

Upon application of the plaintiffs, leave is hereby granted to plaintiffs to file an answer to the counterclaim as amended, such answer to stand in lieu of said answer as heretofore filed.

Filed November 25, 1960

Amended Answer to Counterclaim

Come the plaintiffs, by leave of Court previously granted, and for answer to the counterclaim as amended and in lieu of the answer to said counterclaim previously filed, say:

1. They deny that they have in any way whatsoever failed to fulfill their obligations as Trustees of the United Mine Workers of America Welfare and Retirement Fund.

2. They deny that there is any legal or factual basis, alleged or referred to in the counterclaim, as amended, which would afford a basis for the defendants to recover monies heretofore paid into said Fund by the defendants.

3. They deny that the trust agreement, either as it is written, interpreted or administered, is in conflict with applicable statutes. They further deny that the collective bargaining agreement is violative of 29 USCA, Section 158(a)(3) and/or Sections 50-209 and 50-210 of Tennessee Code Annotated. Furthermore they specifically deny that the trust agreement requires or that it is interpreted or administered so as to require membership in or activities on behalf of the United Mine Workers as a condition precedent to eligibility for benefits paid by the Fund.

4. They deny that they have been a party to any conspiracy to create a monopoly or to restrain trade in the coal industry with any person, corporation or unincorporated association. The Trustees are without knowledge of

any alleged conspiracy to which the United Mine Workers of America and others are charged as being parties and if any such alleged conspiracy becomes material to the rights of plaintiffs herein, they demand full proof with reference thereto.

5. They deny that they have violated or attempted to violate any provision of the Sherman Anti-Trust Act as alleged by the counterclaim.

6. They deny that the assets of the United Mine Workers of America Welfare and Retirement Fund have been used for any purpose other than that provided by the trust instrument and for the administration of the Fund.

7. Further answering, the Trustees specifically deny that they have been enjoined in an action of the National Labor Relations Board because of the use of the Fund to benefit members of the United Mine Workers of America exclusively; they deny that the Welfare Fund is dominated by the United Mine Workers of America, that it is carefully designed to eliminate the possibility of employers exercising powers and duties required of them under 29 U.S.C.A. Section 186(c)(5) or that the Fund is in violation of said 29 U.S.C.A. Section 186(c)(5); they deny that the Welfare Fund is an instrumentality or tool used by the United Mine Workers of America and specifically for the illegal purposes referred to in the counterclaim; they deny that the Welfare Fund contributed a source of manpower for union purposes or that any persons were required by them under threat of losing benefits to participate in such activities; they deny that they have participated in any manner whatsoever in any illegal scheme, plan or program to damage the cross-plaintiffs; they deny that any action taken by them has resulted in the closing down of cross-plaintiffs' mine or that they have caused cross-plaintiffs to pay funds in the amount of $100,000.00 or any other amount into said Fund under illegal compulsion; they are without knowledge of any agreement between large coal producing companies

and the United Mine Workers of America which provided that there would be no protest by such companies over the union's use of the Welfare Fund for its own purposes and therefore they deny that such agreement existed; they deny that the union used the Welfare Fund for its own purposes; they deny that the Trustee nominated by Bituminous Coal Operators is now or has been amenable to the demands of the member on the Board of Trustees of the Fund nominated by Union or that any agreement to that effect has been made or exists; and they deny that they have cooperated or participated in any plan with respect to the suppression of competition of southern coal operators or that they have encouraged or required pensioners to participate in such alleged plans or that they have permitted or authorized the use of medical benefit cards in connection with such plans.

8. The Trustees further deny the other allegations of the counterclaim, as amended, not specifically denied hereinabove.

Filed January 16, 1961

Order

It being shown that the defendant and cross plaintiff, Raymond E. Phillips, had been misnamed in the original complaint in that he was erroneously referred to as Ralph E. Phillips, it is hereby ordered that the record show the correct name of the defendant and cross plaintiff to be Raymond E. Phillips.

Filed April 5, 1961

Motion of James M. Pennington, et al., Defendants and Cross-Plaintiffs, for an Order Consolidating the Claim of Plaintiffs Against Defendants and the Claim of Cross-Plaintiffs, James

M. Pennington, et al., Against Cross-Defendant, United Mine Workers of America for Trial and Dismissing the Claim of Cross-Plaintiffs, James M. Pennington, et al., Against the Cross-Defendants, John L. Lewis, et al.

Defendants and cross-plaintiffs, James M. Pennington, et al., show to the Court as follows:

The very recent decision of the United States District Court for the Eastern District of Tennessee, Southern Division, raises complex issues as to whether the counterclaim filed by these parties against the original plaintiff Trustees, John L. Lewis, et al., may be maintained. As a practical matter, it is not necessary for these parties to press the counterclaim against the Trustees, John L. Lewis, et al., in order to obtain relief since the same claim is asserted against the cross-defendant United Mine Workers of America, which is abundantly solvent. To continue to maintain the counterclaim against the Trustees would unduly burden the case with complex issues not necessary for practical relief, and would defeat the purposes of all parties to simplify the issues in this cause.

Accordingly, these parties move the Court for an order: Consolidating the claim of the Trustees in the original complaint against these defendants with the cross-claim of these defendants against the cross-defendant, United Mine Workers of America pursuant to Rules 42(a) and 54(b) of the Federal Rules of Civil Procedure; these respective claims involving a common question of fact, to-wit: the existence of the conspiracy charged by these parties, said conspiracy being the only defense to the claim of the Trustees in the original complaint and being the only basis for the counterclaim against the United Mine Workers of America; and dismissing the counterclaim of these parties against the Trustees, John L. Lewis, et al.

Response of U. W. W. to Motion of Defendants

Filed April 6, 1961

Response of United Mine Workers of America to Motion of Defendants and Cross-Plaintiffs to Dismiss Their Claim Against the Plaintiffs and to Consolidate Plaintiffs' Case with Cross-Plaintiffs' Claim Against United Mine Workers of America and Motion to Dismiss

UMW has no objection to the order dismissing the Phillips' claim against the Trustees.

UMW does object to the consolidation for trial of the Trustees' claim with the claim of Phillips against UMW.

The Court will recall that UMW was made a cross-defendant under the purported authority of Rule 13(h), granted ex parte. In the first responsive pleading filed by UMW to Phillips' cross-claim, which was a motion to vacate the order and dismiss the cross-claim filed on March 13, 1958, UMW moved to vacate and dismiss on the ground that the order and cross-claim were not contemplated or authorized by Rule 13(h) or by any other Federal Rule of Civil Procedure. At that time Phillips was making no claim against the Trustees in any wise related to the claim made against the UMW, and we are confident that had Phillips' claim remained as it was then, the Court would have sustained UMW's motion for the reasons stated in section B(2) (pages 6-7) of UMW's supporting brief filed on September 18, 1958, reference to which is here made.

Phillips, however, undertook to cure the plain defect in its position under Rule 13(h) by asserting against the Trustees a claim similar to that made against the UMW under the Sherman Act, and the Court overruled UMW's motion. Now, on the eve of trial, and in recognition of the fact that it has no valid claim against the Trustees, Phillips seeks leave of the Court to dismiss such claim. In further recognition of its weakness in having UMW's case tried jointly with that of the Trustees, it asks the Court to consolidate the Trustees' case with its case against UMW.

Order, April 10, 1961

In light of UMW's previous objection to Phillips' tactics and for the reasons stated in our memorandum above referred to, we think that this motion for consolidation is ill made and that the case commenced against UMW by ex parte order under Rule 13(h) should be dismissed.

Filed April 10, 1961

Order

On motion of the defendants and cross- plaintiffs, James M. Pennington, et al, the Court does hereby Order, Adjudge and Decree as follows:

1. The claim of cross-plaintiffs James M. Pennington, et al against the cross-defendants John L. Lewis, et al, Trustees of the United Mine Workers of America Welfare and Retirement Fund, is dismissed.

2. The claims of the plaintiff Trustees John L. Lewis, et al in the original complaint against the defendants James M. Pennington, et al, and of the cross-plaintiffs James M. Pennington, et al against the cross-defendant, United Mine Workers of America, are consolidated for trial, the issues to be decided by the jury.

The motion of the cross-defendant United Mine Workers of America to dismiss this action, such motion having been filed on April 6, 1961, is hereby overruled.

The exception of the plaintiff Trustees to the action of the Court in consolidating the cases as noted in paragraph 2 hereof is hereby noted and reserved.

The exceptions of the cross-defendant United Mine Workers of America to the consolidation of the cases as noted in paragraph 2 hereof and to the action of the Court in overruling its motion to dismiss filed on April 6, 1961, are hereby noted and reserved.

Order Pursuant to Pre-Trial

Filed April 10, 1961

Order Pursuant to Pre-trial

It is agreed by counsel for the parties and ordered by the Court that this statement will be binding at the trial of the cause on its merits:

NATURE OF ACTION

This is a suit brought by John L. Lewis, et al, as Trustees of the United Mine Workers of America Welfare and Retirement Fund against defendants, James M. Pennington, et al, as partners of Phillips Brothers Coal Company for $55,982.62, alleged to be due pursuant to the terms of a trust provision contained in a collective bargaining agreement which existed between United Mine Workers of America and the defendants, James M. Pennington, et al, and being alleged royalty due from said defendants on coal mined under the said agreement. The only defense raised by the defendants is that the collective bargaining agreement sued upon was an instrument used in a conspiracy which violated the Anti-trust law and the National Labor Relations Act as amended. If there were no such conspiracy, the parties have stipulated that the amount sued for is the correct amount to which the plaintiff Trustees are entitled. The same alleged conspiracy, in violation of the anti-trust law, is the basis of a cross-claim by the cross-plaintiffs, James M. Pennington, et al (the same parties who are defendants in the original complaint) against the cross-defendant, United Mine Workers of America. This cross-claim seeks recovery of single or compensatory damages in the amount of $100,000.00, to be trebled under the anti-trust law, and for attorneys' fees.

THEORIES UPON WHICH PLAINTIFFS EXPECT TO RECOVER:

This suit was instituted by the three Trustees of the United Mine Workers Welfare and Retirement Fund who are serving as Trustees of that Fund having been chosen in accordance with the provisions of a collective bargaining

agreement existing between the United Mine Workers and various coal operators, the defendants having joined as a signatory to that agreement, and it was in effect for the period beginning October 1, 1953, through December 31, 1958. The trust agreement contained in the collective bargaining agreement provides that the signatories thereto should pay into the Welfare Fund forty cents per ton on each ton of coal produced by the company for use or sale during the period the contract was in existence.

It is admitted in this record that during this period the defendant company produced for use or sale a total of 145,532.16 tons of coal, this fact being established by stipulation; and it is further stipulated that during this same period the defendant paid into the Welfare Fund five payments at different times in the total amount of $2,227.70.

The plaintiffs, under the terms of the trust instrument contained in said collective bargaining agreement, say that they are entitled to receive, and have judgment for, the unpaid balance at the rate of forty cents per ton on the 145,532.16 tons which defendants produced during that period. Then, the net amount due under the terms of the agreement is $55,982.62.

THEORIES UPON WHICH DEFENDANTS EXPECT TO DEFEAT RECOVERY AND CROSS-PLAINTIFFS EXPECT TO RECOVER

Both as a defense to the claim for the Welfare Fund royalties and as a basis for suing the Union the Coal Company (Phillips Brothers Coal Company operated by James M. Pennington, et al.) contends that the United Mine Workers of America engaged in a conspiracy with the Trustees of the Welfare Fund and with the major coal companies of the country, particularly Consolidation Coal Company, Peabody Coal Company, West Kentucky Coal Company, Nashville Coal Company, Island Creek Coal Company, The Pittston Company and Pittsburgh-Midway Coal Company, and

others, to stabilize the prices of coal, to restrain the trade of small coal producers and to monopolize the bituminous coal industry for the major coal producers. These parties contend that the nature of the conspiracy was as follows:

BACKGROUND OF THE CONSPIRACY:

That after World War II the economics of the bituminous coal industry became unstable by reason of the fact that there was more coal being produced than the markets required; that before 1950 the major coal producers and the Union were in agreement that the major problem of the industry was over-production and that the growth of small independent and non-union producers was contributing to the problem; that the major companies and the Union disagreed on how the problem should be handled in the period right after World War II; that on its side the Union was contending that the answer was to cut down on the working time of all producers; that the Union urged a three-day work week; that for many months before the 1950 contract was signed the Union took the initiative on this question and directed the working time of the men in the industry, the Union Officials setting, on some weeks, three-day work weeks, and at other times "no day" work weeks; that domination of the men in the industry was an essential part of the Union's effort to dictate the economics of the industry and this domination was interfered with by the passage of the new Taft-Hartley Act; that the Union's efforts to maintain closed shops and maintain a union-controlled Welfare Fund were challenged and in some instances were defeated in the courts by the major coal companies; that the major coal companies were opposed to the Union's dictating the working time of the men in the industry but because it cut into their profits.

FORMATION OF THE CONSPIRACY:

That a marked change occurred in the relations between the Union and the major coal companies in 1950, as dis-

closed in their bargaining relations before and after that year; that the express understanding at the time of the signing of the 1950 bituminous coal wage agreement was that the major coal companies, themselves, were to decide on the working time for their employees; that this was a surrender on the part of the Union of its previous policy of seeking to control the economics of the industry by controlling the working time; that the understanding was that the problem of stabilizing the economics of the industry, the problem recognized by both Union and the major coal companies, was to be taken care of by eliminating the smaller and weaker companies in great numbers, leaving the industry to the major coal companies alone.

USE OF THE NATIONAL BITUMINOUS COAL WAGE AGREEMENT IN THE CONSPIRACY AND EVASION OF THE TAFT-HARTLEY LAW:

That the conspiracy involved the use of the National Bituminous Coal Wage Agreement and its successive amendments as an instrument in accomplishing the purposes of the conspiracy; that the accomplishment of the purposes of the conspiracy were furthered by the domination of the Union over the men in the industry and that in 1950, by the express statement of the representatives of the major coal companies, the Welfare Fund was turned over to the Union's control, and that rather than opposing the Union's efforts to evade the Taft-Hartley Act as they had before, the major coal companies have fostered the Union's domination of the men of the industry so that the terms of the National Coal Wage Agreement could be imposed upon the small mines; that by successive amendments to the Uniform National Bituminous Coal Wage Agreement's terms the wage scale and the Welfare Fund payments per ton were raised to exceedingly high levels; that the mechanization program of the major coal companies was to go ahead rapidly and that the successive increases in wage scale and Welfare Fund payments were designed and tailored to meet

the abilities of the major coal companies to mechanize and not have their profits affected by the increasing labor costs in the successive amendment; that the successive amendments to the labor contract were made after careful consideration of the abilities of the major coal companies to make the increases without affecting their profits; that the Union had no concern as to whether the weaker companies could pay; that the Union displayed its knowledge that the weaker companies could not pay and that they would fall by the wayside by reason of the increased terms; that the Union favored the taking over of the industry by the large combines of coal producers and that the Union worked toward this end; that the campaign to impose the wage contracts upon the smaller, independent and non-union mines was intense after 1950; that in areas of strong resistence mobs and terrorism were used; that the Trustees of the Welfare Fund stood by as pensioners under the Welfare Fund were organized into bands which had as their purpose the imposition of the uniform contract upon the smaller and non-union companies; that the paying of Welfare Fund benefits to men in the industry depended upon the retention of membership in good standing in the Union, certified to by Local, District and International Union Officials; that the enticement of benefits under this Fund was held out to the men in the industry as being under Union control; that the finances of the Union and the finances of the major coal companies have been used to further the drive to bring all production under the contract; that one or more major coal companies have assisted in crushing the opposition of the principal Union competitor of United Mine Workers of America in the bituminous coal labor fields; that the result of this conspiracy and these activities has been that large numbers of small companies have been driven out of the industry and that thousands of men in the industry have been driven into unemployment; that when these men are put out of the industry they cease to participate in Welfare Fund benefits and the Fund remains

as a source of benefit for the employees only of those companies that survive.

USE OF BOYCOTTS:

That to accelerate the demise of the smaller companies devices were inserted into later amendments of the National Bituminous Coal Wage Agreement to further restrain their trade; that companies which could not afford to pay the wage scale in terms of the contract were barred from operating on the lands of signatories to the contract; that the major companies have acquired great tracts of the coal lands of the country and there is little good coal land left for the small companies to operate upon; that the small companies were prohibited from selling coal to the signatories to the contract, including the major companies which supplied coal to the large market under large contracts.

THE TVA MARKET:

That the development of the Tennessee Valley Authority as the principal coal purchaser of the entire country called the attention of the conspirators to the Southern Appalachian region when TVA opened up many of its coal-using generating units in 1954, 1955 and 1956; that in 1955 the conspirators manifested their intent and purpose to take over the TVA market by working together with the Secretary of Labor to obtain a determination of a minimum wage in the bituminous coal industry under the Walsh-Healey Act; that the purpose was to drive out of the Government market, particularly the TVA market, the small coal producers; that this determination imposed a wage rate upon a producer of coal supplying coal to a Government market twice as high as the wage rate determined by the Secretary of Labor in any other industry; that, in accordance with this design, this determination of a minimum wage effectively barred the defendants and cross-plaintiffs from participating in the term market of the TVA because they could

not pay the kind of wages set forth in that determination; that because contracts for less than $10,000.00 were exempted from the minimum wage determination, the defendants and cross-plaintiffs were able to ship coal on TVA spot orders; that the conspirators set about to eliminate or drastically reduce the spot market of TVA; that when this effort failed to bring results the conspirators adopted the practice of predatory pricing to drive the spot coal market price down to a price which a small producer could not meet at a profit; that in this phase of the campaign the West Kentucky Coal Company and its subsidiary, Nashville Coal Company, took the most prominent part; that the Union had over $25,000,000.00 of risk capital invested in these companies; that large amounts of tonnage were dumped upon the spot coal market of TVA at constantly reduced prices; that the spot coal price was beaten down to such an extent that defendants and cross-plaintiffs suffered large losses in trying to retain their position in that market and finally had to abandon their sale of coal to that market and it became necessary for them to abandon the partnership business.

ENFORCEMENT OF NATIONAL BITUMINOUS COAL WAGE AGREEMENT:

That companies which survived the other onslaughts of the conspiracy have been killed off by such lawsuits as this, brought by the Trustees of the Welfare Fund; that prior to 1958 some three or four cases were brought by the Trustee against some of the larger producers in the area; that cases against the smaller producers were commenced in 1958 and the following period; that some forty-one of these cases have been brought and are presently pending against the small companies of the area in the State of Tennessee, since January 1, 1958; that the amount sued for by the Trustees exceeds the combined profits of the company for its entire life.

That the Union, in carrying on the foregoing activities

pursuant to its understanding and agreement with the major coal companies, was not acting alone to further its own interests as an organization of wage earners, but was aiding, abetting and cooperating with business men in an effort to restrain trade of small coal companies and to monopolize the industry for the major coal companies; that the conspiracy involved boycotts and a purpose to stabilize the prices of coal in the industry; that the practices used pursuant to the conspiracy, particularly the imposition of the constantly increasing terms of the National Bituminous Coal Wage Agreement upon the small coal companies such as that of the defendants and cross-plaintiffs and the price-cutting practices of the conspirators on the markets supplied by the defendants and cross-plaintiffs were unreasonable.

So Far as the Contract Signed by Phillips Bros. Coal Company Is Concerned:

A central part of the understanding and agreement among the alleged conspirators to stabilize prices in the industry, to restrain competition, and to monopolize, was that the terms of the National Bituminous Coal Wage Agreement would be imposed upon the smaller and financially weaker coal companies with the knowledge and intent that these companies in large numbers would go out of business because they could not keep pace with the increasingly higher wage and welfare terms which were designed to meet the ability of the large combines to pay as the mechanization programs of the latter progressed; that the use of the National contract against the small companies for the purpose of driving them and their employees out of the industry could not be achieved if the employees of these small companies were allowed to exercise the right afforded them by the Labor Statutes; that the purposes of the conspiracy were effectuated by the major coal companies' permitting the Union to assume a dominating role over the

labor force in the coal fields by evasion of the Labor Statutes which protected the rights of the employees of small companies to join a Union or refraining from joining a Union and to select their own bargaining representatives and which statutes forbid Unions from dominating Welfare Funds; that thereby, and pursuant to the intent of the alleged conspirators the employees of the small companies have been deprived of any real choice as to whether they will be represented by the Union or not and whether their bargaining agreement with their employers will be on such a basis that their employers can stay in business and their jobs can be preserved; that the effective use of the National Bituminous Coal Wage Agreement to destroy small companies and the evasion of the labor laws is shown by this case brought by the Trustees and by the circumstances of the making of the contract sued on here by the Trustees; that, in this regard, the Union completely ignored the employees of Phillips Brothers Coal Company, and, having no authority from those employees and without having them as members and without their knowledge, the Union extracted the signing of a copy of the National Bituminous Coal Wage Agreement from Phillips Brothers Coal Company; that several months thereafter, and before the employees knew of or had ratified the contract, and with the use of mobs and in an atmosphere of coercion directed against the company and its employees, the Union shop clause of the contract was enforced by the Union and the employees were required to join the Union in order to go back to work; that they were not given benefit cards under the Welfare Fund until they did join the Union; that it was only under these circumstances that the Union received any authority or right to act as bargaining representative of the employees of Phillips Brothers Coal Company.

Order Pursuant to Pre-Trial

THEORIES UPON WHICH CROSS-DEFENDANT UMW EXPECTS TO DEFEAT RECOVERY:

A. *Theories as to Jurisdiction and Process.*

(1) The Court has not acquired jurisdiction of the UMW on the basis of the purported class action sought to be maintained herein.

(2) The attempted service of process upon UMW under Section 20-225 of Tennessee Code Annotated is ineffectual because said statute is unconstitutional for the reasons heretofore specified to the Court.

(3) UMW is not a necessary or proper party to the original complaint filed and neither Rule 13 nor any of the other Federal Rules of Civil Procedure authorize the issuance of an order bringing in UMW as an additional party.

(4) This Court is without jurisdiction to award any damages for an alleged violation of 29 U.S.C.A., Section 157; 29 U.S.C.A., Section 158; or 29 U.S.C.A., Section 186(a) or (c); and it is without jurisdiction to determine, with regard to the defense asserted to the Trustees' action, whether these Statutes, or any of them, were violated.

B. *Theories With Reference to the Averment that the National Bituminous Coal Wage Agreement and That Agreement As Amended Were Illegal.*

(1) UMW denies that the National Bituminous Coal Wage Agreement of 1950 or that agreement as amended is violative of the Federal statutes and particularly that such contract contains language which unlawfully encourages the employees of coal companies that sign the agreement to become union members in violation of the Federal statutes.

(2) UMW denies that the language in the National Bituminous Coal Wage Agreement of 1950 and its amendments which deal with the qualification for benefits under

the Welfare Fund or any other language in said contract was inserted for the purpose of unlawfully encouraging employees to join the union in defiance of, or in violation of, the labor laws or any other laws of the United States.

(3) UMW denies that any activities engaged in by it individually or with the trustees constituted or was pursuant to a conspiracy for the purpose of creating a practical construction that the Fund was solely for the benefit of UMW members.

(4) UMW denies that the District Court has any jurisdiction to determine the legality or non-legality of conduct under Section 8, or any of the other provisions, of the National Labor Relations Act (29 U.S.C.A. 141 et seq): It further denies that any conduct, which is asserted to have been illegal under the provisions of such Section 8 or of said Act, will sustain a charge of violation of the Sherman Act.

C. *Theories With Reference to the Alleged Violation of the Sherman Act.*

(1) UMW denies that it has entered into any contract or joined in any combination or conspiracy in restraint of trade or commerce in violation of the Sherman Act.

(2) It denies that it has monopolized or attempted to monopolize or that it combined or conspired with any other person or persons or group of persons to monopolize any part of the trade or commerce among the several states or with foreign nations.

(3) By virtue of Section 17 of the Clayton Act (15 U.S.C.A. 17) and by virtue of the provisions of the Norris-LaGuardia Act (29 U.S.C.A. 101 et seq.), the negotiations and execution by the union of the National Bituminous Coal Wage Agreement of 1950, and that Agreement as amended, and UMW's acts and conduct in connection with the en-

forcement thereof do not constitute a violation of the Sherman Act.

(4) UMW is a labor organization within the meaning of Section 17 of the Clayton Act and it acted as such for its members in the negotiations for and execution of the collective bargaining agreements known as the National Bituminous Coal Wage Agreement of 1950 and the amendments thereto.

(5) UMW denies that there was upon its part any conspiratorial conduct or any wrongful conduct, or that it committed any wrongful, conspiratorial, illegal or monopolistic acts violative of the Sherman Act, and that in the period of time involved herein all of the acts done by UMW and involved in this action were motivated by legitimate labor goals and for the purpose of securing union standards of wages and better conditions of employment for its members.

(6) UMW denies that it participated in, or that it authorized or ratified any acts of violence complained of by cross-plaintiff herein.

(7) It denies that in any of the activities complained of in this case it conspired or joined with coal operators or any other non-labor groups for any purpose or in any manner.

(8) It contends that the mechanization of mines and the changes in mining methods which have occurred in and since 1950 are not the result of any conspiracy or any effort to restrain trade or any effort to create a monopoly, nor have such occurred by reason of wrongful conduct on its part, but that such changes have occurred as an outgrowth, result and development of the American economy in the industry over the years.

(9) It denies that there was upon its part any conspira-

torial conduct or any wrongful conduct, or that it committed any wrongful, illegal, conspiratorial or monopolistic acts in connection with the actions which were had under the Walsh-Healey Act for the establishment of wages for those employed in the mining industry.

(10) It denies that cross-plaintiffs have any right to rely upon any proceedings with respect to a Walsh-Healey minimum wage rate determination or that the cross-plaintiffs have any right to introduce evidence thereon or on the effect thereof either as a basis of liability under the Sherman Act or as a part of an alleged conspiracy under said Act.

(11) It denies that it was properly joined as a cross-defendant in this cause.

(12) UMW also asserts as theories of defense the theories upon which the Trustees expect to defeat the defensive claim of Pennington to the extent that such theories may become material and applicable in defense of the claim asserted by Pennington against UMW.

(13) UMW denies that cross-plaintiffs were damaged as a proximate and direct result of any acts on its part.

TRIAL OF THE CROSS-CLAIM AGAINST UNITED MINE WORKERS OF AMERICA:

The issues under the cross-claim of James M. Pennington, et al, against United Mine Workers of America, as presented in the respective theories of those parties set out above, will be decided by the jury and the jury will be presented the following specific issues:

ISSUES FOR THE JURY ON THE CROSS-CLAIM OF JAMES M. PENNINGTON, ET AL, AGAINST THE CROSS-DEFENDANT, UNITED MINE WORKERS OF AMERICA:

1. Did the cross-defendant, United Mine Workers of

America, engage in a combination or conspiracy so as to unreasonably restrain trade or to monopolize commerce among the several states and which combination is outside or beyond the exemption granted by the anti-trust statutes to a labor organization, as alleged by the cross-plaintiffs, James M. Pennington, et al?

2. If the answer to question 1 is "No," the remaining questions need not be answered. If your answer to question 1 is "Yes," name the conspirators shown by the proof to have been involved in the alleged conspiracy.

3. (If the answer to question 1 is "Yes") Were the cross-plaintiffs, James M. Pennington, et al, doing business as Phillips Bros. Coal Co., damaged in their business or property proximately and as a direct result of the conspiracy? (Check only one space) Yes_____ No_____.

4. (If the answer to question 3 is "Yes") Our verdict for cross-plaintiffs, James M. Pennington, et al, is for $_____.

TRIAL OF CLAIM OF THE TRUSTEES AGAINST DEFENDANTS, JAMES M. PENNINGTON, ET AL:

The claim of the plaintiff Trustees, John L. Lewis, et al, against defendants, James M. Pennington, et al, as presented in the respective theories of those parties set out above, will be decided by the jury and the jury will be presented the following specific issue:

Did the plaintiff Trustees engage in a combination or conspiracy, so as to unreasonably restrain trade or to monopolize commerce among the several states, as alleged by the defendants, James M. Pennington, et al? (Check only one space) Yes_____ No_____.

THEORIES UPON WHICH PLAINTIFF TRUSTEES EXPECT TO DEFEAT THE CLAIM OF DEFENDANTS THAT THE COLLECTIVE BARGAINING AGREEMENT WAS UNENFORCEABLE BECAUSE OF AN ALLEGED CONSPIRACY:

(1) With reference to the defense of conspiracy as asserted against the Trustees, they rely upon all of the matters raised as defenses by the UMW insofar as they are applicable.

(2) The Trustees deny that in the administration and enforcement of the trust fund they have surrendered their duties and obligations to the UMW.

(3) The Trustees say that their conduct or actions in instituting this particular suit or any other suits which they may have instituted for the collection of Welfare Funds was not in furtherance of any conspiracy or of any monopolistic intent but assert that their conduct and actions in this respect were in furtherance of their duties and obligations under the trust.

(4) The Trustees deny that the United Mine Workers of America was properly joined as a cross-defendant in this cause.

(5) The Trustees deny that they have any control of or right to exert control over or that they have exerted control over the actions of the beneficiaries of the Fund.

(6) The Trustees deny that the right to receive or retain benefits of the Fund is dependent on membership in the United Mine Workers of America.

Both UMW and the Trustees say that if there was any interference with the production of coal by the cross-plaintiffs the amount of interference or reduction in production was not sufficient to bring any claim or to sustain any claim for violation of any provision of the Sherman Act.

Both the UMW and the Trustees deny that the cross-plaintiffs suffered any damages as a result of any illegal or wrongful action or conduct on the part of either of them.

STIPULATIONS:

(1) It is understood that the sole basis for recovery as asserted by the cross-plaintiffs against the cross-defendant Union in this action is the Sherman Anti-Trust Act and it is expressly understood that no claim under the common law of the State of Tennessee or the common law of any other State or on any other theory is involved in this litigation.

(2) No objection will be made to the convention minutes or to the Journal of the Union because they are copies but the Union and the Trustees reserve the right to object to the introduction of such matters as evidence because of incompetency, irrelevancy and immateriality.

(3) The damage period, so far as the cross-claim of Phillips Brothers Coal Company against the United Mine Workers of America is concerned, is from March 5, 1954, through December 31, 1958.

(4) The parties will exchange Exhibits which they believe they will introduce (except for those to be introduced for impeachment purposes) a reasonable time prior to their introduction in evidence.

(5) By April 14, 1961, the parties shall disclose to each other the witnesses whom they then expect to use at the trial.

By approving this order the plaintiff Trustees and Cross-Defendant, Union Mine Workers of America, do not waive their exceptions to the previous order of the Court wherein the claim of the Trustees and the cross-claim of James M. Pennington, et al, were consolidated for trial.

Filed May 29, 1961

Motion of United Mine Workers of America for Judgment in Accordance with Motions for Directed Verdict or in the Alternative Motion for a New Trial

The cross-defendant United Mine Workers of America moves the Court to set aside the verdict of the jury and to enter judgment in its favor in accordance with its motions for directed verdict for the following grounds or reasons:

1. Under the law, the applicable Federal Rules of Civil Procedure, and the state of the pleadings this action cannot be maintained against this cross-defendant, United Mine Workers of America.

2. The evidence is insufficient in law to sustain a verdict for the cross-plaintiff.

3. Under the applicable law and the proof in this record cross-plaintiff is not entitled to a judgment against this cross-defendant.

If the foregoing motion be denied, the cross-defendant United Mine Workers of America moves in the alternative that the verdict be set aside and that it be granted a new trial for the following grounds or reasons, among others:

1. The evidence is insufficient to support the verdict.

2. The verdict is against the weight of the evidence.

3. There is not sufficient or substantial evidence to support the amount of the jury's verdict.

4. The verdict manifests passion, prejudice and caprice and is the result thereof.

5. The amount of the verdict manifests passion, prejudice and caprice and is the result thereof.

6. The verdict of the jury is contrary to the charge of the Court and to the law applicable to this case.

7. The Court erred in admitting in evidence matters pertaining to rail rate reductions which were made subsequent to December 31, 1958.

8. The Court erred in admitting evidence on sales of coal made by alleged conspirators subsequent to December 31, 1958.

9. The Court erred in admitting in evidence Exhibits 48, 75 and 76, all relating to a pledge of security for a bank loan to North Fork Coal Company, which transaction occurred subsequent to December 31, 1958.

10. The Court erred in admitting evidence concerning the acquisition of properties by alleged co-conspirators after December 31, 1958.

11. The Court erred in permitting the introduction in evidence of Exhibit 47 which purports to be a copy of a speech by the president of Pittston Coal Company, which speech was made subsequent to December 31, 1958.

12. The Court erred in admitting evidence of matters in addition to those set forth above and which dealt with occurrences subsequent to December 31, 1958.

13. The Court erred in admitting in evidence the statements alleged to have been made by officers or representatives of alleged co-conspirators before prima facie evidence of the existence of such alleged conspiracy was presented.

14. The Court erred in admitting evidence with regard to the petitions filed with and activities before the Secretary of Labor for the determination of the prevailing wage in various areas in the bituminous coal industry under the

Walsh-Healey Act and in admitting evidence of the action of the Secretary of Labor thereon.

15. The Court erred in admitting in evidence the statement of the Secretary of Labor with respect to the action taken by him on petitions filed to determine the prevailing wage for various areas in the bituminous coal industry under the Walsh-Healey Act.

16. The Court erred in admitting Exhibit 41 which was introduced to show a comparison of the various prevailing wage rates determined by the Secretary of Labor under the Walsh-Healey Act in various industries.

17. The Court erred in admitting other evidence concerning the enforcement of the Walsh-Healey Act by the Department of Labor as it was applicable to the bituminous coal industry.

18. The Court erred in admitting in evidence Exhibit 43 which purports to show a statement by the Secretary of the Department of Labor concerning enforcement of mine safety laws and regulations.

19. The Court erred in admitting evidence of efforts on the part of coal operators to obtain lower freight rates pertaining to the shipment of coal.

20. The Court erred in admitting Exhibit 33 in evidence which purported to set forth the requirements of eligibility for benefits under the Welfare and Retirement Fund created under the Bituminous Coal Wage Agreement of 1947.

21. The Court erred in admitting evidence as to the understanding of cross-plaintiffs' employees on eligibility requirements for benefits from the Welfare and Retirement Fund.

22. The Court erred in admitting evidence to the effect that persons drawing pensions from the United Mine Work-

ers of America Welfare and Retirement Fund engaged in picketing or related activities.

23. The Court erred in admitting into evidence the statements of objections to interrogatories calling upon the Trustees of the United Mine Workers of America Welfare and Retirement Fund to identify non-union recipients of benefits and in directing the reading of the comment thereon by the witness Lewis.

24. The Court erred in permitting the introduction of evidence on the action of the United Mine Workers of America in establishing a membership committee during the effective periods of the 1947 and 1948 collective bargaining agreements and in admitting evidence relative to the action of such committee.

25. The Court erred in admitting evidence on other suits instituted by the Trustees of the Welfare and Retirement Fund to collect delinquent amounts owing the Fund.

26. The Court erred in admitting evidence concerning purported violence and other activities and matters pertaining thereto.

27. The Court erred in admitting evidence concerning the union security provisions of the National Bituminous Coal Wage Agreement of 1950 and its amendments. The Court's statements and instructions to the jury at numerous times during the trial with reference to such provisions were erroneous and had a tendency to confuse the jury. It was error for cross-plaintiffs' counsel to refer repeatedly to the union security provisions of the collective bargaining agreement as a union shop clause, and it was error for the Court to instruct the jury that such contract provisions do not constitute an effective union shop clause.

28. The Court erred in admitting evidence concerning this cross-defendant's compliance with certain provisions of

Section 9(f), (g) and (h) of the Taft-Hartley Act.

29. The Court erred in permitting counsel for cross-plaintiffs to follow a pattern of asking objectionable questions and, upon objection, withdrawing such questions.

30. The Court erred in permitting the admission of evidence with reference to the extent of unemployment in coal producing areas.

31. The Court erred in admitting in evidence Exhibit 122 styled "Report on Unemployment in Coal Mining Industry, June 10, 1957."

32. The Court erred in admitting evidence on the so-called land lease and protective wage clauses of the National Bituminous Coal Wage Agreement.

33. It was error to admit into evidence a statement of all the assets and investments of this cross-defendant.

34. It was error to admit evidence concerning transactions between the United Mine Workers of America and Cyrus Eaton and/or the Chertsey Corporation involving Chesapeake and Ohio Railroad Company stock.

35. It was error for the Court to admit evidence concerning transactions involving the sale and ownership of the stock of the National Bank of Washington.

36. It was error to admit evidence concerning transactions between Cyrus Eaton and United Mine Workers of America involving the purchase and sale of stocks in various utility companies.

37. It was error to admit in evidence Exhibits 54 through 66 and testimony relating thereto.

38. It was error to admit in evidence the statement concerning Consolidated Coal Company as set forth in Moody's Industrial Manual for 1960.

39. The Court erred in admitting evidence concerning the acquisition of other coal operations by Pittston Coal Company.

40. The Court erred in admitting evidence concerning the activities relating to alleged unfair labor practices at the operations of Peabody Coal Company and its subsidiaries.

41. The Court erred in admitting in evidence the two letters sent to Peabody Coal Company and its affiliates concerning the collective bargaining contract of Peabody and the Progressive Mine Workers.

42. The Court erred in admitting in evidence the statement from Moody's Industrial Manual on Peabody Coal Company to show "how big" Peabody Coal Company is, and in the remarks made at the time of this introduction (Tr. p. 1391).

43. The Court erred in admitting in evidence the contents of the Hugh White letter of July 1, 1957.

44. The Court erred in admitting in evidence the deposition of Dino Fratigloni.

45. The Court erred in admitting in evidence Exhibit 96.

46. The Court erred in admitting the testimony of witness Martin Hochdorf relative to TVA computations concerning the generation of electricity.

47. The Court erred in admitting the testimony of Taylor Maddox relative to the closure of certain mines in Tennessee.

48. The Court erred in admitting evidence purporting to show a comparison in the price paid by Tampa Electric Company and Duke Power Company for coal with the price paid by TVA.

49. The Court erred in admitting in evidence bids of DeBardeleben Coal Company and Truax-Traer Coal Company for the sale of coal to the TVA.

50. The Court erred in permitting the witness I. E. Schmidt to express an opinion on whether bidding practices of certain companies on the TVA spot market indicated a pattern or trend.

51. The Court erred in admitting evidence of term contracts awarded by TVA to certain coal companies.

52. The Court erred in admitting evidence relative to the Nashville Coal Company—Tampa Electric Company litigation.

53. The Court erred in admitting evidence relative to the purchase of coal by Tampa Electric Company from Love and Amos Coal Company.

54. The Court erred in admitting evidence on the purchase of coal by Tampa Electric Company from Peabody Coal Company in 1958 and in admitting into evidence the Tampa Electric Company—Peabody Coal Company contract of 1959.

55. The Court erred in admitting into evidence proof that the deposition of the witness John Amos was taken in certain other litigation in January of 1958 and in admitting into evidence testimony concerning the purported significance thereof.

56. The Court erred in admitting in evidence facts purporting to show a comparison in the growth of the TVA

steam coal market with that of other steam coal markets and in purporting to show the delivered costs of steam coal to different markets.

57. The Court erred in holding that hypothetical question asked of the witness Amos was proper and permitting the same to be answered as such question and answer appear at page 1868 of the transcript.

58. The Court erred in permitting the introduction of evidence as to the national average price F.O.B. mine of all bituminous coals as a basis for comparison with the average price of Phillips Brothers' steam coal F.O.B. Phillips Brothers mine.

59. The Court erred in admitting evidence purporting to explain why the witness Hutson had surrendered the hospital card which had been issued to him by the Welfare and Retirement Fund.

60. The Court erred in admitting in evidence proof with reference to the mechanization of their respective mining operations by the West Kentucky Coal Company, the Peabody Coal Company, and the other coal companies who are alleged in this case to be co-conspirators and in permitting the jury to take into consideration in arriving at its verdicts the fact of such mechanization.

60a. The Court erred in admitting testimony with reference to commercial transactions of various coal or coal mining companies.

61. The Court erred in admitting testimony of the witness Sturgill of Kentucky Oak Mining Company and of other witnesses connected with other coal or mining companies, which companies are not alleged to be co-conspirators, concerning their transactions or transactions of their companies with other coal companies and/or with the TVA.

62. The Court erred in failing to submit to the jury as a part of its charge cross-defendant's Revised Requests Nos. 37, 49, 50, 53(a), 58 and 63.

63. The Court erred in refusing cross-defendant's motion that the jury be required, as a part of its answer to Verdict Form No. 2 submitted by the court, to specify the names of the parties to any conspiracy found.

64. The Court erred in entering the verdict of the jury.

65. The Court committed material error in charging the jury thusly (T. 3459):

> "Similarly, unions act through their officers, agents, employees and members and no union participating or interested in a labor dispute may be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members or agents, except upon clear proof of actual participation in, or actual authorization of, such act, or of ratification of such acts after actual knowledge thereof."

66. The Court committed material error in charging the jury thusly (T. 3459):

> "Before you can return a verdict that the Union attempted to monopolize the bituminous coal industry, specific intent to restrain trade or to build a monopoly is necessary in order to violate Sections 1 and 2 of the Sherman Act, where the acts committed by the party or parties charged fall short of the results prohibited by the Act. But, if restraint of trade or monopoly results as the consequence of the cross-defendants' conduct or alleged conduct, or alleged business arrangement, specific intent to restrain or monopolize is not necessary in order to find that Sections 1 and 2 of the Act have been violated."

And in charging the jury thusly (T. 3458):

> "It is not necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade results as the consequence of the alleged conspirators' conduct or business arrangements."

67. The Court erred in permitting the consolidation for trial of the Plaintiff-Trustees' action against the original defendants with the cross action of cross-plaintiffs against the United Mine Workers of America and in overruling cross-defendant's objections to cross-plaintiffs' motion to such consolidation.

68. There is no material evidence to show that this cross-defendant conspired with each of the coal companies which is alleged to be a co-conspirator and hence the Court erred in failing to sustain cross-defendant's motion for a partial directed verdict as to each and all of said alleged co-conspirators.

Filed May 29, 1961

Motion of John L. Lewis, Henry G. Schmidt and Josephine Roche, As Trustees of the United Mine Workers of America Welfare and Retirement Fund, for Judgment in Accordance with Motions for Directed Verdict or in The Alternative Motion for a New Trial

The plaintiffs, John L. Lewis, Henry G. Schmidt and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund, move the Court to set aside the verdict of the jury and to enter judgment

in their favor in accordance with their motions for directed verdict for the following grounds or reasons:

1. The evidence is insufficient in law to sustain the jury verdict that the Trustees engaged in a combination or conspiracy so as to unreasonably restrain trade or monopolize commerce among the several states as alleged by the defendants.

2. Under the applicable law and the proof in this record plaintiffs are entitled to a judgment against the defendants for $55,982.62 with interest thereon.

If the foregoing motion be denied, the plaintiff-Trustees move in the alternative that said verdict be set aside and that they be granted a new trial for the following grounds or reasons, among others:

1. The evidence is insufficient to support the verdict.

2. The verdict is against the weight of the evidence.

3. The verdict manifests passion, prejudice and caprice and is the result thereof.

4. The verdict of the jury is contrary to the charge of the Court, and to the law applicable to this case.

5. The Court erred in overruling plaintiff-Trustees' motion to vacate its order granted under Rule 13(h), Federal Rules of Civil Procedure.

6. The Trial Court erred in its order of April 10, 1961, consolidating the trial of the claim of plaintiffs in the original complaint against defendant and the trial of the claim of cross-plaintiffs against cross-defendant.

7. The Court erred in admitting Exhibit 33 in evidence, which purported to set forth the requirements of eligibility for benefits under the Welfare and Retirement Fund created under the Bituminous Coal Wage Agreement of 1947.

8. The Court erred in admitting evidence as to the under-

standing of cross-plaintiffs' employees on eligibility requirements for benefits from the Welfare and Retirement Fund.

9. The Court erred in admitting evidence to the effect that persons drawing pensions from the United Mine Workers of America Welfare and Retirement Fund engaged in picketing or related activities.

10. The Court erred in admitting into evidence the statements of objections to interrogatories calling upon the Trustees of the United Mine Workers of America Welfare and Retirement Fund to identify non-union recipients of benefits and in directing the reading of the comment thereon by the witness Lewis.

11. The Court erred in permitting the introduction of evidence on the action of the United Mine Workers of America in establishing a membership committee during the effective periods of the 1947 and 1948 collective bargaining agreements and in admitting evidence relative to the action of such committee.

12. The Court erred in admitting evidence on other suits commenced by the Trustees of the Welfare and Retirement Fund to collect delinquent amounts owing the Fund.

13. The Court erred in admitting in evidence the contents of the Hugh White letter of July 1, 1957.

14. The Court erred in admitting evidence purporting to explain why the witness Hutson had surrendered the hospital card which had been issued to him by the Welfare and Retirement Fund.

15. The Court erred in admitting in evidence matters pertaining to rail rate reductions which were made subsequent to December 31, 1958.

16. The Court erred in admitting evidence on sales of

coal made by alleged conspirators subsequent to December 31, 1958.

17. The Court erred in admitting in evidence Exhibits 48, 75 and 76, all relating to a pledge of security for a bank loan to North Fork Coal Company, which transaction occurred subsequent to December 31, 1958.

18. The Court erred in admitting evidence concerning the acquisition of properties by alleged co-conspirators after December 31, 1958.

19. The Court erred in permitting the introduction in evidence of Exhibit 47 which purports to be a copy of a speech by the president of Pittston Coal Company, which speech was made subsequent to December 31, 1958.

20. The Court erred in admitting evidence of matters in addition to those set forth above which dealt with occurrences subsequent to December 31, 1958.

21. The Court erred in admitting in evidence the statements alleged to have been made by officers or representatives of alleged co-conspirators before prima facie evidence of the existence of such alleged conspiracy was presented.

22. The Court erred in admitting evidence with regard to the petitions filed with and the activities before the Secretary of Labor for the determination of the prevailing wage in various areas in the bituminous coal industry under the Walsh-Healey Act and in admitting evidence of the action of the Secretary of Labor thereon.

23. The Court erred in admitting in evidence the statement of the Secretary of Labor with respect to the action taken by him on petitions filed to determine the prevailing wage for various areas in the bituminous coal industry under the Walsh-Healey Act.

24. The Court erred in admitting Exhibit 41 which was introduced to show a comparison of the various prevailing

wage rates determined by the Secretary of Labor under the Walsh-Healey Act in various industries.

25. The Court erred in admitting other evidence concerning the enforcement of the Walsh-Healey Act by the Department of Labor as it was applicable to the bituminous coal industry.

26. The Court erred in admitting in evidence Exhibit 43 which purports to show a statement by the Secretary of the Department of Labor concerning enforcement of mine safety laws and regulations.

27. The Court erred in admitting evidence of efforts on the part of coal operators to obtain lower freight rates pertaining to the shipment of coal.

28. The Court erred in admitting evidence concerning purported violence and other activities and matters pertaining thereto.

29. The Court erred in admitting evidence concerning the union security provisions of the National Bituminous Coal Wage Agreement of 1950 and its amendments. The Court's statements and instructions to the jury at numerous times during the trial with reference to such provisions were erroneous and had a tendency to confuse the jury. It was error for cross-plaintiffs' counsel to refer repeatedly to the union security provisions of the collective bargaining agreements as a union shop clause, and it was error for the Court to fail to instruct the jury that such contract provisions do not constitute an effective union shop clause.

30. The Court erred in admitting evidence concerning this cross-defendant's compliance with certain provisions of Section 9(f), (g) and (h) of the Taft-Hartley Act.

31. The Court erred in permitting counsel for cross-plaintiffs to follow a pattern of asking objectionable questions and, upon objection, withdrawing such questions.

32. The Court erred in admitting evidence on the so-called land lease and protective wage clauses of the National Bituminous Coal Wage Agreement.

33. The Court erred in admitting in evidence a statement of all the assets and investments of this cross-defendant.

34. The Court erred in admitting evidence concerning transactions between the United Mine Workers of America and Cyrus Eaton and/or the Chertsey Corporation involving Chesapeake and Ohio Railroad stock.

35. The Court erred in admitting evidence concerning transactions involving the sale and ownership of the stock of the National Bank of Washington.

36. The Court erred in admitting evidence concerning transactions between Cyrus Eaton and United Mine Workers of America involving the purchase and sale of stocks in various utility companies.

37. The Court erred in admitting in evidence Exhibits 54 through 66 and testimony relating thereto.

38. The Court erred in admitting in evidence the statements concerning Consolidated Coal Company and Island Creek Coal Company as set forth in Moody's Industrial Manual for 1960.

39. The Court erred in admitting evidence concerning the acquisition of other coal operations and/or additional coal properties by Pittston Coal Company.

40. The Court erred in admitting evidence concerning the activities relating to alleged unfair labor practices at the operations of Peabody Coal Company and its subsidiaries.

41. The Court erred in admitting in evidence the two letters sent to Peabody Coal Company and its affiliates

concerning the collective bargaining contract of Peabody and the Progressive Mine Workers.

42. The Court erred in admitting in evidence the statement from Moody's Industrial Manual on Peabody Coal Company to show "how big" Peabody Coal Company is, and in the remarks made at the time of this introduction (Transcript L. 1391).

43. The Court erred in admitting in evidence the deposition of Dino Fratiglioni.

44. The Court erred in admitting in evidence Exhibit 96.

45. The Court erred in admitting the testimony of witness Martin Hochdorf relative to TVA computations concerning the generation of electricity.

46. The Court erred in admitting the testimony of Taylor Maddox relative to the closure of certain mines in Tennessee.

47. The Court erred in admitting evidence purporting to show a comparison in the price paid by Tampa Electric Company and Duke Power Company for coal with the price paid by TVA.

48. The Court erred in admitting evidence relative to the Nashville Coal Company—Tampa Electric Company litigation.

49. The Court erred in admitting evidence relative to the purchase of coal by Tampa Electric Company from Love and Amos Coal Company.

50. The Court erred in admitting evidence on the purchase of coal by Tampa Electric Company from Peabody Coal Company in 1958 and in admitting into evidence the Tampa Electric Company—Peabody Coal Company contract of 1959.

51. The Court erred in admitting into evidence proof

that the deposition of the witness, John Amos, had been taken in certain other litigation in January of 1958 and in admitting into evidence testimony concerning the purported significance thereof.

52. The Court erred in holding that the hypothetical question asked of the witness Amos was proper and in permitting the same to be answered as such question and answer appear at page 1868 et seq of the transcript.

53. The Court erred in admitting in evidence bids of DeBardeleben Coal Company and Truax-Traer Coal Company for the sale of coal to the TVA.

54. The Court erred in permitting the witness T. E. Schmidt to express an opinion on whether bidding practices of certain companies on the TVA spot market indicated a pattern or trend.

55. The Court erred in admitting evidence of term contracts awarded by TVA to certain coal companies.

56. The Court erred in admitting in evidence facts purporting to show a comparison in the growth of the TVA steam coal market with that of other steam coal markets and in purporting to show the delivered costs of steam coal to different markets.

57. The Court erred in permitting the introduction of evidence as to the national average price F.O.B. mine of all bituminous coals as a basis for comparison with the average price of Phillips Brothers' steam coal F.O.B. Phillips Brothers mine.

58. The Court erred in permitting the admission of evidence with reference to the extent of unemployment in coal producing areas.

59. The Court erred in admitting in evidence Exhibit 122 styled "Report on Unemployment in Coal Mining Industry, June 10, 1957."

60. The Court erred in admitting in evidence proof with reference to the mechanization of their respective mining operations by the West Kentucky Coal Company, the Peabody Coal Company and the other coal companies who are alleged in this case to be co-conspirators and in permitting the jury to take into consideration in arriving at its verdicts the fact of such mechanization.

60a. The Court erred in admitting testimony with reference to commercial transactions of various coal or coal mining companies.

61. The Court erred in admitting testimony of the witness Sturgill of Kentucky Oak Mining Company and of other witnesses connected with other coal or mining companies, which companies are not alleged to be co-conspirators, concerning their transactions or transactions of their companies with other coal companies and/or with the Tennessee Valley Authority.

62. The Court erred in failing to submit to the jury as a part of his charge cross-defendant's Revised Requests Nos. 37, 49, 50, 53(a), 58 and 63.

63. The Court erred in entering the verdict of the jury.

64. The Court committed material error in charging the jury thusly (T. 3459):

> "Similarly, unions act through their officers, agents, employees and members and no union participating or interested in a labor dispute may be held responsible or liable in any court of the United States for the unlawful acts of individual officer, members or agents, except upon clear proof of actual participation in, or actual authorization of, such act, or of ratification of such acts after actual knowledge thereof."

65. The Court committed material error in charging the jury thusly (T. 3459):

"Before you can return a verdict that the Union attempted to monopolize the bituminous coal industry, specific intent to restrain trade or to build a monopoly is necessary in order to violate Sections 1 and 2 of the Sherman Act, where the acts committed by the party or parties charged fall short of the results prohibited by the Act. But, if restraint of trade or monopoly results as the consequence of the cross-defendants' conduct, or alleged conduct, or alleged business arrangements, specific intent to restrain or monopolize is not necessary in order to find that Sections 1 and 2 of the Act have been violated."

And in charging the jury thusly (T. 3458):

"It is not necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade results as the consequence of the alleged conspirators' conduct or business arrangements."

66. There is no material evidence to show that the plaintiffs conspired with any of the coal companies which is alleged to be a co-conspirator and hence the Court erred in failing to sustain plaintiffs' motion for a partial directed verdict as to each and all of said alleged co-conspirators.

Entered August 2, 1961

Judgment

This case came on to be heard before the Honorable Robert L. Taylor, Judge, upon the verdict of the jury, the motion of the plantiffs-trustees, John L. Lewis, et al, for judgment notwithstanding the verdict of the jury and in the alternative for a new trial, and also upon the motion of the cross-defendant, United Mine Workers of America, for judgment notwithstanding the verdict of the jury and in

the alternative for a new trial, together with the petition and supporting affidavits of cross-plaintiffs for the allowance of attorneys' fees, and upon the entire record in the case and the Court having fully considered thereof together with the briefs and arguments of counsel is of the opinion and doth hold and adjudge for reasons stated in a memo delivered from the Bench that there is no material or substantial evidence in this record to support the finding of the jury that the Trustees engaged in a combination or conspiracy so as to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states as alleged by the original defendants, James M. Pennington, Raymond E. Phillips, and Lillian Goad Phillips, Administratrix of the Estate of Burse Phillips, deceased, and the partnership known as Phillips Brothers Coal Company.

WHEREFORE IT IS ORDERED AND DECREED that the yerdict of the jury in so finding be set aside and the Court doth award the plaintiffs-trustees judgment for a portion of the claim asserted herein by them, finding and holding that said Trustees are entitled to have and recover royalty upon the quantity of coal produced for use or sale by the defendants, James M. Pennington, Raymond E. Phillips and Lillian Goad Phillips, Administratrix of the Estate of Burse Phillips, deceased, and the partnership Phillips Brothers Coal Company, only for the period from and after April 25, 1955 to and including December 31, 1958, or a total of 108,560.56 tons, at the rate of Forty Cents ($0.40) per ton, or the sum of Forty-three Thousand, Four Hundred Twenty-four and 22/100 ($43,424.22) Dollars.

The Court doth further hold and adjudge that the motion of the cross-defendent, United Mine Workers of America, for judgment notwithstanding the verdict of the jury and in the alternative for a new trial is not well made, and, therefore, the same, and each and every ground of said motion as stated in both alternatives, is overruled.

WHEREFORE, IT IS ORDERED AND ADJUDGED that the cross-

plaintiffs, James M. Pennington, Raymond E. Phillips and Lillian Goad Phillips, Administratrix of the Estate of Burse Phillips, deceased, and the partnership Phillips Brothers Coal Company, have and recover of the cross-defendant, United Mine Workers of America, in accordance with the applicable statutes, the sum of Two Hundred Seventy Thousand ($270,000.00) Dollars, being three times the amount of damages awarded by the jury, and also that they have and recover the additional sum of Fifty-five Thousand ($55,000.00) Dollars which the Court finds to be a reasonable amount of attorneys' fees to be awarded and assessed in accordance with the applicable statutes, thus making a total award in favor of said cross-plaintiffs and against the cross-defendant, United Mine Workers of America, in the amount of Three Hundred Twenty-five Thousand Dollars ($325,000.00).

It is further ordered and adjudged pursuant to the previous order of the Court that the counterclaim filed in this case against said Trustees by the defendants and cross-plaintiffs be, and the same hereby is, dismissed.

It is also ordered and adjudged that the costs in this cause shall be taxed after the time for appeal expires or after the disposition of the cause on appeal.

It is further ordered that execution issue in favor of the plaintiffs-trustees, John L. Lewis, et al., against the defendants, James M. Pennington, Raymond E. Phillips and Lillian Goad Phillips, Administratrix of the Estate of Burse Phillips, deceased, and Phillips Brothers Coal Company, for the said sum of Forty-Three Thousand, Four Hundred Twenty-four and 22/100 Dollars ($43,424.22), and that execution issue in favor of the cross-plaintiffs, James M. Pennington, Raymond E. Phillips, and Lillian Goad Phillips, Administratrix of the Estate of Burse Phillips, deceased, and Phillips Brothers Coal Company, against the said cross-defendant, United Mine Workers of America, for the

said sum of Three Hundred Twenty-five Thousand Dollars ($325,000.00).

Filed July 31, 1961

Opinion Rendered From the Bench

This case was tried to a jury and the Court and consumed approximately five weeks of trial time. The jury returned a verdict on May 19, 1961 in response to two verdict forms, the pertinent parts of which read as follows:

"1. Did the cross-defendant, U.M.W., engage in a combination or conspiracy so as to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states outside and beyond the exemption created by the anti-trust statutes to a labor organization as alleged by cross-plaintiff, Phillips Brothers Coal Company?"

The jury answered "yes".

"2. If your answer to Question 1 is Yes, was cross-plaintiff, Phillips Brothers Coal Company, damaged in its business or property as a direct and proximate result of the conspiracy?"

The jury answered "yes".

"3. We find in favor of cross-plaintiff, Phillips Brothers Coal Company, and fix its damages in the amount of $90,000.00."

The other verdict form is as follows:

"1. Did the Trustees engage in a combination or conspiracy so as to unreasonably restrain trade or monopolize commerce among the several states, as alleged by the original defendant, Phillips Brothers Coal Company?"

The jury answered "yes".

For convenience the International Union will be referred to as U.M.W.; James M. Pennington, et al, as Phillips Brothers; and Messrs. John L. Lewis, Henry G. Schmidt and Miss Josephine Roche as Trustees.

U.M.W. has moved the Court to set aside the verdict of the jury and render a judgment in its favor, and has urged in its support three separate grounds which, for practical purposes, raise the question of the sufficiency of the evidence to support the verdict of the jury.

U.M.W., in the alternative, has moved for a new trial and urged in its support 68 separate grounds. Several of the grounds set forth in the alternative motion are directed to the question of the sufficiency of the evidence.

The effect of the finding of the jury is that the U.M.W. conspired with large coal companies to stabilize prices in the coal industry around the year 1950 in violation of Sections 1 and 2 of the Sherman Anti-Trust Laws.

Some of the circumstances relied upon by Phillips Brothers to support their contention that the parties combined and conspired to fix the cost of production of coal so high that the small operators could not operate successfully are: That the large operators and the union agreed to make every effort to put all producers of coal under union contract with the U.M.W. That after 1950 wages were increased without waiting for the previous contract between the union and the operators to expire. That the increases were geared to meet the abilities of the major companies to pay. That the increases were forced on the small companies with knowledge that they could not pay them. That the large coal companies contested controversial provisions in the wage agreements prior to 1950, for example, those on union security, welfare, days of work, labor costs, rates of pay, while the large operators subsequent to this period permitted the Union to write these provisions into the wage provision contracts without protest. That one purpose of the unlaw-

ful agreement between U.M.W. and the large coal operators was to drive Phillips Brothers and other small operators out of business.

It is claimed that the Union was given control of the Welfare Fund; that Union membership clauses in the contract which were legal prior to 1950 continued to be observed by U.M.W. and by the large coal operators; that the Union used its funds to finance some of the major companies; that it purchased stock in one or more coal companies and advanced large sums of money to Mr. Eaton to invest in the West Kentucky Coal Company and accepted stock in that company as a collateral security for such advancements; that the U.M.W. worked hand in hand with this company and other large companies to drive small operators out of business.

It is claimed that the Union and the large coal operators knew that the small operators could not pay the wages and royalties stipulated in the wage agreement of 1950 and amended from time to time during the material period involved in this lawsuit.

The question for decision by this Court is whether there is any evidence to support the verdict of the jury that U.M.W. combined with business groups to restrain trade and monopolize the coal industry in interstate commerce. The principle is so well established as not to require citation of authority that it is a violation of the law for a union to combine with employer groups to suppress competition or to monopolize an interstate industry. *Allen Bradley Co.* v. *Local 3, Electrical Workers,* 325 U.S. 797 (a case which has been referred to often today in the course of argument); *Carpenters* v. *U. S.,* 330 U.S. 395.

There is some proof in the record that Union representatives and large coal operator representatives discussed stabilization of prices at one time or another during the critical periods referred to in the cross-claim.

In passing upon a motion of this character, the Court is required to follow certain rules, some of which will be mentioned.

First, a conspiracy may be inferred from things done by the alleged conspirators. *Loew's, Inc.* v. *Cinema Amusements, Inc.*, 210 F. 2d 86, 93.

The Supreme Court, in discussing the subject of conspiracy, has stated:

> "A conspiracy is to be viewed by the Court as a whole; the integral parts thereof are not to be weeded out and inquired into separately." *U. S.* v. *Patten*, 226 U.S. 525 (This case has also been referred to by counsel during the argument today.)

Second, it is the duty of the Court to take the view of the evidence most favorable to Phillips Brothers and to sustain the verdict if there is substantial evidence to support it. *Lavender* v. *Kurn*, 327 U.S. 645; *Magnolia Petroleum Co.* v. *Howard*, (C. A. 10), 193 F. 2d 269.

It is rare for a conspiracy to be established by direct evidence. *Eastern State Retail Lumber Dealers Assn.* v. *U.S.*, 234 U.S. 600.

Conspiracies are ordinarily proved by circumstances. *Loew's, Inc.* v. *Cinema Amusements, Inc.*, supra, 93.

Third, damages may not be recovered in a conspiracy case unless they are shown with reasonable certainty to have resulted from the wrongs of the conspirators but the injured party will not be deprived of damages because of uncertainty as to the amount. *Story Parchment Co.* v. *Patterson Paper Co.*, 282 U.S. 555.

Fourth: The question of the amount of damages is for the jury provided the injured party has established by the preponderance of the proof with reasonable certainty that

he has sustained damages as a direct and proximate result of the wrongful acts of the alleged conspirators.

> ". . . raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150.

Fifth: It is not necessary to find specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as a consequence of the wrongs of the alleged conspirators. *U. S.* v. *Patten, supra,* 543; *U. S.* v. *Masonite,* 316 U.S. 265, 275.

Our Sixth Circuit has stated that the trial judge does not sit as a 13th juror as does the trial judge in the state courts of Tennessee. In discussing this subject, the Court quoted from the case of *Tennant* v. *Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35, as follows:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Then follows the statement that,

> "It would be a usurpation of judicial authority, in the absence of any showing of bias, prejudice, passion, corruption or caprice upon the part of the jury where there is in the record substantial evidence to support the amount awarded by a jury as damages to the plaintiff, should the trial judge presume to set aside the verdict, or to reduce it, merely because the judge himself would not have awarded so large an amount had the case been tried to him without a jury." *Werthan Bag Corp.* v. *Agnew,* 202 F. 2d 119. See *Spero-Nelson* v. *Brown,* (C.A. 6), 175 F. 2d 86.

Counsel for Phillips Brothers have reviewed the evidence in their briefs in detail and have undertaken to point out various parts of the evidence which they claim support their theory that a conspiracy was shown.

Counsel for U.M.W. have likewise reviewed the evidence in detail and have pointed out certain portions of the evidence which they claim sustain their contention that the evidence is insufficient to support the charge of conspiracy.

The Court has given careful consideration to these briefs. As stated at the outset of the hearing, the briefs cover some 366 pages. At this point the Court will digress from the main subject to state that although the jury verdict was returned on May 19, 1961, and the last brief was not filed until July 28, 1961, and the case was not set for argument until today, namely, July 31, 1961, the Court had a purpose in not pushing or prodding the attorneys in the early filing of their briefs. The Court granted numerous extensions of time in which to file the briefs. The purpose was to give counsel plenty of time to prepare thorough briefs, as the Court recognizes that the case presents complex issues of fact and of law.

As previously indicated, the briefs have been given careful consideration. We have heard extended oral arguments and from the record as a whole, the Court is of the opinion, and finds, that there is substantial evidence to support the verdict of the jury in the cross-claim against the U.M.W. and, therefore, overrules the motion of U.M.W. for a judgment notwithstanding the verdict of the jury.

Only brief mention will be made of the U.M.W.'s motion for a new trial because what the Court has previously said is sufficient to dispose of a number of the grounds urged in support of the motion for a new trial.

The first six grounds of this motion again raise the question of the sufficiency of the evidence. Nothing further need be said concerning this question.

Grounds 7 through 61, inclusive, complain of the rulings of the Court on various questions of evidence. It is the opinion of the Court that it did not commit prejudicial error against the U.M.W. in its rulings on the objections to certain portions of the evidence. We do not believe that it is either proper or necessary at this time to take up separately the various rulings and repeat the reasons given by the Court for its action during the course of the trial. These rulings have been thoroughly discussed by the parties in their briefs and they were thoroughly discussed during the trial.

Ground No. 62 complains of the action of the Court in failing to submit to the jury U.M.W.'s Requests No. 37, 49, 50, 53, 53A, 58 and 63. The Court believes that it charged revised Request No. 53A verbatim. The court further believes that it gave Requests No. 50 and 53 as supplements to its original charge.

The other charges, Nos. 37 through 63, were charged in substance, except Request No. 58, and as to that request the Court was of the opinion, and is now of the opinion, that it would not have been proper to charge that request.

The Court is of the opinion that Ground No. 63 is without merit and is therefore overruled.

Ground No. 64 is general and does not require a discussion.

Grounds No. 65 and 66 also complain of certain portions of the charge. It is the opinion of the Court that these grounds are without merit and are, therefore, overruled.

Ground No. 67 asserts that the Court erred in permitting the consolidation for trial of the Trustee's action against Phillips Brothers with the cross-action of Phillips Brothers against U.M.W. It is claimed that U.M.W. was improperly joined in the action under Rule 13(h) of the Federal Rules of Civil Procedure. That the original answer raised the defense of the contract being made pursuant to

a conspiracy in violation of the anti-trust laws. That a counterclaim was filed against the Trustees and a cross-claim was filed against the U.M.W. That the Court granted the motion for an order under Rule 13(h) to bring the U.M.W. into the case as a cross-defendant. That service was bad upon U.M.W. and the Trustees moved to quash the service of process. That amendments and motions to amend the answer, the cross-claim and counterclaim were filed in which the conspiracy was described and set up as a defense to the original claim of the Trustees. That it was also the basis of the counterclaim against the Trustees and the basis of the cross-claim against the U.M.W. That under these circumstances the Court had no right to allow the case to be continued against U.M.W. after the claim for affirmative relief against the Trustees had been withdrawn. Rule 15(c) of the Federal Rules of Civil Procedure relates amendments back to the date of the original pleading. The motion to quash the service of process was denied.

It is the opinion of this Court that inasmuch as the cross-claim charged U.M.W. with being a co-conspirator in the same conspiracy raised as a matter of defense against the Trustees' claim, the Union was properly brought into the case under Rule 13(h). *Lesnik* v. *Public Industrials Corp.*, 144 F. 2d 968.

Where there is service of process and where federal jurisdiction is present, the Court may try the ancillary claim regardless of the disposition made of the original claim. *Pierce* v. *Perlite Aggregates*, 110 F. Supp. 684; *Switzer Bros., Inc.* v. *Chicago Card Board Co.*, 252 F. 2d 407. See *Emmerich* v. *May*, 130 F. Supp. 426; *U. S.* v. *Milhan*, 15 F.R.D. 459.

Rule 13 contemplates bringing in third parties where the subject matter raised is to qualify or defeat the original claim of the plaintiff against the original defendant. The purpose of the rule is to avoid circuity of action and to dis-

pose of the entire matter at one time. *Blair* v. *Cleveland Twist Drill Co.*, 197 F. 2d 842.

Rule 20(a) provides:

> "All persons may be joined in one action as defendants if there is asserted against them jointly, severally or in the alternative, any right to relief in respect thereof or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action."

Rule 21 provides:

> "Parties may be dropped or added by order of the Court on motion of any party or of its own initiative at any stage of the action and on such terms as are just."

The purpose of these rules is to require that all disputes relating to the same subject matter be settled in one lawsuit.

As previously indicated, it is the contention of U.M.W. that the dismissal of the counterclaim brought about a dismissal of the cross-claim. This contention seems to run counter to Rule 20(a), which is as follows:

> "A plaintiff or defendant need not be interested in obtaining or defending against all of the relief demanded. Judgment may be given for one or more of the plaintiffs, according to their respective rights to relief and against one or more defendants according to their respective liabilities."

Rule 54(b) provides:

> "When more than one claim for relief is presented in an action, whether as a claim, or counterclaim, cross-claim, or third-party claim, the Court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determina-

tion that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated which adjudicates less than all of the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of the judgment adjudicating all of the claims."

Aside from the aforementioned rule, it is the opinion of the Court that it had the right to treat the cross-claim against the U.M.W. as an original suit. The question of conspiracy was involved in both of the suits. That is, the question was involved in the defense to the claim of the Trustees and it was involved in the claim of Phillips Brothers against U.M.W. It does not seem feasible to this Court to have a five weeks trial in the U.M.W. phase of the case and also a five weeks trial on the Trustees phase of the case when the matter of conspiracy could just as well have been settled in one trial.

Ground No. 68 asserts that there is no material evidence that U.M.W. conspired with each of the coal companies which are alleged to be co-conspirators, and the Court erred in failing to sustain U.M.W.'s motion for a partial directed verdict as to each of the alleged co-conspirators.

It is to be observed that it was not necessary for the proof to show that U.M.W. conspired with all of the coal companies named in the complaint in order for Phillips Brothers to establish a cause of action but only one or more of them. This ground of the motion, in the opinion of the Court, is also without merit.

Mention should be made at this time of the claim of U.M.W. that the Court erred in admitting evidence bearing on the question of conspiracy before the damage period and subsequent to the damage period. Specific mention

should be made of this question because of the repeated insistence of U.M.W. that the Court committed prejudicial error in admitting this character of testimony. The jury was told that such evidence was admitted for whatever bearing, if any, it had on the alleged conspiracy but that it was not admitted as bearing on the question of damages and the jury should not consider it on the question of damages.

It is the opinion of the Court that since a general conspiracy was charged such evidence was clearly competent as bearing on the question of whether a conspiracy existed during the crucial period. *Buckeye Powder Co.* v. *Hazard Powder Co.*, 205 F. 827, 830; *Hillside Amusement Co.* v. *Warner Bros. Pictures*, 7 F.R.D. 260; *Wellman* v. *U. S.*, (C.A. 6), 227 F. 2d 757; *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683.

For the reasons indicated, the Court is of the opinion and holds that the motion of U.M.W. for a judgment notwithstanding the verdict of the jury and the alternative motion of U.M.W. for a new trial, and all of the grounds urged in support of these motions, are without merit and are therefore overruled.

This brings us to the Trustees' motion to set aside the verdict of the jury and to enter judgment in their favor for $55,982.62 with interest. The motion is based upon the proposition that the evidence is insufficient in law to sustain the verdict of the jury that the Trustees engaged in the conspiracy charged in the counterclaim.

The overt acts charged against the Trustees are:

(a) The Trustees paid benefits only to members of U.M.W.

(b) The Trustees required the beneficiaries of the trust to picket or perform other acts for the U.M.W. in order to obtain or retain pension benefits, or acquiesced in the doing of these things by the beneficiaries.

(c) The Trustees, as a punitive measure, brought legal actions to recover royalties on coal produced.

(d) The Trustees held out to the men in the industry that the Fund was under Union control.

(e) The Fund, in fact, was under the domination and control of the U.M.W.

The Court charged the jury that these acts standing alone were not sufficient to establish that the Trustees were co-conspirators.

The Court further charged the jury that the acts of individuals, unless the Trustees actually authorized the unlawful acts, if any, or ratified such acts, if any, after actual knowledge thereof, would not bind the Trustees so as to make them parties to the alleged conspiracy.

The Court further charged that the Trustees, in their official capacity, had no legal right to require or not to require the beneficiaries of the Fund to picket on behalf of U.M.W. in labor matters; that the Trustees were legally obligated to collect all monies due the Fund and to use reasonable means to make such collection, including the bringing of suits; that the Fund "was created by a trust instrument contained in the National Bituminous Coal Wage Agreement of 1950 pursuant to Section 302 of the Taft-Hartley Act, and the wording of the trust agreement was in accordance with the requirements of the Taft-Hartley Act. The trust instrument provides for payment of benefits to employees of signatory operators. . ."

Action of a majority of the Trustees is required to bind the Fund. See *Van Horn* v. *Lewis*, 79 F. Supp. 541.

In the opinion of the Court there is no substantial evidence to support the verdict of the jury that a majority of the Trustees participated in the alleged conspiracy. There is no evidence that either Miss Josephine Roche or Mr. Henry G. Schmidt or Mr. Charles A. Owen, now de-

ceased, (those parties being the only parties, except Mr. John L. Lewis, who served the trust fund after 1950), had any dealings with large coal operators from which it could be inferred that they agreed, combined, or conspired to stabilize coal prices in the bituminous coal industry in interstate commerce.

The actions of Mr. Lewis alone without authorization or consent of a majority of the Trustees would not be sufficient, in the opinion of the Court, to bind the Fund or to show that the Trustees conspired with the large coal operators to drive a small operator out of business. If it had been shown that Mr. Lewis controlled the actions of the other Trustees at the time this alleged conspiracy was formed, this might present a different question.

In the opinion of the Court there is no evidence to support the verdict of the jury that Mr. Lewis, for himself and another of the Trustees, entered into the conspiracy so as to bind the Trustees either individually or in their capacity as trustees or to bind the Trust Fund.

The charge that the Trustees were conspirators seems to have been directed at Mr. Lewis. This can very well be understood inasmuch as Mr. Lewis served in a dual capacity. He was president of the U.M.W. during the material period and also chairman of the Fund during this period.

Counsel for Phillips Brothers pointed out in their brief that Mr. Lewis made certain statements in his testimony given on discovery to the effect that the U.M.W. and some of the large coal operators decided to stabilize prices, but some of his testimony during the trial was not entirely consistent with that testimony. If there is a sound basis for such contention, we do not believe that this is sufficient to sustain the verdict of the jury that the Trustees participated in the conspiracy.

The evidence is reasonably clear that Union membership was not a prerequisite for obtaining benefits from the Fund

after 1950. In that connection, it must be recalled that in 1951 the Trustees published a brochure setting forth in detail the requirements of pension benefits, not one of which was Union membership. Trustees Roche, Schmidt and Lewis each testified that benefits from the Fund have been paid to non-Union members as well as to Union members. Such was also the testimony of counsel Mitch.

The evidence is insufficient to show that the Trustees instituted suits for the purpose of eliminating small operators. Trustees Roche and Schmidt testified that the matter of institution of suits was left in the hands of counsel Mitch for the most part.

The evidence is insufficient to show that the Trustees required pensioners to picket for the U.M.W. in order to obtain or retain benefits of the Fund.

The evidence is insufficient to show that the Trustees held out to industry employees that the Fund was under Union control. The Trustees testified positively that the Union did not dominate or control the Fund. The evidence is insufficient to show the contrary.

It is true that there are some suspicious circumstances in the record not only as to these matters but also as to other charges against the Trustees. However, a juror's verdict cannot be based upon suspicion alone. *N.L.R.B.* v. *Sun Shipbuilding & Dry D. Co.*, (C.A. 3), 135 F. 2d 15, 31.

Substantial evidence means more than merely the suspicion of the existence of a fact. *Hazel-Atlas Glass Co.* v. *N.L.R.B.*, (C.A. 4), 127 F. 2d 109, 117.

Having found that there is no substantial evidence to support the verdict of the jury that the Trustees engaged in the conspiracy as charged by Phillips Brothers, it follows as a matter of contract that the Trustees are entitled to recover unpaid royalties due them under the contract signed by Phillips Brothers, but the Trustees are not entitled to

recover the royalties that accrued before a majority of the employees of Phillips Brothers became members of the Union. At the time Phillips Brothers signed the National Bituminous Coal Wage Agreement of 1950, the U.M.W. did not represent a majority of their employees and therefore was not the bargaining agent for the employees. We think that a fair interpretation of the record shows that a majority of the employees of Phillips Brothers joined the Union on April 25, 1955. The Trustees, therefore, are entitled to recover unpaid royalties that accrued after that date. The Court bases this conclusion on the principles announced in the case of *International Ladies Garment Workers' Union, AFL-CIO* v. *N.L.R.B. and Bernhard-Altmann Texas Corporation;* U. S. Supreme Court, June 5, 1961.

In view of the foregoing conclusions, it is not necessary for the Court to determine the question of whether the Trustees would be deprived of recovery if there had been evidence to support the verdict of the jury that the Trustees joined in the conspiracy, as charged by Phillips Brothers.

* * * * * * * * * * * *

The record in this case shows that Mr. Jerome Taylor, associate of Mr. Templeton, performed ten hours of work; Mr. Harley G. Fowler, a partner of Mr. Rowntree, 200 hours; Mr. Templeton 370 hours; Mr. Robertson 1,189 hours, and Mr. Rowntree, 2,792 hours, making a total of 4,461 hours. A part of this work was necessarily performed in the defense of the claim of the Trustees against Phillips Brothers.

* * * * * * * * * * *

Filed August 28, 1961

Notice of Appeal

Notice is hereby given that the United Mine Workers of America, the cross defendant in the above styled case, hereby appeals to the United States Court of Appeals for Sixth Circuit from the final judgment entered in this action on August 2, 1961.

Notice of Appeal; Order, August 28, 1961

Filed August 28, 1961

Notice of Appeal to Court of Appeals for the Sixth Circuit

Notice is hereby given that the defendants, James M. Pennington, Raymond E. Phillips and Lillian Goad Phillips, Administratrix of the Estate of Burse Phillips, Deceased, jointly and severally hereby appeal to the United States Court of Appeals for the Sixth Circuit from that portion of the Final Judgment entered in this action on August 2nd 1961, which sustains in part the motion of the plaintiffs, John L. Lewis, Josephine Roche and Henry G. Schmidt, Trustees of the United Mine Workers of America Welfare and Retirement Fund for judgment notwithstanding the verdict.

Filed August 28, 1961

Order

Come the parties by their attorneys and make known that James M. Pennington, Raymond E. Phillips and Lillian Goad Phillips, Administratrix of the Estate of Burse Phillips, deceased, the cross-plaintiffs in this case, have agreed that cross-defendant, United Mine Workers of America, shall not be required to post a supersedeas bond in connection with its appeal in the above styled case.

It is, Therefore, Ordered pursuant to the agreement of the parties that execution shall not issue upon the judgment entered against the cross-defendant, United Mine Workers of America, in the above styled case during the pendency of its appeal to the United States Court of Appeals for the Sixth Circuit and during any period allowed for petitioning for certiorari before the Supreme Court of the United States and while review of the case is pending in the Supreme Court of the United States.

Entered October 2, 1961

Order Extending Time for Filing Record on Appeal and Docketing Appeals in the Court of Appeals for the Sixth Circuit

By agreement of counsel for plaintiffs, John L. Lewis, Josephine Roche, and Henry G. Schmidt, Trustees of the United Mine Workers of America Welfare and Retirement Fund, the defendants and cross-plaintiffs, James M. Pennington, Raymond E. Phillips and Lillian Goad Phillips, Administratrix of the Estate of Burse Phillips, deceased, and the cross-defendant, United Mine Workers of America, it is ordered that the time for filing the record on appeal and docketing the appeals in the Court of Appeals for the Sixth Circuit is extended to a date ninety (90) days from the date of the filing of the first notice of appeal, which was filed on August 28, 1961.

Caption in District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TENNESSEE

NORTHERN DIVISION

CIVIL ACTION No. 3431

JOHN L. LEWIS and JOSEPHINE ROCHE, as TRUSTEES of the UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND,
HENRY G. SCHMIDT, Trustee (amended 8-11-58), *Plaintiffs,*

vs.

JAMES M. PENNINGTON, RALPH E. PHILLIPS and *BRUCE PHILLIPS, Individually and trading as PHILLIPS BROTHERS COAL COMPANY, A Partnership,**

*LILLIAN GOAD PHILLIPS, Admrx. as defendant and cross plaintiff in the place and stead of Bruce Phillips (substituted 9-30-60) *Defendants,*

vs.

UNITED MINE WORKERS OF AMERICA, *Cross Defendant.*

**The name of "Ralph E. Phillips", was corrected to "Raymond E. Phillips" on January 16, 1961.

Transcript of Proceedings

* * * * * * * * * * *

The Court: Ladies and gentlemen, the original complaint in this case was filed by John L. Lewis, Henry G. Schmidt and Mrs. Josephine Roche as Trustees of the United Mine Workers of America Welfare and Retirement Fund against James M. Pennington, Ralph E. Phillips and Bruce Phillips, individually and trading as Phillips Brothers Coal Company, to collect the sum of $55,982.62 alleged to have been due pursuant to the terms of a trust provision contained in a collective bargaining agreement which existed between the United Mine Workers of America and the defendant Phillips Brothers, being alleged royalty payments due said plaintiffs under said agreement.

* * * * * * * * * * *

As I say, the sole defense of this defendant to this claim for these royalties is that these trustees participated in an alleged conspiracy between the United Mine Workers of America and certain coal companies, whose names will be mentioned during the course of this trial.

Now the sole issue for this jury to decide insofar as the claim of the trustees is concerned, is whether these trustees participated in this alleged conspiracy.

If you find that the trustees did not participate in the conspiracy, you will say so. If you find that they did par-

ticipate in this alleged conspiracy, you will say so. From that point on, the Court will decide the remaining questions that are involved in that phase of the case.

Now by cross-claim, this partnership brought in the United Mine Workers of America. They will be referred to probably in the course of this trial as the international union, and in the cross-claim cross-plaintiffs charge that the union violated sections 1 and 2 of the Sherman Anti-trust Law in that the union conspired with a number of large coal companies, whose names will be mentioned hereafter, to restrain interstate commerce in the bituminous coal industry and in so doing they violated Section 1 of the Sherman Anti-trust law.

Cross-plaintiff further charges that the union conspired with a number of these large coal companies to violate Section 2 of the Sherman Anti-trust law which prohibits monopolies or prohibits an attempt to monopolize.

4 Cross-plaintiffs say that this union and these large coal companies, one or more of them, monopolized or attempted to monopolize the bituminous coal industry.

Cross-plaintiffs say that it was damaged as a direct and proximate result of that conspiracy in that it was driven out of business. And in that connection, cross-complainant says that one of the purposes of this conspiracy between the union and these large coal companies was to raise the wages very high and to raise the royalty on this coal very high, so that only the large coal companies which used the modern tools or mechanics in the getting out of coal and the processing of coal could pay these royalties; that the union and these large coal companies knew that these little companies, of which Phillips Brothers Coal Company was one, could not pay the standard of wages which they fixed and these high royaltics on the coal that was produced.

Now for defense to those claims of cross-plaintiff Phillips Brothers Coal Company, the union states that it did

not conspire with the large coal companies or anyone else to violate either Section 1 or Section 2 of the Sherman Anti-trust Act or any other provision of the anti-trust law.

5 The union says further that it did no wrong, that it did not commit any wrongful act against cross-plaintiff or against any other coal operator, either large or small; that under a certain provision—I believe it is Section 15 of the Clayton Act, which is a part of the anti-trust law—the union says that it as a union, as well as all other unions, is exempt from the anti-trust laws. And that every-
6 thing it did in the negotiations of these coal companies, including plaintiff, was done to further the objective of the union and its members, namely to improve the working conditions, the members of the union, to raise the wages of the union, and that none of the objectives which the union had in mind violated any of the anti-trust laws.

* * * * * * * * * * *

I might say to you at this time that the main issues for you to decide in this case, first insofar as the trustees' claim is concerned, are whether or not these trustees, namely Mr. Lewis, Mr. Schmidt and Mrs. Roche or Roché—you will hear these names.

Mr. Kramer: Roche.

The Court: She is a lady out here in Denver, Colorado. Roche is her name, and she is one of the trustees of this trust fund, this welfare fund. I say whether these trustees participated in this alleged conspiracy. Now in that con-
7 nection, of course, you will have to decide, first, whether there was any conspiracy. Second, if there was a conspiracy, whether the trustees participated in it.

Now when you do that, you will have performed your duties insofar as the claim of the trustees is concerned.

The issues under the cross-claim are substantially as follows. First, did the union with one or more of the coal

companies, and their names will be furnished to you before this case ends, conspire between themselves and with others to violate either Section 1 or Section 2 of the Sherman Anti-Trust Law. That is to say, did they conspire to restrain interstate commerce in the bituminous coal industry, unreasonably restrain interstate commerce in the bituminous coal industry. Second, did they conspire with one or more alleged conspirators to monopolize or attempt to monopolize the bituminous coal industry in violation of Section 2 of the Sherman Anti-Trust Law.

This suit, this cross-claim was filed on February 14, 1954. Under the anti-trust laws, anything that occurred more than four years prior to the suit was filed is barred by the statute of limitations, so the alleged damage period involved
8 in this suit is from February 14, 1954 until February 14, 1958 under the anti-trust four year limitation act. But by agreement of the parties in this case, since the Phillips Coal people went out of business on December 31, 1958, the damage period begins on February 14, 1954 and ends December 31, 1958, or the date that Phillips Brothers Coal Company went out of business.

Those are the main problems which the jury that sits on this case will have to decide.

* * * * * * * * * * *

112 The Court: Members of the jury, counsel for each side expect at this time or shortly to state to you their respective contentions.

* * * * * * * * * * *

125 Mr. Rowntree: May it please the Court, ladies and gentlemen of the jury,

* * * * * * * * * * *

127 I think you will see from the proof that it will be our purpose to show to you that something is wrong

in our coal industry. It is our position that the thing that has caused the predicament of our coal industry is this conspiracy—a conspiracy entered into between the United Mine Workers of America, these Trustees who have sued us, and certain large coal companies in the country.

* * * * * * * * * * *

We are talking here about the facility of these two groups getting together—the union officers finding an easy way to perpetrate, to perpetuate their union power and their own international jobs.

We are not talking about the ordinary member of the union. The proof will show that during the course of this conspiracy two-thirds of the members of this union have been forced out of the industry.

* * * * * * * * * * *

But it is necessary in order for you to follow many of the questions in the proof in this case—it is necessary for you to hear our position with respect to certain rules that are contained under the National Labor law. For we charge here that this conspiracy was carried on by certain attempts to evade the federal labor law.

* * * * * * * * * * *

In other words, this right of choice that is given to employees is a fundamental right as protected by law and can't be inter-meddled with or interferred with by coercion, restraint, on the part of the union or by encourage or discouragement on the part of an employer.

We say that there is one exception to that where the employer and the union duly authorized by the employees as the collective bargaining agent, put into their contract a union shop clause.

A union shop clause provides that the employees may be required to join a union within 30 days of their employment, but that union shop clause has certain restrictions in it.

Before 1951 the employees had to vote whether or not there would be a union shop clause before that union shop clause would be effective. That was before 1951.

After 1951, the federal law says that it is no longer necessary for the employees to vote but a union who has or who wants an effective union shop clause in its contracts must be in compliance with the reporting provisions of the labor law.

These reports that the union is supposed to file are reports about its financing, its organization, its elections, and it must also file a report with respect to or on the subject of connection with communism by its elected officers—the officers of the union must file an anti-communist oath.

* * * * * * * * * *

133 I would like to give you the background of this conspiracy that we charge, and most of this material will be taken from the deposition of Mr. John L. Lewis, certain union records and trustee records, the deposition of Judge Charles I. Dawson, and the deposition of Mr. George H. Love, the board chairman of Consolidation Coal Company.

We charge that the companies involved in this conspiracy, these national companies, are Consolidation Coal Company, Peabody Coal Company, West Kentucky Coal Company, Nashville Coal Company, Island Creek Coal Company, The Pittston Company, the Pittsburgh Midway Coal Company—those are the companies that we say were the big national combines who engaged with the union in this conspiracy.

* * * * * * * * * *

You realize that in World War II and the immediate postwar years the productive capacity of the country grew tremendously, and in the year '48 and '49 a crisis was confronted by the industry, arising from overproduction for the markets that were then able to absorb the coal.

134 Before 1950 the major coal companies and the union were pretty much in agreement that this was

the principal problem confronting the country and that it was added to by the growth of these small coal companies that grew up during the war and the immediate postwar period; that the overproduction was being contributed to by these small companies, and that was a problem.

Both the union and the major coal companies recognized that problem, but they were in disagreement on how to handle that problem.

The union in this period of '48 and '49 was taking the position that the problem should be met by reducing the working time of all coal companies, big and little alike, and that was their effort at that time. They sought to dictate the working time of the men in the industry throughout the whole industry.

This involved their effort to dominate the men of the industry. They sought to evade these labor laws I have been talking about. They sought to impose union shop or even closed shop contracts. They sought to direct and take over the Welfare Fund we have heard about. They sought to control it.

The major coal companies at that time, '48 and '49, did not like this idea. The union was setting three day work weeks and no day work weeks, and seeking to dictate
135 the economics of the industry. The major coal companies attacked these efforts in the courts and defeated the union on several cases with respect to these labor laws, the union shop and their control over the Welfare Fund.

Then we had the struggle over the 1950 contract. We say that this was the point where this conspiracy was formed. This period is important, the year 1950, because we say that is when this conspiracy was organized.

In 1950 we will see from the proof a tremendous difference in the relation of these major coal companies with the union as compared to the period after 1950. In 1950, it

is our contention that there was an agreement between the union and the major coal companies as will be shown clearly, we believe, from the proof, at that time by the express declaration of the representatives of the major coal companies, they obtained from the union the right to dictate their own working time. From that point on, the major coal companies have had the privilege of dictating their own working time and at that point there was a surrender by the union of its previous effort to dictate the working time in the industry.

At that time the representatives of the major coal companies declared that they were turning this Welfare
136 Fund over to the union.

It is our position that that was strictly contrary to the Taft-Hartley Act and the National Labor Relations Act, that that was an indication of the agreement between parties that the conspiracy could be furthered by continuing the union's domination over the men of the industry, rather than the major coal companies opposing that as they had in the past. We will see a great difference in their relation in that respect from 1950 on.

We maintain that the union shop clause was contained in the act and we think it was under circumstances that violated the federal labor laws, as the proof will show, and that the union's control over the Welfare Fund continued after 1950.

We say that a principal agreement that was made in 1950, was the agreement that this national labor act—I mean contract, the National Bituminous Coal Wage Agreement would be imposed upon the small mines of the country and that it was necessary to evade the labor statutes in order to do that.

This national contract is a uniform thing. It applies to everybody alike, regardless of ability to pay, regardless of mining conditions in the individual mine, regardless of

the degree of mechanization in the individual mine.

137 We say that there was an agreement that these terms in this contract would be increased tremendously in succeeding amendments to the contract until it reached proportions far beyond the abilities of the small companies to pay.

This contract was amended frequently by increasing the wage scale and the royalty for coal under the Welfare and these increases put it out of reach of the small companies, so it became necessary to have an agreement on how this contract could be imposed upon the small companies which would be beyond their reach when it was understood when the law contemplated that the employees of the small companies had the right of choice with respect to their affiliation with a union or their selection of a union as a bargaining agent.

If the employees had the choice, we think it is obvious that the employees would not force terms on their employer that would put them out of business. We think it is obvious that an employee would want to hold his job rather than going into unemployment.

So that is why we get into this area of the evasion of the Taft-Hartley Act or the National Labor Relations Act.

The means of forcing the contract upon the small
138 coal companies will be a subject of this case. Mobs and terrorism were used. There will be some proof in this case on that. We will hold it to a minimum. We can't put it all in, but we will put that which pertained to this coal company in.

The trustees of the Welfare Fund stood by as pensioners under the fund were organized into bands which has as their purpose the imposition of the contract upon the small companies of the various areas.

Paying of the Welfare Fund benefits to men in the industry depended upon the retention of membership in good standing in the union, certified to by the local, district and international union officers.

It is our contention that the labor law says, just as counsel pointed out, that the fund will be run equally by an employer representative and employee representative. They may have a neutral trustee to help in case of dispute between the two. But we think it is obvious that if the fund is run exclusively by an union or run exclusively for union members, that that is a term or condition which would encourage union membership and which would violate the labor law. We think in this case the nature of the management of the fund will be clear and that the union's control will be obvious.

139 This fund was held out to the members of the union and to the employees in the industry as a union controlled fund.

We think we will encounter denials by the union and the trustees that the union does run this fund, but I want you to watch the proof and see what the proof shows.

The finances of the union and the finances of the major coal companies were used in large amounts to bring the contract to bear upon all the production in the country. There will be proof with respect to the use of union financing in this regard in many millions of dollars.

One or more of the major coal companies have assisted in crushing the opposition of the principal union competitor of the United Mine Workers in the coal fields. There will be some proof with respect to cooperation between Peabody Coal Company and the union in knocking out the little progressive mine workers and some important mines. The proof will consider as briefly as possible that incident.

The result of this conspiracy and these activities over the country has been the large number of small companies that have been forced out of the industry and their employees have been forced out of the industry.

140 In fact, we think the industry has been slashed in the number of men in the industry, has been reduced two-thirds during the course of this conspiracy.

In the meantime the major coal companies have mechan-

There will be quite a few records in the case. We will attempt to summarize them as much as possible, but to present this picture as clearly as possible, that the spot coal market was beat down to such an extent that there was no profitable market left here in the Tennessee Valley, and we say that our clients were severely injured by this, because this was our market, the market that we sold coal to, that that is the cause of our losses in '57 and '58 which run us out of business.

Now with respect to this contract that the trustees have sued us on. I want to deal specifically with that. That is one of these National Bituminous Coal Wage Agreements that I have been talking about where the increases occurred, where the purpose was and the knowledge was that these small companies could not possibly pay under this contract, and as I have said, there are some forty-one of these small companies sued in Tennessee at the present time.

This contract, we say, was forced upon this com-
145 pany. Did the union go to the employees to obtain their membership or authority to represent them in dealing with this employer, our client? No. We think the proof will show that the contract was extracted from the company, that the union had no authority from any employee, from certainly not the majority. We think the proof will show that the employees were not even members of the union, that they didn't even know about the contract, and I recall to your mind what we say the labor law is, that the employees have the right of choice, that they obviously are not going to impose a contract upon the employer that clearly would force him out of business, and we say that after the contract was signed, it was several months after that that a mob came and forced the employees to join this union.

I think that the proof will be certainly clear as to the union's participation in that, and it was only under those circumstances that the union obtained any right to represent these employees.

171 Mr. Kramer: May it please the Court, on behalf of the trustees, at this time I want to introduce a stipulation.

The Court: All right, sir.

Mr. Kramer: After the style of the case, this stipulation is introduced as if it was the sworn evidence and has the same effect as His Honor will tell you.

The Court: That's right.

Mr. Kramer: The following matters are stipulated between the parties to this action:

First, the defendants executed collective bargaining agreements with the United Mine Workers of America on October 1, 1953; September 6, 1955; and October 22, 1956; which agreements provided that the defendants were to pay a royalty of forty cents per ton on each ton of coal produced for sale.

Second, the defendants produced the following monthly tonnages of coal from October 1, 1953, to and including December 31, 1958, period, being subject to the forty cents per ton royalty.

It begins [illegible]th October, 1953, 3,093.29; November, 1953, 2,995.42; December, 1953, 1,930.25.

172 For the year, 1953, after signing the contract, [illegible] total, 8,018.96.

In the year, 1954, in January 2,133.45; in February, 405.19; in March 440.31; in April 181.70; in May 1,533.15; in June 3,465.40; in July 1,763.70; in August 2,525.67; in September 1,699.07; in October 5,010.00; in November 3,442.41; in December 2,885.48; making a total for 1954, that calendar year, 25,485.86.

For the year 1955, in January 1,688.50; in February 468.37; in March 724.47; in April 579.07; in May 3,854.86; in June 5,035.60; in July 3,868.81; in August 5,325.33; in September 3,923.90; in October 3,988.73; in November 3,310.64; in December 1,152.51; which makes a total for the year 1955 of 33,920.79.

1956, in January 700.81; in February 359.71; in March 838.87; in April 1,542.54; in May 1,976.02; in June 2,963.88; in July 2,639.63; in August 2,530.22; in September 3,180.13; in October 2,385.05; in November 2,949.91; and in December 1,296.55; making a total for calendar year 1956, 23,363.32.

In 1957, January 577.62; February 63.78; in March 1,106.90; in April 448.66; in May 3,327.69; in June 2,282.91; in July 1,718.02; in August 4,782.68; in September 2,249.58; in October 2,587.50; in November 2,101.31; and in December 1,410.32; making a total for the year 1957 of 173 22,656.97 tons.

For the year 1958, in January 1,230.05; February 162.90; in March 1,243.73; in April 1,845.25; in May 1,768.-61; in June 2,893.34; in July 2,931.86; in August 4,718.16; in September 5,092.16; in October 3,466.76; in November 4,094.36; in December 2,632.71; which makes a total for the calendar year 1958 of 32,079.89 tons.

Three, defendants made the following payments pursuant to the collective bargaining agreements:

On November the 12, 1953, $321.17; in December, 1953, $193.02; on July 30, 1955, $312.16; December 17, 1955, $769.63; and August 4, 1956, $631.72; for a total during the period of $2,227.70.

Four, the amount of royalty which was not paid on the total production of 145,525.79 tons is in the amount of $55,982.62.

Five, this stipulation may be read in evidence upon the trial of this case, and it is signed by counsel.

The stipulation makes reference to the contracts, Your Honor, recites that this was under the term of the contract.

We ask that the stipulation be filed as a part of the record in this case, and with that plaintiff trustees 174 rest.

* * * * * * * * * * *

JACK SHATTUCK

called as a witness by and on behalf of the defendants,

after having first been duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

By Mr. Rowntree:

Q. This is Mr. Jack Shattuck. A. Yes, sir.

Q. You have been sworn, Mr. Shattuck? A. Yes, sir.

The Court: How do you spell your last name?

The Witness: S-H-A-T-T-U-C-K.

By Mr. Rowntree:

Q. Where do you live, sir? A. Clinton.

Q. Clinton, Tennessee? A. Yes, sir.

Q. In April, 1955, who were you working for? A. Power Equipment Company here in Knoxville.

Q. What was your job? A. Salesman.

Q. What kind of equipment do they sell? A. Earth
175 moving equipment.

Q. What was your area of sales? A. I had Morgan, Scott, Fentress, Cumberland, Campbell, and Claiborne Counties.

Q. Were coal mining companies among your customers? A. Yes, sir, strippers.

Q. Were they a substantial number of your customers? A. Oh, yes, most of my customers were coal operators.

Q. Were you in Jellico, Tennessee, sometime in April of 1955? A. Yes, sir, I was.

Q. Do you recall what part of the month it was? A. No, I don't remember the date.

Q. What did you see there when you were there in Jellico? A. You mean at some—

Q. Something unusual. A. Well, this one morning, I had stayed at the hotel up in Jellico, and there was a terrific mob of people, of men, around the Osborne Tipple which is right in the center of Jellico, just a terrific congregation of men.

Q. Did you stay there in Jellico and watch them? A. No, I went about my business.

176 Q. And where did you go? A. Well, I called on several people there in Jellico, and I went from there up to Newcomb.

Q. And who did you see in Newcomb? A. The first ones I saw were Mr. Boots and Mr. Cox who were customers of mine.

Q. Are you familiar with Campbell County, Tennessee? A. I think so, most of it.

Mr. Rowntree: We have here a map from the Tennessee Valley Authority of Campbell County, Tennessee, Your Honor. I will ask the witness—

The Court: You want to use the blackboard?

Mr. Rowntree: Yes, sir, I would like to put it on the board.

177 By Mr. Rowntree:

Q. From a hasty perusal of that, does that appear to be a true representation of a map of Campbell County? A. That is a map of Campbell County all right. Jacksboro, LaFollette, Jellico, Newcomb.

Mr. Kramer: This is the same map I have seen heretofore?

Mr. Rowntree: Yes, sir.

A. (Continuing) Yes, sir, that is Campbell County for sure.

Mr. Rowntree: I will introduce that as Defendant's Exhibit—shall we number these exhibits serially all the way through?

The Court: Yes, serially.

Mr. Rowntree: As Exhibit No. 1.

(EXHIBIT NO. 1 was filed.)

By Mr. Rowntree:

Q. Mr. Shattuck, will you step down and point out where Newcomb is on this map? A. (Witness complies with request of counsel.) Is that what you want, sir?

Q. Will you mark "Newcomb" with an X there, particularly the place where you saw Mr. Boots and Mr. Cox?

A. I will have to put my glasses on. Where they were at?

Q. Right. A. Right there (marking on map).

178 Q. Will you point out on the map Jellico. Just point to it. A. (Witness complies with request of connsel.)

Q. Take the seat, please. A. (Witness returns to witness stand.)

Q. What happened there at the—what kind of operation did Mr. Boots and Mr. Cox have there at Newcomb, or had, at that time? A. They were stripping coal on what is known as the dead lift strip. The strip both on contour strip or dead lift, on a flat, and this happened to be what is known in the business as a dead liff strip pit.

Q. And what happened there at that pit while you were there? A. Well, I went in there and was talking to Mr. Boots, who was one of the owners, and while I was talking to him this mob busted in there and—

Mr. Kramer: May it please the Court, we want to object to this line of testimony, and I think we ought to, in view of the law as we understand is applicable, have an opportunity to present our objection, and I am sure your Honor is familiar with the testimony he is offering by this witness.

179 at this time, your Honor will recall, and we are going to ask that the jury—if we may present it in the absence of the jury.

The Court: You mean you object to it?

Mr. Kramer: We do, your Honor.

The Court: Well, what is the purpose of this testimony?

Mr. Rowntree: We have explained that our position is that the small coal companies signed the Bituminous Wage Agreement for certain reasons. We are showing a connection between this incident and the enforcement of the union shop clause in their contract. This has a direct relationship to that, sir. And the union insists, apparently, that there was no effective union shop clause.

We are showing the enforcement of the union shop clause by this incident and other incidents in a series here in

which our coal company was directly involved, and the terrorism in the coal fields has a strong position in this case under our theory.

Mr. Kramer: We think, your Honor, under the Apex case that your Honor is somewhat familiar with, that this type of proof does not establish anything that would bring it within a violation of the Sherman Act.

180 The Court: Members of the jury, before there can be a violation of the Sherman Act it must appear from the proof under the complaint in this case, which is by way of a cross-action, that, first, there was a conspiracy by the UMW—that is the United Mine Workers—and one or more of these coal companies whose names have been mentioned, and that there was one or more overt acts committed by one or more of the conspirators to carry out the conspiracy; that it must further appear that the conspiracy was to either violate Section 1 of the Sherman Act which provides, in substance, as I have indicated, that parties shall not combine to restrain interstate commerce; or it must appear that the defendant conspired to violate Section 2 of this Sherman Act which provides, in substance, that parties shall not monopolize trade in a particular industry, or shall not attempt to monopolize a particular industry which is engaged in interstate commerce.

Now unless this testimony which is about to be introduced has some bearing on those questions, then it will not be considered by the jury because it will not be relevant.

The fact alone that the union may have participated in acts of violence—and the Court by mentioning that
181 is not indicating in any respect that it did or did not —but acts of violence upon the part of the union, or the union members, would not be a violation of the anti-trust laws. And if acts of violence are the only things that are established in this record, then such acts would not be a violation of the anti-trust laws and the jury could not find against the union.

Mr. Kramer, with that explanation I am going to let him go into this matter.

Do you say that you are going to connect this testimony up?

Mr. Rowntree: Yes, sir. We have to connect the union up with our complaint. That is what it did. We said things in our complaint and we have to connect the union up with the conspirators in the conspiracy and the reason why these things were done.

The Court: The point is, Mr. Rowntree, do you expect to connect this theory of yours up with the testimony hereafter that relates to the problems that are involved?

Mr. Rowntree: That is correct.

The Court: All right. Upon that avowal of counsel the Court will hear the testimony subject to the explanation made to the jury.

* * * * * * * * * * *

182 Mr. Kramer: It is our position, first, that some act remote and from somebody else with somebody else, if it were committed, even by union members, members of the union, could not be used to show a violation of the Sherman Act.

The Court: That is correct, unless it is connected up. But if it is a part of a conspiracy then it may have some bearing on the issues that are involved.

Mr. Kramer: But your Honor, our position is that they do not claim there was a conspiracy between the United Mine Workers and these small operators at all. He is claiming, I take it, some small operators which are wholly disconnected with us. There may have been even a violation of the contract, I don't know, but whatever it may have been it is wholly irrelevant and would be prejudicial, incompetent, and has no place in this case.

Acts of violence, evidence of acts of violence, do not make a violation of the Sherman Act unless, your Honor, it was

for the purpose—conduct that exists was for the
183 purpose of doing an act that violates the Sherman Act. This is not competent.

We think it is an effort to get into this testimony, or into this record, matters that appear to be inflammatory testimony which has absolutely no relationship to a violation of the Sherman Act.

Your Honor recall this is not a violation of the common law.

The Court: Yes, I know that.

Mr. Kramer: And you have had this question before you before and it was on a theory of common law, but we don't have any such thing in this case.

The Court: The Apex case to which you refer holds, in substance, that acts of violence were not violation of the Taft-Hartley Act, and the Court has told the jury it is not a violation of the anti-trust law unless he connects this testimony up in some way.

I fail to see the relevancy of this at this time but you say you are going to connect it up?

Mr. Rowntree: Yes, your Honor. Fully one-half of that portion of our theory of the case dealt with the imposition of the national contract on small coal companies. Why did those companies sign the contract? Why was the union shop clause in it?

184 The Court: Is it your position that these acts drove these operators into the signing of the contract?

Mr. Rowntree: Yes, sir.

The Court: Coerced them into signing it; is that the position?

Mr. Rowntree: Yes, sir. It isn't just signing contracts for some companies. Some companies—it is enforcing that union shop provision and making the employees join a union whether they wanted to or not, and seeking to get authorization from employees to be their bargaining repre-

sentative by force like this. That is how the national contract was imposed on small operators.

* * * * * * * * * * *

Mr. Rayson: Mr. Rowntree states it is his theory that the acts that this witness is evidently going to testify about was one of enforcement of a union shop contract.

Your Honor will recall that Judge Miller in the Fentress case said that similar things did not make an enforcement of the contract. It actually was a requirement on the part of the union, something over and above the require-

185 ments of the contract.

So we don't think that under the law of the Fentress case, which is precisely on that point, that this testimony could have any possible relevancy to the union shop.

The Court: But he never had the anti-trust issue before him, did he—that is, Judge Miller?

Mr. Rayson: He did not have the anti-trust issue before him, your Honor, but he did have the question before him of the union shop. And he said in that case that the conduct designed to have men join the union under this same contract was not in furtherance of a union shop but it was a requirement on the part of the union to have the men to do something that was not required by the contract, which Mr. Rowntree says is the instrument by which this conspiracy was achieved.

186 And so we think certainly that theory is at fundamental odds with the law in that case formed by the Sixth Circuit.

Mr. Rowntree: Our basis is far beyond the defendant's basis. We say the union shop provision was in this contract for the same identical reason that these acts were done to make people join the union; that there is a basic reason beyond both of those, and that is the conspiracy which explains both the activities of these men out there and the presence in this contract of this union shop clause that the courts have had difficulty from time to time with.

The last case was this Perry Coal Company case where

the Court of Appeals in the Seventh Circuit had trouble with it and went to look at the conduct of the parties to see what it meant.

We are now going to the conduct of the parties. So really we have two or three different bases for putting this proof in and principally is to show the conspiracy and the purpose of these people and the means they carried out the conspiracy.

Basically we say that the National Bituminous Coal Wage Agreement was an instrument in carrying on this restraining of trade and the running of small companies out of business, and the reason that they were able to get small
187 companies to sign that agreement was this thing that we are going into now. It explains it. To say that we cannot go into this means that we would be volunteering, the small companies over the area, would be volunteering to do things and submitting themselves to liability for things which they could not possibly do, and we are showing why these people signed these contracts that they could not abide by, and that there was a plan that they could not abide by.

The Court: Well, subject to the objection, I will hear the proof. Go ahead.

By Mr. Rowntree:

Q. Mr. Shattuck, what happened there at the Boots and Cox mine while you were there? A. As I told you, I was there in pursuit of my business and to advise them that this mob was on the rampage. And as I talked to Mr. Boots, here they came.

Mr. Kramer: Of course, I am going to object to this type of language, "mob on the rampage". Your Honor has ruled that he may testify what he saw, but not a conclusion of that type.

The Court: That is correct.

Mr. Rowntree: That is correct.

Mr. Kramer: And will ask your Honor to instruct the jury.

188 The Witness: I am sorry.

The Court: You will disregard "the mob was on the rampage".

Tell what you saw, please, sir.

The Witness: Yes, sir.

A. A large group of men ran into this pit. I heard them cussing and calling names, and they said, they asked me what I was doing there and I told them and they said, "Well, you better get out." Well, they didn't have—I was talking to Mr. Boots at the time—

Mr. Kramer: Your Honor, Mr. Boots is a coal operator. I object to conversation between this witness and the man Boots and ask that the jury be instructed to disregard it.

Mr. Rowntree: I think the witness was about to recite a fact.

The Court: Objection sustained. Don't tell what you said to Mr. Boots or what Mr. Boots said to you.

Mr. Rowntree: I don't think the witness started to.

A. They asked me my business there and I told them. They told me to get out. Believe me, they didn't have to tell me to get out the second time. I was very happy to leave. While I was leaving, Mr. Boots was pushed quite roughly and he went down.

189 By Mr. Rowntree:

Q. How old a man is Mr. Boots, or was he? A. I would say at that time about 63, or 64, or 65, something like that, an elderly man. He was pushed in the mud, lost his glasses and was stomped and I went out, went on.

Q. Where did you go? A. Well, I went back to my car to get away.

Q. And where did you proceed to from there? A. Well, I couldn't go out the short way because so many cars were blocking the roadway, so I had to go out the long way to see some more of my customers who were up what is known in that country as Elk Valley. And by the time I got around to get to them to pursue my business, I was too late. They

had—this group of men had previously gone into the other places—

Mr. Kramer: I object to that. He did not see that. He got there and there was nobody there. That is the substance of what he testified. I do not mean to anticipate. Your Honor heard similar testimony and is as familiar with it as I am. I object to him testifying to something that he didn't see. When he got there everybody was gone. That is all he knows.

The Witness: I beg your pardon.

190 Mr. Rowntree: No, your Honor, the witness is not testifying to that effect. Counsel is anticipating something that the witness is not going to say.

The Court: You may continue.

A. As I came out of the Boots and Cox pit. As I told you, sir, I couldn't get back the short way. The cars that these men had come in were blocking the way, and I had to go around the long way, which I did, and went up and this group of cars with these same group of men in them that had been at the Boots and Cox pit were headed into the—is it all right if I give the name?

By Mr. Rowntree:

Q. Go right ahead. A. Of Mr. Frost and Mr. Parrish's pit. So I didn't—I was too late to get in there. I just went on. From there I went up to another pit. All right to name the pit?

Q. Yes. A. Phillips Brothers pit, and told them what was going on, and they had known about it and they were not working.

Q. Where is the Frost and Parrish pit with reference to Boots and Cox mine? A. It is up the road a little bit at a place called Whistle Creek.

Q. Can you point it out on the map, or do you think you can find it? A. I sure can. I think I can. (Witness

191 went to map.) Right here (indicating). That is Whistle Creek as it flows into Big Elk Creek right there. This goes over into Capuchin.

Q. Let's put a green zero there. A. And I went from here on up to Pioneer.

Q. Put a green zero on Frost and Parrish mine. A. All right. (Witness marked map.)

Q. That is a green X. A. Isn't that what you wanted?

Q. That is all right. Take your seat, Mr. Shattuck.

Mr. Kramer: I take it, your Honor, the record may show a continuing objection from us on all this line of testimony without repeating it each time?

The Court: Yes, sir.

Unless the union is connected up with these activities, unless it has some bearing upon the charges in this complaint, the jury will not consider the testimony for any purpose.

By Mr. Rowntree:

Q. I believe, Mr. Shattuck, Phillips Brothers Coal Company is down in the vicinity of Pioneer in Campbell County? A. In the vicinity of Pioneer, yes, sir.

Mr. Rowntree: That is all.

192 CROSS EXAMINATION

By Mr. Kramer:

Q. Are you still connected, Mr. Shattuck, with Power Equipment Company? A. No, sir, I am not.

Q. What are you doing at the present time? A. I am in the same kind of business. I have my own company.

Q. And you are selling to coal producers, strip operators? A. Anyone who handles earth moving equipment, sir.

Q. And a large part of your customers are coal producing companies today, are they not? A. Not as large a part as there used to be.

Q. I did not ask you, my friend, for a comparison. But a large part is to coal producers, is it not? A. Sir—

Q. I will put it this way, a substantial part—I don't want to get in an argument with you. A. No, no.

Q. You do not sell much to them? A. I sell some to them, yes, sir.

Q. Okay. I believe that is all.

REDIRECT EXAMINATION

By Mr. Rowntree:

193 Q. Mr. Shattuck, did you testify before that a substantial part of your customers were coal producers in 1955? A. Yes, sir.

Q. And at the present time is it your testimony—

Mr. Kramer: I object to leading, your Honor. It is very leading.

The Court: I will sustain that.

By Mr. Rowntree:

Q. Is that still true today? A. The percentage is much less.

Mr. Rowntree: That is all.

Mr. Kramer: No further questions, your Honor.

(Witness excused.)

* * * * * * * * * * *

ANDREW FROST

a witness called by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Robertson:

Q. State your name. A. Andrew Frost.

Q. Where do you live, Mr. Frost? A. Williamsburg, Kentucky.

194 Q. What do you do now? A. At the present?

Q. Yes. A. I am general superintendent for Pioneer Fuel Company, production superintendent.

Q. I will ask you, Mr. Frost, whether or not in early 1955 you went into the mining business? A. Yes, sir.

Q. What sort of a business organization was this, partnership? A. It was a partnership organization with my brother-in-law and myself, Byrd Parrish. We was operating as Parrish and Frost Coal Company.

Q. Now where was this company operating? A. We was at—just out of Newcomb, Tennessee on Whistle Creek Road.

Q. Now we have a map here, which I wish you would

stand down and indicate the approximate location of your pit at that time. Mark that with an "F", if you would, a red "F". A. Well, we were right up on the Elk Valley Road out of Newcomb, turned up Whistle Creek to the right and we were just about in here close to this green mark, right close to the road on the right-hand side. (Witness marked map.)

Q. Take your seat, please. Mr. Frost, did you
195 early in 1955, say February or March, somewhere in through there, have a visit from a group of men or a man or any men? A. Yes, sir. We started this operating in the early part of 1955; if I am not mistaken, it was in January. Around the latter part of February or so, close to that time, two men came to our pit, Leon Morgan, John Lynch, Junior, and—

Q. What did they want?

Mr. Kramer: Your Honor, we object for reasons heretofore given.

The Court: Members of the jury, this will not be considered for any purpose, unless these men are connected up with the union in some way and unless this testimony has some bearing on the alleged conspiracy that is involved, and before it can be relevant to any issue, it must be connected up, first, with the union, if it can be connected up. That is Morgan and this other man had some connection with the union, were representing the union, who is one of the defendants in this case. Secondly, that what was done on this occasion had some bearing on the alleged conspiracy that is involved.

You may proceed.

By Mr. Robertson:

Q. Now what did Leon Morgan and John Lynch, Junior want on that occasion? A. Somewhere close to noon
196 I was out at my car eating lunch, and I was by myself, they came up and they kept talking about my brother-in-law and myself signing a union contract. They were both kind of agitating like, you know, kept insinuating

that we would sign the contract. I told him no, that I had no business talking to them about signing a contract because they wasn't the union organizer; if I talked union contract with anybody, I would talk to Ed Daniel.

Q. Who is Ed Daniel? A. Ed Daniel was the union organizer of the Jellico District at that time.

Q. All right. Did these men leave? A. Well, after a period of time, but—

Q. Let me ask you this, Mr. Frost. While they were talking to you, did you notice anything unusual in or about their clothing? A. Yes, sir.

197 Mr. Kramer: Now, Your Honor, we object certainly to that line of testimony which can have no bearing, as we see it, on this type of lawsuit. They were not union organizers, his testimony is, Your Honor.

The Court: Of course, I don't know—

Mr. Robertson: I withdraw the question.

The Court: All right.

By Mr. Robertson:

Q. I will ask if anyone else came to your pit that day? A. Yes, sir.

Q. Who? A. Ed Daniel came back with about four or five other men later that afternoon, after I had told John Lynch and Leon Morgan that I would not talk to them about signing a contract, if I talked to anybody, I would talk to Ed Daniel. Ed Daniel brought these men to the pit that afternoon, and kept insisting that we sign a contract, and I said, "Ed, we have just got started, if you would give us a chance to see if we could produce coal at a profit, then we may talk contract to you, but we couldn't do it now," because we were just getting started and had invested our money in this equipment, and we had to have a chance to get started in our operation.

198 Q. And I'll ask you, Mr. Frost, were Leon Morgan and John Lynch, Jr., with Ed Daniel when he came to your pit that afternoon? A. Yes, sir. He and about three

—the two of them and about three other fellows as well as I can remember distinctly. I didn't know their names.

Q. How did Mr. Daniel talk to you? A. Well, he kept—he was—foul language all the time. I mean it was just definite that we would sign a contract, if we didn't sign a contract, that we would never haul any more coal out of that pit, and he said, "Let this be your last coal hauled today." I said, "Well, it is our last," the last truck was just coming out of the pit. I said, "We don't intend to haul any more coal today, but we will haul again Monday," and he said, "No, you won't haul Monday," so he left the pit, and we did haul coal after that time.

Q. All right. Now could you tell the Court and jury what the next episode to take place at your pit was? A. The next episode was on April the 6th, 1955.

Q. And what happened on April 6, 1955? A. About eleven o'clock, something close to that, there was a big mob of men came to the pit. It's hard to estimate the number, it was such a large group. They came up, and my brother-in-law and I—we operated our own equipment, but had
199 four other employees, laborers working with us. I was running the shovel. Dave Lowe was—later on I took it he was the leader of that mob to our pit—he came up and waved that I shut the machine down, and I didn't pay any attention to him at the start.

Q. You were operating the machine at that time? A. I was operating the shovel, yes, sir.

Q. All right. A. And then I could look out and see that there was a big mob of men, and then he kept insisting that I shut the machine down, and he was standing on the ground, and I set the bucket down, and went back in and shut the shovel off, and just as I shut the shovel off and started to swing down off the machine, I was hit and knocked to the ground.

Q. Where were you hit, Mr. Frost? A. Up on the side of the head.

Q. What were you hit with? A. Either a blackjack or a

gun butt, I'm not positive, because—the knot is there still though.

Q. I'll ask you when you—well, were you knocked out? A. Just temporarily. I don't know how long. When I came to, I was on the ground and all the other men, six of us all told, and they were all on the ground.

Q. What were the conditions in that pit? A. The
200 conditions was muddy, it was raining that day. They had us all on the ground, and I came to, and they was stomping, and "don't let them up until you see blood running out of their mouth," and "make they lay there."

Q. That remark was made by some of the mob? A. That was the remarks made by the mob, yes, sir.

Q. Did they stay there until they saw blood running out of the noses and mouths? A. Yes, sir, it was running.

Q. When you left your—when you had to leave your pit at that time to go back to your home in Williamsburg, did you have to go back through Jellico? A. Yes, sir.

Q. Did you go through Jellico that afternoon? A. Well, it was—I'd gather we—after the mob got out of the pit, why we all gathered up in a group up in the woods, kind of pull ourselves together a little bit, and we left the pit, I'd say somewhere around two o'clock that afternoon, and went through Jellico on the way back to Williamsburg, and still there was groups of men a-standing around, but we didn't see any big mobs together, but there was noticeable groups a standing around in Jellico there.

Q. Now were you able to resume your operations?
201 A. No. sir.

Q. The next day? A. We tried to resume our operations about—I was in the bed under the doctor's care for about—something over a week, and when I got better, about two weeks later, we went back to the pit and tried to resume operations, but couldn't get any of our employees to work for us.

Q. Why wouldn't they? A. They were afraid. So we hired two other men to come out and guard for us.

Mr. Kramer: We are going to object to this claim of fear of operation, because that is not anything at all within the scope of the trial that we are now engaged in.

By Mr. Robertson:

Q. You didn't sign a contract?

The Court: Wait a minute. What is the—

Mr. Robertson: I withdraw the question.

Mr. Kramer: And I ask that the jury be instructed to disregard their testimony.

The Court: Then the jury will not consider the testimony that the men were afraid, allegedly afraid to return to work. It is withdrawn from the record.

By Mr. Robertson:

202 Q. At any rate, Mr. Frost, you didn't sign a contract? A. Not at that job, no, sir.

Q. And you were not able to get men? A. Sir?

Q. You were not able to get men to come back to work for you? A. No, sir. We had to give up our equipment and discontinue the operation altogether.

Q. Now, I'll ask you what you did about a job after that. A. I started to work for Osborne Mining Company after that.

Q. Now where was this company operated? A. That company was operating on the Gatliff property over in Kentucky out of Jellico.

Q. When was this approximately that you went with them? A. That was, I'd say I worked for them about four months, June, July, August, and September.

Q. Now what job did you have with Osborne Mining Company? A. Shovel operator or dozer operator, either one that was available to run.

Q. Was Osborne a stripping operation? A. Yes,

203 sir.

Q. And what shift were you on there? A. Night shift.

Q. And I'll ask you under what conditions you had to work there? A. We was working under a strain all the time.

Mr. Kramer: Your Honor, we object to that in the Osborne Mining Company. It is another alleged incident that happened at a different place at a different time. I don't think it is competent. It is not his own operation at all. It is entirely different.

The Court: Well, what is the purpose of this?

Mr. Robertson: We will withdraw the line of questioning.

The Court: All right.

By Mr. Robertson:

Q. Do you remember a trial at Jacksboro when certain individuals were tried there in a criminal case regarding alleged beating of John Van Huss. A. Yes, sir.

Q. Did you attend this trial? A. I was at that trial every day, sir.

Q. I'll ask you if you saw any union representatives at that trial? A. Yes, sir.

204 Mr. Kramer: Now, Your Honor, I object to that, and move to strike that. I can't see what the trial of a case of some other type in a state court at another time has to do with this case. That certainly isn't an evidence of a conspiracy, the fact that union people were present when some case was tried, if they were proved to be members of a union, and I object to it as being irrelevent and immaterial and ask the Court to instruct the jury to disregard it.

Mr. Robertson: Your Honor, in order to connect up the union, we are showing that these people who came to them were union men, that they were tried—

Mr. Kramer: I object to any reference to this trial in the presence of the jury.

Mr. Robertson: Your Honor, that is connecting the union, and that is what it is offered for.

Mr. Rowntree: If Your Honor please, to save time, we will prove this by a representative of the union.

The Court: All right.

Mr. Kramer: Your Honor, I am going to object to the conduct of counsel attempting to go just so far and with-

drawing it. This type of proffered proof I think can be prejudicial. This is the third instance of this sort
205 we have had in the last few minutes.

Mr. Rowntree: We did this in the Osborne trial, connected the union by this very witness, and now counsel is objecting. That is why we do it. In order to save time, we will do it another way.

The Court: All right, go ahead.

Mr. Robertson: That is all I have of this witness.

CROSS EXAMINATION

By Mr. Kramer:

Q. Presently you are operating a coal business, aren't you? A. Sir?

Q. Presently you are operating a coal business? A. Presently?

Q. Yes, sir. A. No, sir, not myself, no, sir.

Q. You are operating with the Pioneer Fuel Company? A. No, sir.

Q. You are working with them? A. I am working for them.

Q. Superintendent, you said? A. Yes, sir.

206 Q. I thought you meant connected officially, but you are superintendent? A. Yes, sir.

Q. That is a non-union company? A. Yes, sir.

Q. Selling coal to TVA? A. No, sir, not that I know of. I have no jurisdiction over the market, just production.

Q. You don't deny that they are selling coal to TVA? A. I just—

Q. You just don't know, that's all? A. No, sir.

Q. How long have you been working for this Pioneer Fuel Company? A. One month, sir.

Q. Just one month? A. Yes, sir.

Mr. Kramer: That's all. Your Honor, I want to be sure and not continue to do something. I want the record to show a continued objection to all of this line of testimony in all of these instances so that I do not need to interrupt all the time.

The Court: All right.

Mr. Robertson: Call H. B. Wicks.

207 H. B. WICKS

a witness called by and on behalf of the defendants, after having first been duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

By Mr. Robertson:

Q. State your name. A. H. B. Wicks.

Q. And where do you live, Mr. Wicks? A. Robbins.

Q. Are you employed at this time? A. No, sir.

Q. How old are you? A. Fifty-two.

Q. Have you been engaged in the mining business most of your life? A. Yes, sir.

Q. In what capacity? A. Well, I've been in it about every way. I've been an operator myself.

Q. What's been most of your experience? As a miner? A. Yeah, coal miner.

Q. Deep or strip? A. Deep mine.

208 Q. You mentioned going into business, when was that, Mr. Wicks? A. It was '57.

Q. How long did you operate? A. About seven months.

Q. Did you have a case in this Court? A. Yes, sir.

Q. Over a year or so ago? A. Yes, sir.

209 Q. Was that suit based on a breach of contract of the United Mine Workers?

Mr. Kramer: We object to that.

The Court: Sustained. That has nothing to do with this case.

By Mr. Robertson:

Q. Were you a member of the United Mine Workers in the spring of 1955? A. Yes, sir.

Q. Mr. Wicks, I will ask you, did you attend a meeting of union members in Jellico? A. Yes, sir.

Q. Sometime in the spring of 1955? A. Yes, sir.

Q. Can you fix the date on that? A. No, sir.

The Court: Did you want to show by him that this suit

involved these same royalties; is that what you had in mind?

Mr. Robertson: No, your Honor.

The Court: Then that is all right. I have ruled correctly.

Mr. Combs: What year were you asking about?

Mr. Robertson: 1955.

By Mr. Robertson:

210 Q. Do you remember when coal was dumped in the streets of Jellico? A. Yes, sir.

Q. When was this meeting which you attended in relation to that date? A. The day before.

Q. I see, and where was this meeting, Mr. Wicks? A. It was in Jellico.

Q. In a union hall? A. They told me it was Morley local, is all I know about it.

Q. Did anybody notify you to be at this meeting? A. Yes.

Q. Who notified you to be there? A. Well, I don't know but three of the men. There was six in the car but I just knowed three of them. It was Henry Jones and Estel Jones and Ed Brandenburg.

Q. You mean you drove over with someone from your house? A. No. They notified me, it was the night before, to meet them at the mine office the next morning at 6 o'clock to go to this meeting.

Q. And who was it that notified you? A. Henry Jones and Estel Jones and Ed Brandenburg.

Q. Do you know whether or not—

211 The Court: Ed who?

The Witness: Brandenburg.

Q. Do you know whether or not Henry Jones is a pensioner? A. All I know is what he told me. He told me he was.

Mr. Kramer: Your Honor, I thought he was going further, and I move to strike.

The Court: Yes, that would be hearsay. That would not be competent.

Mr. Robertson: I agree.

The Court: Motion is sustained to strike.

By Mr. Robertson:

Q. Who were the speakers at this meeting, Mr. Wicks? A. Well, there was several speakers. I really didn't know them all but I knowed Ed Daniel and Taylor Maddux, and I don't know the last man that spoke—I didn't know him personally but I know who the announcer said he was. Said it was Albert Pass from Middlesboro.

Q. Can you tell what the purpose of that meeting in Jellico was? A. Well, the speakers said there was coal being loaded there in Jellico for $2.00 a ton and they wanted it stopped.

212 Q. Who made these remarks that you recall? Just tell who they were and what they said, the ones that you remember. A. Well, now I never paid much attention to what Ed Daniel and Taylor Maddox said, but I did Albert Pass because it seemed like he really wanted us to do something about it.

Q. All right, will you tell what Albert Pass, or the parts you remember, the remarks he made? A. Well, he said that the coal was being loaded there in Jellico for $2.00 a ton. And he said, "You men knows that that is got to be stopped." And said, "It don't make no difference what it takes to stop it either." And he said, "If any of you men get in any trouble stopping it, all you have to do to see me is look back. I'll be there."

Q. Did you attend any other meeting or gatherings any time after this meeting at Jellico about which you have just testified? A. I was ordered out on a picket line after that. I don't know whether it was next day or the second day after that: I believe it was the second day after that.

Q. All right, where did you go. First of all, where did you gather? A. We gathered down at a tavern on Clear Fork or Clear Creek. Somewhere down there. I forget whether it was Clear Fork or Clear Creek.

213 Q. Is that just out of Jellico? A. Yes, sir.

Q. All right. Now what time of the day was this

gathering? A. We left Westburn about six o'clock. I have an idea it was about seven when we got there.

Q. Now how many gathered there, approximately? A. There was—I don't know exactly. There was six carloads of us.

Mr. Kramer: Your Honor, I want to again object for the same reasons as heretofore given.

The Court: Same ruling.

Mr. Kramer: Now before we get too far away from it, your Honor, with reference to the statement that this witness says that one Albert Pass made, whom he thinks was connected with the union, was from Middlesboro, when he said, "I'll be there, look back," or something to that effect. To that extent—I am not objecting to the entire statement, but to that extent I object to that statement and ask that it be stricken.

The Court: Unless Albert Pass is connected up with the union, unless this meeting is connected up with the union, the jury will not consider it. But if it is and it has any bearing upon the alleged conspiracy, it may be considered by the jury for whatever it may be worth.

214 Mr. Kramer: In order that I may not overlook the real point, because your Honor has already ruled on it and my continuing objection, but I do further object to his statement, "Look back and I'll be there." It may be an intimation of a threat or something of that sort, and we say it is wholly irrelevant and immaterial in this case, and I object to that.

The Court: Overruled.

By Mr. Robertson:

Q. Mr. Wicks, who notified you of this gathering? A. The same men.

Q. And who was that? A. Henry Jones and Estel Jones and Ed Brandenburg. I don't know the other three men. There was always six men in the car when they come.

Q. Did you ride with these men from your home to this gathering? A. No.

Q. Did you drive over there in a car? A. No, sir, I rode with another fellow.

Q. All right, what happened there after you gathered? First of all, I will go back to the question that I asked that I don't believe you answered, and that is how many approximately gathered there on that occasion? A.
215 There was six carloads of us and they said there was six men to the car. I know there was six in the car I rode in.

Q. All right. Where did you go from there? A. We went to a strip pit somewhere up in Kentucky.

Q. Did you know at the time whose strip pit it was? A. No. sir.

Q. Have you learned since that time whose strip pit it was? A. Yes, sir.

Q. Whose was it? A. Osborne.

Q. Just state briefly in your own words, Mr. Wicks, what took place there on that occasion.

Mr. Kramer: Same objection as previously, your Honor.

The Court: Same ruling.

By Mr. Robertson:

Q. Go ahead. A. We just drove up there and drove up to where we could see the strip pit and see the machinery working up there, and the men all got out of the machinery and went to the woods—at least one of them did. I seen one of them. The other men said that all of them got out and went to the woods.

216 Q. Don't tell what somebody else said. Just testify what you saw. A. Well, the leader of our gang motioned us to turn around. He done turned around, you see, and he motioned us to turn around and follow him, and we just come back out of there. That is all there was to it.

Q. How could you tell who the leader of your gang was? A. Well, he had a red cap on.

Q. Well, where did you go from Packard then? A. We come back to Jellico.

Q. What took place in Jellico? First, let me ask you this.

Were there other gangs there congregating other than yours? A. Yes, sir.

Q. And how many would you say gathered there on that occasion, roughly? A. About 400.

Q. And what happened after you congregated there in Jellico? Was this in the downtown business district of Jellico? A. Yes, sir.

Q. What happened there? A. We formed a line and marched through town, marched through some of the buildings.

217 Q. Just in and out of the buildings? A. Yes sir.

Mr. Kramer: Now, your Honor, we are objecting to that and moving again to strike. They don't claim this was at the mine, said it was down in the Town of Jellico and some people walked through the streets and walked through some buildings. I don't see where that is material for what is claimed here.

The Court: Overruled. Unless this is connected up with the matters involved in this suit, it will have no bearing on the case.

It is my understanding that you expect to connect these matters up with the alleged conspiracy and with the union? Is that the purpose of it?

Mr. Robertson: Yes, your Honor.

The Court: All right.

Can this man come back tomorrow? It is 4:30 by my watch, or almost 4:30.

Can you come back?

The Witness: Yes.

The Court: Don't talk about the case, now. Don't let anybody talk to you.

Adjourn court until tomorrow morning at nine o'clock.

(Thereupon, at 4:30 o'clock, p. m. court adjourned until Tuesday, April 18, 1961, at 9:00 o'clock, a. m.)

218 Tuesday, April 18, 1961

(At 9:05 a. m., court convened pursuant to adjournment, when the following proceedings were had.)

The Court: Gentlemen, call your witness, please.

Mr. Robertson: Call Mr. H. B. Wicks, please.

H. B. WICKS (Resumed)

having been previously sworn, resumed the stand, was examined, and further testified as follows:

DIRECT EXAMINATION (Continued)

By Mr. Robertson:

Q. Now, Mr. Wicks, I believe you testified yesterday that you were called out to a meeting in Jellico sometime in the spring of 1955 at which time you stated that one Albert Pass made a talk there. A. Yes, sir.

Mr. Rayson: Your Honor, we object to the leading of this witness.

The Court: Yes, it is leading.

By Mr. Robertson:

Q. Well, I'll ask you, Mr. Wicks, do you know, if you know, what position Mr. Albert Pass holds with the United Mine Workers of America, if any? A. At that time he was secretary-treasurer.

219 Q. Of what? A. Of Middlesboro, secretary-treasurer of the United Mine Workers.

Q. All right. In this caravan, two or three days later, that you testified about, which went to Kentucky and back to Jellico, did you know any of the persons in the lead car of that caravan? A. Yes, sir.

Q. Could you state who they were? A. One of them was Tom Taylor.

Q. Now who is Tom Taylor? A. He was the president of Westburn local.

Q. Were you a member of Westburn local at that time? A. Yes, sir.

Q. All right, go ahead. A. Charlie Williamson and Bob Williamson. I forget the other two men's names. I know them, but I forgot their names.

Q. State whether or not Dave Lowe was in that car. A. Yes, sir.

The Court: Who?

Mr. Robertson: Dave Lowe. Your witness.

220 CROSS EXAMINATION

By Mr. Rayson:

Q. Mr. Wicks, I believe that you testified about the same matters that you are now testifying about in this very courtroom about two and a half years ago, is that correct? A. Yes, sir.

Q. Now you have told us that at one point you were with a Henry Jones and an Estel Jones and also an Ed Brandenburg in going from your home to Jellico, is that correct? A. No, sir.

Q. What did you tell us about Ed Brandenburg? A. I told you that he was in the car that come and notified me to go to this line.

Q. Now in the previous time you testified, you made no such statement, is that not correct, Mr. Wicks? A. Yes, sir.

Q. Are you saying that you told the court that Ed Brandenburg came and told you that he was in the car? A. No, sir, Ed Brandenburg didn't have anything to do with telling me. It was Henry Jones.

Q. Did you testify on the previous trial that Ed Brandenburg was there? A. I don't know as—I don't believe I did, but Ed Brandenburg was in the car. I forget—

221 Q. Now on the previous trial, Mr. Wicks, you testified about hearing Albert Pass make a talk, did you not? A. Yes, sir.

Q. And I believe at that time you made no mention of any such statement by him that coal was being loaded in Jellico for two dollars a ton, you made no such statement, is that not correct? A. Yes, sir, I did.

Q. You did make such a statement, or you did not? A. I did.

Q. Where are you employed at the present time, Mr. Wicks? A. Nowhere.

Q. How long have you been unemployed? A. Two years.

Q. Mr. Wicks, I believe that sometime ago you were convicted of a felony in the Criminal Court of Campbell County, were you not? A. Yes, sir.

Q. Was that in 1935? A. '35?

Q. Yes. A. No. sir.

Q. When was it? A. '40.

Q. 1940? A. Yes, sir.

222 Q. Following that conviction, I believe that you spent a period of time in the state institution, is that right? A. Seventeen months.

Mr. Rayson: That's all, Your Honor.

The Court: Now, members of the jury, that proof is competent as bearing on the credibility of this witness, that is the only purpose for which it is received as evidence in this case.

RE DIRECT EXAMINATION

By Mr. Robertson:

Q. Mr. Wicks, did that conviction have anything to do with any parties to this suit whatsoever? A. No, sir.

Q. What was the nature of the crime, Mr. Wicks? A. Manslaughter.

Mr. Robertson: Your witness.

Mr. Rayson: Nothing further.

Mr. Robertson: Call Mr. Will Hood Wender.

223 WILL HOOD WENDER

called as a witness by and on behalf of the defendants, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Robertson:

Q. What is your name? A. Will Hood Wender.

Q. And where do you live, Mr. Wender? A. I live in Jellico, Tennessee.

Q. What do you do? A. At the present time I am working at Jellico Stone, driving a truck.

Q. What were you doing in the spring of 1955? A. I was hauling coal.

Q. State whether or not during the spring of 1955 you saw an unusual occurrence in Jellico? A. I did, sir.

Q. Can you give the date of that? A. Yes, sir. I can give the—it was in April of 1955, sir.

Q. What time of the day was this? A. It was in the morning. About 9 in the morning, sir.

Q. Where were you at the time that you saw this?

224 A. I was in Jellico across from Osborne Coal Company's tipple or loading ramp.

Q. And just state in your own words, Mr. Wender, what you saw there on that occasion.

Mr. Kramer: May it please the Court, we renew our objection because it is the evident purpose of counsel to go into transactions similar to what were testified by other witnesses for the reason given in yesterday's objection. And we renew that objection, your Honor, on the ground it is incompetent, irrelevant and immaterial and for the reasons heretofore given to the Court without repeating them.

In addition to that ground of the objection, I make a further ground to the objection, your Honor ruled on yesterday such evidence was competent on the avowal of counsel that they would later connect it up with certain acts or with some course of conduct or some course that would at least make a prima facie for a violation of the Sherman Act.

We believe, your Honor, that there must be some prima facie showing of overt acts or some course of conduct on the part of one—or either of the original plaintiffs, the trustees of the welfare fund, and/or the defendant to the cross action, the United Mine Workers of America,

225 showing that there was a conspiracy and that these people entered into it before this type of testimony would be competent for any purpose, and prima facie proof of the establishment of a conspiracy or of an intent. We think that requirement is necessary before this type of proof can be introduced, and for that further reason, as well as for the additional reason, we object to the introduction of this testimony.

Mr. Robertson: Your Honor, we contend that all of this was the union's part in this conspiracy, and we are gradually connecting this to the union, and we will show how it was part of this conspiracy.

We are contending in this suit that it would be impossible for the union to have taken part in a conspiracy and violated the Sherman Anti-trust Act without also conspiring to avoid the labor laws in effect at that time. For that reason, we are offering this testimony for the same purpose.

The Court: Members of the jury, unless this testimony is connected with the trustees in some way it will not be considered by the jury as bearing on the trustees' phase of the lawsuit.

Unless this testimony is connected up with the United Mine Workers of America, and unless a conspiracy is established, and unless the United Mine Workers is shown
226 to be a part of the conspiracy, then you will not consider this testimony for any purpose.

But if the trustees are connected with the alleged conspiracy, and if the United Mine Workers of America are connected with the alleged conspiracy, then such testimony may be considered for what bearing it may have on those matters.

In that connection, one of the charges of Phillips Brothers Coal Company is that the trustees caused beneficiaries of the trustee fund to picket coal operators and to engage in other union activities.

Now if this testimony has any bearing on that subject it may be considered by the jury for whatever bearing it may have on that subject and on the other subjects just indicated.

With that explanation, Mr. Kramer, the objection is overruled.

Mr. Kramer: May I add one word. Your Honor understands I am objecting to the order of proof as well as the introduction of the testimony as a whole and insisting that there must be a prima facie case of conspiracy before this type—introduced before this type of evidence can be in-

troduced even if we are wrong in our original insist-
227 ence and then we have this insistence in addition.

The Court: I understand.

* * * * * * * * * * *

The Court: But these matters, these alleged conspiracy cases are complicated at best, as you know, and the Court is forced to depend on counsel for each side to link this testimony together so as to have a bearing on the issues.

If counsel for either side fails in that respect, then you may renew your motions at the proper time and the Court will consider them. If these matters are not connected up, Mr. Kramer, and you make a motion at the proper time to delete this testimony, or like testimony, from the record, then the Court will give that motion proper consideration.

* * * * * * * * * * *

By Mr. Robertson:

230 Q. All right, Mr. Wender, just state what you saw there in Jellico on that occasion. A. Well, I was in Jellico and a car parked across from Osborne's tipple, loading dock, and a group, of men came into the parking lot and cross in front of Osborne's tipple, and coal trucks coming into Osborne's tipple and these other tipples around down there, and this group of men were stopping these trucks and making the men dump them and abused them.

Q. Was this Osborne tipple located in downtown Jellico? A. Yes, sir, it sure is.

Q. How many trucks did you see there which were dumped by this group of men? A. They dumped several trucks that day, that morning. They just stayed there about 20 minutes and I seen around five dumped, trucks that were dumped, and one of the drivers run off from the truck and this group of men, or mob, came down there and tried to catch him but he got away. And they tried to look in the truck to see if the key was there in the truck and apparently it wasn't, so they went on back over in the parking lot and more trucks come in all the time. This Barton boy who was driving a

truck, he came into the parking lot—

231 Mr. Kramer: Just a moment. Your honor, I want to make a further objection. I do not understand under your Honor's previous ruling you have permitted the introduction of all this detail. I think your Honor has permitted, as I understand your Honor's ruling, the introduction of testimony showing certain occurrences. I am going to object to the detailing of what happened in connections with those occurrences.

The Court: Well, counsel, I hope you don't go into it in any more detail than you feel is necessary to establish your contention in the matter. Let's not go into any of these details unless you feel it is absolutely necessary.

Mr. Robertson: Yes, your Honor.

By Mr. Robertson:

Q. All right, how long did that occurrence last? A. In the City of Jellico?

Q. Yes. A. About 20 minutes.

Q. And then just state what happened after that. A. Well, the group of men started leaving the parking lot and getting into cars, headed toward Newcomb, and these cars would pull up there and the men get in them, headed toward Newcomb. So they had one man over in the field unloading a truck there at that time, an old man, mak-

232 ing him shovel it off his truck. So both of them left going toward Newcomb and I turned my car around and followed them toward Newcomb. So I got to Newcomb and they had a traffic director up there, George Smith. He is one of the men that was in Jellico there. And he was directing some of the men on up toward Elk Valley and some was going on into Lonzo Cox's stripping pit. So I went on up to Lonzo Cox's stripping pit and pulled down in the pit to turn around, and I seen some men hitting at Lonzo Cox, and he had got away from them and was going up the bank there in the pit, and he got up on top and fell, staggering and fell like he was hurt pretty bad.

Mr. Kramer: Of course I object to that sort of statement.

The Court: Sustained.

By Mr. Robertson:

Q. Just state what you saw. A. Lonzo, there was a group of men down there, a bunch of men down there in that pit cussing and hollering and raising the devil down there, milling around. So Lonzo got up on top of the pit—why he had a handkerchief over his mouth and was dusting dirt off his britches where he had been—like he had been down. I don't know whether he had been down other than the first time I saw him fall or not, but he was dusting the dirt off his britches, holding a handkerchief over his mouth and didn't look like he could hardly walk the way he was walking.

233 Then I finished turning around—I stayed there two or three minutes. I finished turning around and started toward Jellico.

Q. Did you see anyone on your way back to Jellico? A. Yes, sir, I seen Mr. Daniel. He pulled into the D & M Tavern in front of me, in the driveway there, just off the highway.

Q. Is that Mr. Ed Daniel? A. Yes, sir, Mr. Ed Daniel. There is a group of cars that pulled in by him that were in front of me. There was also a whole bunch of cars there. They just followed each other into the driveway. They were all gathering up there talking and I came on to town.

Q. Do you know who Mr. Ed Daniel is? A. Yes, sir. At that time he was with the United Mine Workers, a district representative or something—I don't know just exactly what that was.

Q. Did these cars, when they left Jellico going on this caravan, did that caravan ever get out of your sight? A. No, sir, it sure didn't.

Q. Do you know that that was the same group of men in Jellico? A. Yes, sir, it most certainly was.

Mr. Robertson: Your witness.

234 Mr. Kramer: Just so the record is straight, I understand from yesterday your Honor permits us from making the objection each time and to let the record show

a continuing objection to this type of testimony for the reasons given.

The Court: Yes, sir.

CROSS EXAMINATION

By Mr. Rayson:

Q. As of April 1955 you had been hauling coal by truck for quite a while, is that correct? A. Yes, sir, it was.

Q. Did you drive your own truck? A. I drove my father's truck.

Q. Drove a truck for your father? A. Yes, sir.

Q. What was your job in driving this truck? A. Well, I just—my father let me have the truck to try to make a living with and I drove it and hauled coal to Osborne.

Q. You would haul coal from these little coal mines to the tipple in Jellico? A. That is right, sir.

Q. You would go back and forth from the coal mines to the tipple, is that correct, two or three times a day? A. Yes.

235 Q. And how long would you say you had been doing that as of April 1955? A. You mean how long had I been hauling—

Q. Had you been doing it several years or how long? A. I have done it off and on all my life.

Q. You have done it since then? A. I have—since that time?

Q. Yes. A. Not to Osborne, no. They put them out of business.

Q. You mean you think Osborne quit business then? A. I don't know, but I never did haul any more coal to him.

Q. Your truck was never dumped? A. No, sir.

Q. You continued to haul coal from these same coal mines after that occasion, did you not? A. Not for a while, no, sir.

Q. Well, after that time you did haul coal? A. I hauled for Gilchrist and Son, but I didn't haul for Osborne.

Q. Didn't you haul from some of the little mines out on Buck Creek? A. Yes, sir.

Q. They were all non-union mines, weren't they? A. I don't know.

236 Q. Well, you know they were non-union mines before April 1955 and after April 1955, don't you? A. I never did ask.

Q. Now, Mr. Wender, you have worked for a stone company now, is that right? A. That is correct.

Q. How long have you been working for them? A. I worked for them all last summer and then I have worked for them this time about a month.

Q. Are you driving a truck for them also? A. Driving a Euc, back dump Euc truck.

Q. Have you done anything else, other than that, except to haul coal? A. For the last, up until I got that job, I was working for Jellico Stone. I got run over with a truck. I didn't do anything until I went back to work for them.

Q. Well, other than your work as a driver for the stone company, have you worked since 1955 in the coal business trucking coal? A. I have hauled coal from Gilchrist and Sons, Crotches Creek tipple to Gilchrist and Son's loading ramp in Jellico.

Q. You have done that since 1955? A. Yes, sir.

Q. Has that been your principal occupation since

237 then? A. No, sir.

Q. Other than the stone business? A. No, sir. I have worked as a mechanic in Cincinnati, Ohio for about a year, and I worked for Terminal Garage here in Knoxville since then. I have worked for G. P. Foods here in Knoxville, and worked some in a drygoods store.

Q. All right, let's talk about this day in April. You say you were parked in a car across the street from this tipple in Jellico, is that right? A. Yes, in a Ford convertible with the top down.

Q. Was anyone with you? A. Yes, sir, there was.

Q. Who was with you? A. Ray Sodders.

Q. Did he remain with you all day? A. Yes, sir, he sure did.

Q. It was a rather drizzly day, wasn't it? A. Not that I remember, no. If it had of been, I wouldn't have had the top down on the car, that's for sure.

Q. You had the top down? A. Yes, sir.

Q. And you watched this group of men just across the street from you? A. Yes, sir, I sure did.

238 Q. As they left headed toward Newcomb—that is sort of southwest of Jellico, isn't it? A. Southwest? Let's see. No, it wouldn't be southwest, would it? Southeast, wouldn't it?

239 Q. All right, southeast. You followed them out? A. Yes, sir.

Q. Went right behind them? A. Yes, sir.

Q. Watched them all the way? A. Yes, sir.

Q. And you went in there and you followed them into the Boots and Cox— A. Yes, sir.

Q. And you milled around and saw them? A. No, I didn't mill around, I stayed in the car and watched them. I wasn't about to get down there and let somebody get hold of me.

Q. You and your friends were there in this convertible with the top down? A. Yes, sir.

Q. Watching what was going on? A. Yes, sir.

Mr. Rayson: Nothing further.

RE DIRECT EXAMINATION

By Mr. Robertson:

Q. One further question, Mr. Wender. You said that this Mr. Smith was directing traffic there in Newcomb, some turned in the Boots and Cox pit, and he directed others toward Elk Valley. A. Yes, sir, he certainly did.

240 Q. Is that out toward Pioneer? A. Elk Valley, you turn left at Elk Valley to go to Elk Valley from Newcomb, and you turn right to go to Alonzo Cox's pit.

Q. What I mean is Elk Valley out toward Pioneer? A. Let me see where Pioneer is.

Q. Do you know whether or not it is? A. Pioneer. You can go across from Elk Valley Mountain and go into Oneida. Yes, it's towards Pioneer, yes.

Mr. Robertson: That's all. Call Mr. Alonzo Cox.

ALONZO COX

a witness called by and in behalf of the defendants, having first been duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

By Mr. Templeton:

Q. Are you Mr. Alonzo Cox? A. Yes, sir.

Q. Where do you live, Mr. Cox? A. Jellico.

Q. Where did you live in April of 1955 and before? A. Jellico.

Q. How long have you lived in Jellico? A. I moved
241 to Jellico in '44, 1944.

Q. Where did you move from? A. Sir?

Q. Where did you live before you lived in Jellico? A. Elk Valley, Tennessee.

Q. How far is that from Jellico? A. Approximately twelve miles.

Q. Are you a native of that section? A. Sir?

Q. Are you a native, were you born in Elk Valley? A. Born and raised in Elk Valley.

Q. What business are you in, Mr. Cox? A. I'm sorry to tell you, I have got a cold and my head is stopped up. You will have to talk a little louder.

Q. What is your business? A. Coal mining, stripping business.

Q. How long have you been in the coal stripping business? A. Ten years.

Q. Were you in that business in April, 1955? A. Yes, sir.

Q. Where was your operation? A. It is at Newcomb, Tennessee, about five miles south of Jellico.

Q. Were your employees members of any labor
242 organization prior to April, 1955? A. Would you repeat that again, please?

Q. Did you operate a union mine prior to April, 1955? A. No, I wasn't union at that time.

Q. Sir? A. I was not union at that time.

Q. Have you ever been a union mine? A. Before, yeah.

Q. How long before? A. Well, we had been out about ninety days, or four months before this happened.

Q. You mean before April, 1955? A. Yeah.

Q. If I understand you, some ninety days—you had belonged to the union, but for ninety days before April, you had not? A. That's right.

Q. What union did you belong to? A. UMW, United Mine Workers.

Q. Had you been approached by any person or official from the United Mine Workers Union prior to April, 1955, regarding re-establishing your membership? A. Yes, sir, they was on my job.

Q. Who approached you? A. Mr. Ed Daniel.

243 Q. You knew Mr. Daniel? A. Yes, sir.

Q. You knew what he did? A. Yes, sir.

Q. How long had you known him? A. Well, I had knowed Mr. Daniel practically—well, ever since I moved to Jellico, ever since I've been in Jellico.

Q. What did you do with reference to his approach about joining the union? A. Well, I told Mr. Daniel that—

Mr. Kramer: I think maybe we ought to clarify this Your Honor, if I may. I don't know whether you are talking about this man personally joining the union or signing a collective bargaining agreement. You are asking him if they approached him about joining the union, which may make a difference on my objection.

Mr. Templeton: I will clarify that, Mr. Kramer, if I can.

By Mr. Templeton:

Q. What did Mr. Daniel want you to do, if anything, when he approached you? A. Mr. Daniel wanted me to sign up with the United Mine Workers.

244 Q. You personally or for your company? A. Me and my company. I had a partner.

Q. Your business? A. My business, my operation.

Q. Did he want you to sign up for your employees? A. For my employees.

Q. And what was your response to that? A. I told Mr. Daniel that there was a few operating around in this area that was operating un-union, and I said, "You get the rest of the boys to sign up, and I'll go along with you on it." I said, "It's not right for me to sign up and let the others go along and work un-union."

Q. What was the result of that? Did you sign up then or not? A. No, I did not sign up then.

Q. What happened after that, Mr. Cox? A. Well, they went on off, and never did come back any more until this trouble happened over there at that time.

Q. And how long was that after the visit of Mr. Daniel to your mine? A. Something like sixty days.

Q. Well, now, tell the jury and the Court what took place at the time that you are talking about them coming back and when was it, if you know? A. Well, this group of men
245 come in on me about—it was April the 6th of 1955—

Mr. Kramer: Now, Your Honor, for the reasons heretofore given, we object to this testimony which is evident will be along the same line, without repeating the basis of my objection.

The Court: Overruled.

By Mr. Templeton:

Q. Just go ahead, Mr. Cox, and state what took place there then when they came in on you as briefly as you can. A. April 6, along about ten or eleven o'clock in the morning, they came in there, something like—well, I would say something near three hundred men, I would judge. They asked me what I was doing up there working un-union, and I said, "Well, I'm trying to make a living."

Q. Asked you what, Mr. Cox? A. Asked me what I was doing up there operating an un-union mine, and I said, "I'm trying to make a living." Then they went to beating on me,

knocking me over the high wall, kicked me in the back, done beat my partner up.

Q. Did they leave then? A. They left shortly afterwards.

Q. Now, Mr. Cox, as a result of a subsequent event, what did you do with reference to signing a union contract
246 or not—

Mr. Kramer: I object to the form of the question. Of course if the first clause is omitted, I do not, but as a result, I object to the conclusion. If he is asking if he later signed a collective bargaining agreement, I do not object.

Mr. Templeton: That is all I want to know, Your Honor.

The Court: Well, you want to reframe your question?

Mr. Templeton: Yes, Your Honor, I will reframe the question.

By Mr. Templeton:

Q. Did you or not subsequently sign a union contract? A. Me and my partner did, about sixty days after the trouble.

Q. About sixty days after? A. Something like that, about six weeks or two months after it happened.

Q. Who did you sign the contract with representing the United Mine Workers, if that is who it was? A. Mr. Ed Daniel and Taylor Maddox.

Q. Did you then resume operation of your mine,
247 Mr. Cox? A. In a few days after we signed up with them, we went back to work.

Q. Did you have any more trouble? A. No, we did not.

Q. Have you had any trouble since? A. No, we haven't.

Q. Are you still operating a union mine? A. We are.

Q. Did yo[illegible]perate it last year? A. Yeah.

Q. What was the financial result of your last year's operation?

Mr. Kramer: Just a moment, Your Honor, we object to that, don't see how in the world that could be competent in this case.

The Court: Well, what theory did you say—what he did, he's not a party to this suit.

Mr. Templeton: All right, Your Honor. We don't insist.

I can think maybe of some reasons, but I don't insist on it.

The Court: Well, then it is not necessary for the Court to rule.

CROSS EXAMINATION

By Mr. Kramer:

Q. Mr. Cox, where is the mine located that you are
248 now operating? A: Now operating?

Q. Yes, sir. A. It is above Elk Valley, Tennessee, what they call Lick Fork.

Q. And about how far from Jellico? Well, the operating will be about fourteen miles, approximately.

Q. Is it a truck mine? A. Yes, sir.

Q. In other words, you don't load directly from your mine on the rail cars? A. Yeah, we load on the railroad cars.

Q. But do you haul it to the ramp some distance away? A. We haul it by truck.

Q. How far? A. About a seven-mile haul.

Q. That is what I thought. In other words, your mine is located about seven miles from the rails, and you load from the truck? A. That's right.

Q. And you have the truckers? You hire the truckers? A. I hire the truckers.

249 Q. And how many men do you employ in your mine? A. There's thirteen on the payroll.

Q. Is that about your average? A. That's about the average.

Q. What we call a small mine? A. That's right.

Q. And you have continued to operate that small mine now for how many years? A. Well, I am going to try to operate it until I work out.

Q. I know. We are all going to try to. I am going to try to practice law until I work out, too, but I mean how long have you been operating that mine— A. I've been on this particular job six minths.

Q. Now prior to the time you came to this location, where you are operating that mine with thirteen employees, you

operated somewhere else for about three years?

A. That's right, different places.

Q. Where did you operate that mine for three years? A. For three years?

Q. Yes. A. Well, I haven't been on one particular job for three years.

Q. Well, would you just tell us about, so His Honor and the jury will understand, where you have operated
250 since this trouble, the different places you have operated the mine.

Mr. Rowntree: Please, may I inquire the reason for this line of questioning? The Court: Yes, sir.

Mr. Kramer: The purpose of this, Your Honor, is to show a response to the assertion made by the cross-plaintiff that the effort was being made to force the small mines out of business, and they were forced out of business. This gentleman has already testified that he's operated six months with a thirteen-man mine, which is a small mine, and I intend to show that from the time of that trouble, the small mines were not forced out of business, which is one of the issues in this lawsuit.

The Court: All right.

By Mr. Kramer:

Q. Would you tell us where else you have operated? A. I have operated in Whitley County, which is just across the state line from Jellico.

Q. Just across the state line. When did you operate that mine? A. '59.

Q. And about how many men did you have employed? A. About the same thing.

251 Q. And you marketed that coal by trucking it to the railroad? A. That's right.

Q. Now where else have you operated a small mine during this period of time? A. On Hickory Creek and Stinking Creek. That's in Tennessee.

Q. Don't mean as much to us as they do to you. How close is that to Jellico? A. That was twenty-one miles.

Q. And where did you truck that coal to? A. Trucked it to Jellico.

Q. Trucked it twenty-one miles to Jellico and employed about the same number of men there? A. About the same number.

Q. Were you operating individually or as a partnership at that place? A. Partnership.

252 Q. You all partners? A. No, not at this time, a partner—I bought my partner out. After I bought him out in 1957.

Q. Okeh. Have you operated anywheres else—before I leave that. Why did you cease operating there? Did you mine the coal all out? A. Mined it all out.

Q. Usually happens, run out of coal, exhaust the supply of coal from that opening? A. That's right.

Q. Were you strip mining or deep mining? A. Strip mining.

Q. And you were just digging on the surface of the earth? A. Yes.

Q. A little mine there. A. Yes.

Q. And after having mined that for how long— A. That one particular place?

Q. Up Stinking Creek, whatever that other creek was. A. You mean how long I were in there? Q. Yes, Sir.

The Court: What is the name of that creek?

The Witness: Stinking Creek.

253 The Court: That is not in Tennessee, is it?

The Witness: That is in Tennessee.

Mr. Kramer: They have some over in Kentucky too.

The Witness: That is what I always heard it called.

By Mr. Kramer:

Q. How long, approximately, did you mine there? A. I was there about 14 months.

Q. And you got all the coal out you could from that location? A. That's right.

Q. And then what did you do? A. I moved onto the job I am on now.

Q. And you are operating there, and how long do you think you have a supply of coal—you cannot judge accurately of course, but judging from your experience—for stripping operations at that location? A. Well, I have got about 8,000 acres to strip over. I don't know how many years it will take for me to strip it.

Q. Have your employees been with you, the same employees in the main, most of these years? A. Yes, practically all of them have been with me.

254 Q. Stay on year after year with you? A. That's right.

Mr. Kramer: That is all.

Mr. Templeton: If your Honor please, in view of counsel's questions regarding the success of the business, I think our question is now, with regard to the financial success or failure of it, are proper.

The Court: No. I do not think the financial success would have any bearing on the issues in this case. But I will let you go into the matters Mr. Kramer has gone into. But I won't let you go into his financial part. If he were suing that would be a different matter.

Mr. Templeton: All right. Note our exception. Just a minute.

Mr. Rowntree: If your Honor please, as I recall counsel's response to our inquiry, he was developing this in response to our contention that a small mine could not operate, and we think it is pertinent whether this man was making money or starting to lose money, or what.

The Court: Now the Court ruled on the details of his finances. If you want to ask a general question, just one general question on that line, I will let you do it. But

255 I will not let you bring in the figures and go into the details because that would require another trial about his alleged—

Mr. Rowntree: Ask two questions, general questions.

The Court: Yes, you can ask one general question on that and—

Mr. Kramer: Now, your Honor, we object to— I don't know just what these general questions are to be on but we object to them because there are many factors involved here whether or not this man makes a profit or not and that is not material to this lawsuit.

The Court: In the light of your cross examination, I will let him ask the question whether he is or is not making money or losing money. He cannot go into the details.

What was the other question? Is that all?

Mr. Templeton: That one question, your Honor, and the other question was whether or not Mr. Cox had paid the 40 cents a ton royalty.

Mr. Kramer: Your Honor, whether he has or hasn't under the law as it is now, under the facts as they are, he is obligated to pay it under the union agreement.

256 That agreement is in, considered in, because it is referred to in the introduction of testimony by the trustees and therefore, your Honor, it is immaterial.

The Court: I will let you ask those two questions.

Mr. Templeton: All right, your Honor.

The Court: The objection is overruled. Go ahead in the light of the cross examination.

REDIRECT EXAMINATION

By Mr. Templeton:

Q. Mr. Cox, during the periods that Mr. Kramer asked you about since this occurrence in 1955, have you made or lost money in the operation of your coal mine? A. Well, last year I did not make any money. I just barely existed.

Q. Have you been able to pay, or have you paid, the 40 cents a ton royalty welfare? A. I haven't the last twelve months.

Q. Have not? A. I have not.

Mr. Templeton: You may ask him.

Mr. Kramer: Subject to our exceptions and without waiving them, your Honor, I desire to ask a couple of questions.

The Court: You may do so.

257 RECROSS EXAMINATION

By Mr. Kramer:

Q. Mr. Cox, sometimes and at some of these mines during this period since 1955, you have made money, at other times you haven't; that is true, isn't it? A. That's right.

Q. And sometimes you have kept up on the payment of royalties, sometimes you have dropped behind and caught up, and sometimes you haven't caught up; isn't that correct? A. Yes.

Q. And at the moment you are behind because you did not pay last year's royalty. A. The royalty was kept up until this 12 months.

Q. Then it was kept up all this period until the last 12 months and you haven't kept it up then? A. That's right.

Mr. Kramer: That is all.

Mr. Templeton: Stand aside. Call John Van Huss.

JOHN VAN HUSS

called as a witness by and on behalf of the defendants, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Templeton:

Q. You are Mr. John Van Huss? A. Yes, sir, I am.

Q. Where do you live, Mr. Van Huss? A. I live at LaFollette, Tennessee.

Q. How long have you lived there? A. Well, since October 1933.

Q. What is your business? A. I am a coal mine operator.

Q. How long have you been a coal mine operator? A. About eight years—8 or 9 years.

259 Q. Were you a coal mine operator in April, 1955? A. Yes, sir, I was.

Q. And before that time? A. Yes, sir, before that a few years. Q. What type mine did you operate, Mr. Van Huss? A. It was an underground mine, small mine.

Q. How many men did you work? A. Well, it was 8 or 10, I believe, back then.

Q. Did you have a mechanized mine? Just what type mine did you have with reference to how you got the coal from the inside out to the surface of the ground? A. Well, we pulled it outside with two ponies at that time.

Q. You did not have a mechanized mine then? A. No. Well, we cut the coal and that was all. We cut coal with a machine and loaded it on a conveyor and pulled it outside with ponies.

Q. Mr. Van Huss, did you require that the employees belong to a union or not?

A. They did not belong to the union as far as I knew anything about it.

Q. Had you ever been approached by any person representing any union with regard to your men joining a union?

A. Yes, sir.

260 Q. Who? A. Ed Daniel.

Q. Did you know Mr. Daniel? A. Yes, I knew him.

Q. Did you know who he worked for? A. I did.

Q. Who did he work for? A. He worked for the United Mine Workers.

Q. And that was his purpose in approaching you—

The Court: Mr. Kramer, in order to avoid going over Mr. Daniel's position from time to time, can it be stipulated at this time the position held by Mr. Daniel?

Mr. Kramer: Yes, your Honor. Mr. Daniel was a field representatives of District 19 of the United Mine Workers of America.

The Court: During the period—

Mr. Kramer: During the period involved in this litigation so long as we understand the years we have been talking about.

The Court: It will not be necessary to go into this position any more.

Mr. Kramer: Correct, your Honor.

Mr. Combs: One question, your Honor, while we are in-

terrupted. He is asking the witness whether or not
261 this Ed Daniel approached and talked to him about the men belonging to the union.

I think counsel again is talking about whether or not he signed a contract and there is a difference on that, and I don't think counsel is intentionally doing that.

I don't think Mr. Daniel discussed with him whether his employees did or did not belong to the union as I understand his line of questioning. I don't know, but that is what he is asking about, whether he joined the union or not. The same thing we had a while ago.

The Court: Will you be explicit on that, Mr. Templeton.

Mr. Templeton: All right, your Honor.

By Mr. Templeton:

Q. Just say what Mr. Daniel approached you about then, Mr. Van Huss; what did he want? A. He approached me about my signing a contract. For your business or personally? A. Well, for the mine.

Q. For the mines. A. Yes, sir.

Q. Did you sign? A. No, sir, I did not.

262 Q. Did you continue to operate? A. Yes, sir.

Q. Now then, Mr. Van Huss, did anything out of the ordinary take place at your mine on April 6th, or April 11th, or in the month of April, 1955?

Mr. Kramer: Wait a minute. The same objection, your Honor, we made before and for the reasons heretofore stated.

The Court: Same ruling.

Q. Go ahead. A. Yes, sir. I came out of the mines. There was a—it was in the afternoon and there was a bunch of men outside, and, well, they beat me up severely and—

Q. Did you know any of them, Mr. Van Huss? A. Yes, sir, I did.

Q. Who did you know? A. Well, I knew Tom Taylor and Dave Lowe and Lawrence Rutherford and Chris Walden.

The Court: Taylor, Who else? Tom Taylor?

The Witness: Tom Taylor and Dave Lowe.

The Court: Who else?

The Witness: And Chris Walden.

The Court: W-a-l-d-e-n?

The Witness: Yes, sir. W-a-l-d-e-n.

263 By Mr. Templeton:

Q. Are those the only ones you knew, Mr. Van Huss? A. Yes, sir.

Q. How many men were there besides those three? A. Well, there was possibly a hundred.

Q. A hundred besides those three? A. Roughly a hundred.

Q. Did they say anything to you? A. Yes, sir. Oh, yes, they talked to me.

Q. What did they say? A. Well, they cursed me, and Dave Lowe is the one that stood over me with a pistol and questioned me about the men in the mine—how many were in the mine, and dared me to lie to him about how many men were in the mines, and he said that "You wouldn't listen to Daniel, that he was just one man."

Q. Said you wouldn't listen to Daniel? A. That's right.

Mr. Kramer: Of course, your Honor, we are objecting to what some individual said, not an official of even a local union, the union would not be bound by those statements.

The Court: Unless it is connected up the union would not be bound. That is a matter for the jury to say whether the union was or was not connected with the matter.

264 Mr. Kramer: May I make my position just a little clearer, your Honor?

The Court: Yes.

Mr. Kramer: I think under the law, even though he be a member of the union, this testimony would not be chargeable merely because he was a member of the union unless he is an officer of the district of a union.

The Court: You would not be bound unless the organizers of the union were there for organizational purposes and unless they ratified, or these men did, or unless they encouraged them to do it, inciting them to; if so, the union

would be bound. Go ahead.

265 By Mr. Templeton:

Q. Do you know where Mr. Tom Taylor was from? You said you knew him. A. Well, he is from Westburn.

Q. From Westburn? A. Yes.

Q. Do you know where Dave Lowe lived? A. Well, I found out since then that he lived at Westburn.

Q. In Westburn? A. After the trouble.

Q. Did you prosecute these men, Mr. Van Huss? A. Yes, sir.

Q. In the criminal court at Jacksboro? A. I did.

Q. Do you know what attorneys represented them in that trial, if any?

Mr. Kramer: Now, your Honor, we object to that. That is wholly irrelevant and immaterial.

The Court: Overruled.

By Mr. Templeton:

Q. Do you know who represented the defendants? A. Yes, sir, it was Mr. Kramer and Mr. Ryson or Bryson.

Mr. Kramer: Rayson.

266 The Witness: Rayson. I am sorry. And Roy Asbury.

By Mr. Templeton:

Q. Roy Asbury, he is a lawyer at Jacksboro? A. He is at Lafollette.

Q. What was the result of that prosecution?

Mr. Kramer: Now, your Honor—

The Court: I sustain that.

Mr. Taylor: All right.

The Court: I think your action indicated you were going to object. Am I mistaken about that?

Mr. Kramer: Well, I will just withdraw the objection and let him show.

The Court: All right, he withdraws the objection.

By Mr. Templeton:

Q. What happened to your trial? A. Well, the verdict was

not guilty.

Mr. Kramer: Just evidence that he had good lawyers, your Honor.

Mr. Taylor: You may ask him.

Mr. Kramer: May we have just a moment, please, your Honor?

The Court: Yes, sir.

CROSS EXAMINATION

267 By Mr. Kramer:

Q. Mr. Van Huss, when was it that Mr. Ed Daniel talked to you about signing a collective bargaining agreement with the United Mine Workers of America with reference to the difficulty that occurred at your mine in April, I guess it was, 1955? A. Well, it was some several months before it.

Q. As a matter of fact, wasn't it about two or two and a half years before? A. Well, just to be safe, I will say several months.

Q. Several months? A. Yes.

Q. You don't recall what our previous testimony was on that? A. No, I don't remember.

Q. But you do now—you will say it was at least several months before that difficulty? A. Yes.

Q. By the way, Mr. Van Huss, are you operating a mine now? A. Yes, sir.

A. Oh, you are. Where is that mine? A. Well, it's where I had the trouble in '55, the same mime.

Q. The same mine? A. Yes, sir.

268 Q. I take it it is not mechanized, is it? A. Well, the only difference is, we are pulling the coal with a locomotive now rather than the ponies.

Q. It is what we call a deep mine, isn't it? A. Yes, sir.

Q. And you do have a cutting machine? The coal is not dug out of the coal seam or vein by picks any more, is it? You have a cutting machine? A. Yes, sir, we use a cutting machine.

Q. You have a cutting machine, so it is mechanized to that extent. How do you get the coal from back in the mine to the surface? A. Well, the principal tonnage is loaded on a conveyor by hand.

Q. Yes. A. And it is conveyed to the entry and where it is put in cars on track.

Q. Now most of us do not understand the mine work as well as you do. When you say loaded on a conveyor, would you explain to these ladies and gentlemen what you mean by a conveyor? A. A conveyor, it is a device for transferring material. Of course, there is different types.

Q. Let's use the type you have. A. Well, the type I use principally is a shaking conveyor and it is a metal
269 chute that conveys the coal by shaking. And the coal is put on this conveyor by hand and this coal, it is transferred to the entry—that is the haulage way for the cars, and it is put in the cars on the haulage way.

Q. About how far does this piece of equipment you call a conveyor that operates by vibration, sort of, isn't it? A. Yes.

Q. Like my hand is shaking, and as it shakes, it comes toward the surface? A. Yes.

Q. As that coal comes out from where your cutting machine is operating, say now or has been for the last few weeks or months, how far are you in the ground? A. You mean with the conveyor?

Q. Yes. A. The conveyor, it conveys the coal—well, 300 feet is a pretty good distance. Then we move it up.

Q. Now when you move it up, you mean move it further back into the ground? A. Yes, we move it farther in the mines and we extend the track up to it.

Q. And you extend the track up to it? A. Yes.
270 Q. So even the deeper you go in the mine, you still do not man handle it, it is moved by equipment to get it into the trucks? A. Into the cars, yes, sir.

Q. And then how are the cars operated to the surface? A. Well, we pull them with a locomotive.

Q. You have a steam locomotive? A. No, sir, it is electric.

Q. You have an electric locomotive? A. Yes, sir, it goes in the mine.

Q. So you use the electric locomotive to put it out to the surface? A. Yes, sir.

Q. When you get it to the surface, what disposition do you make of your coal? A. We dump it by hand into the coal chute.

Q. Now how many men do you work in your mine? A. You mean now?

Q. Yes. A. Well, there will be about, roughly from 60 to 65.

Q. And you are operating with 60 to 65 men?, A. Yes, sir.

Q. You are not operating under any collective bargaining agreement with the United Mine Workers, are you?

271 A. No, sir.

Q. How long have you operated and you used 60 to 65 men? Before I get to that, would that be about the average number you have used over the last three or four years? A. No. sir.

Q. Tell us about the progress you have made in the number of men you have used. Has it been up or down? A. Well—

Q. You don't need to be exact. Just give us an approximate number. A. Well, let's see. You mean since '55?

Q. Yes. I mean since you had the little difficulty up there. A. Well, I would say that the increase has been fairly steady and, however, in 1960 I worked two shifts continuously in 1960 and part of the time a third shift.

Q. When you operate two shifts, do you operate on eight hour shifts? A. Yes, sir.

Q. So with this non-union mine you operated in 1960 on two shifts of about 30 men on a shift? A. No, sir. Well, it would be about 20 men.

Q. Twenty men on a shift, and you operated—when you operated on three shifts, that would be around the clock? A. Yes, sir.

Q. How many days a week did you operate? A. In
272 1960?

Q. Yes, when you were operating three shifts. A. Well, we would operate—well, let's see, we were down some along in the spring of the year. Well, when the season is good, we have been working six days.

Q. You worked a six day week, three shifts a day, 20 men to the shift. Am I about right or am I wrong? A. Well, that is about right.

Q. That is about right. You have already testified, I believe this morning, that you didn't recall how long it was prior to the time of this difficulty in April of 1955 that you talked to Mr. Daniel. I want to read a question and answer which I think comes from your previous testimony. It does come from your previous testimony. And see if it refreshes your recollection. The question was asked Mr. Van Huss, "Had Daniel talked to you before?" And you answered, "Yes, sir."

"How long prior to this?

"Well, roughly close to two years. Never since."

No. "Roughly close to two years."

Does that refresh your recollection any?

A. Well, how long would several months mean? I am trying to tell the truth, you know. I don't want to say several years.

273 Q. You still won't say—of course, when you testified before it was much closer to the time of the occurrence than it is now because this testimony was three or four years ago and, of course, your recollection was better. You don't recall now whether it was two years or several months, but you do know it is several months?

A. I would rather say several months to be—

* * * * * * * * * *

Q. By the way, when he did approach you, was that at the same mine?

A. No, sir, it was just across the holler.

Q. You had moved to a new location?

A. Yes, sir.

(Witness excused.)

* * * * * * * * * * *

274 RAYMOND E. PHILLIPS

a witness called by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Rowntree:

Q. What is your name, sir? A. Raymond E. Phillips.

Q. You are a defendant and cross-claimant in this case? A. Yes, sir.

Q. Where do you reside, Mr. Phillips? A. I live at Helenwood, Tennessee.

Q. Where is that near? A. That is about seven miles south of Oneida.

Q. In Scott County? A. Scott County.

275 Q. Are you a native of that section? A. Yes, sir.

Q. What did you do for employment before World War II? A. Well, I worked as a machinist and mechanic.

Q. Did you spend all that time over at Scott County? A. No, sir, I worked in Indiana and I worked in Tennessee and I worked in Pennsylvania.

Q. What did you do in Pennsylvania? A. Well, I worked for the Baldwin Locomotive Works.

Q. Were you a member of a union there? A. Yes, sir.

Q. Did you attend night school up there? A. I did.

Q. What kind of school? A. Diesel engineering.

Q. When World War II came along, what happened to you? A. Well, I was drafted in the service.

Q. Air Force? A. Yes, sir.

Q. Were you in mechanical work in the Air Force? A. Well, they first sent me to school to be an airplane technician, which is a mechanic and flight engineer.

Q. Did you become a flight engineer? A. I did.

276 Q. Did you later become a line chief? A. Yes, sir.

Q. What is that job? A. Well, it is actually a master mechanic which has a crew chief and a flight chief under you. My job was to take charge of the flight of aircraft, keep them in flying condition.

Q. How many aircraft did you have on the line that you had charge of? A. I had 86.

Mr. Kramer: I object to this. I don't see that it is prejudicial, except that it is immaterial. We are taking up time, building up the record. If it has materiality, counsel can show it.

Mr. Rowntree: We will go on.

By Mr. Rowntree:

Q. What did you do after the war? A. Well, I came back to Tennessee and started a used car business, garage business.

Q. Just tell briefly what you did from there up until the time you got in the coal business? A. Well, chiefly in garage business. I was servicing, oh, diesel equipment was kind of new in our part of the country and I was about the only one that knew anything about diesels. I was more of a

277 diesel serviceman as well as an automobile mechanic. Until we got into the coal business. Q. Did you have a garage over in Scott County? A. We did.

Q. Did you do mechanical work there? A. Yes, sir.

Q. Is that where you had your trouble with your eye? A. Yes, sir.

Q. Was that an accident that occurred in the garage there? A. It did.

Q. Now when did you start in the coal mining business? A. I am not sure of the date, without going and digging out some old records, but I believe it was 1950, to the best of my knowledge.

Q. And who did you start in business with? A. Me and my brother.

Q. What is his name? A. His name was Burse Phillips.

Q. And the two of you organized the partnership in or about 1950? A. We did.

Q. What kind of coal mining did you do? A. Strip mining.

Q. Whereabouts? A. We started in Scott County,
278 a little place called Glen Mary, Tennessee.

Q. And how much did you and your brother invest in this coal mining business? A. Well, we had invested eighteen thousand dollars.

Q. In 1953, did you organize this partnership between you and Burse and James Pennington? A. We did.

Q. What did you do with the equipment that you had in the previous operation? A. Well, some we traded in for better equipment, and some we still used in the new operation.

Q. Did Mr. Pennington make a contribution to the capital? A. He did.

Q. How much? A. Nine thousand dollars.

The Court: How much?

The Witness: Nine thousand.

By Mr. Rowntree:

Q. Is your brother Burse living or has he died? A. He died last July.

Q. Now this nine thousand dollars of James Pennington, how did you arrive at that figure for him? A. Well,
279 we figured up what we had in our equipment that my brother and I had purchased, and it come to eighteen thousand dollars, so we figured to make him an equal partner, why he would have to put in as much as we had in it.

Q. And did you all employ some additional employees after you started up this partnership? A. The three of us?

Q. Yes. A. Well, in a short time after we formed this partnership, why we had around seven, eight employees. I wouldn't know exact without going back and checking the old records.

Q. You worked up over a period of time? A. We did.

Q. Several months? A. Yes, sir.

Q. Now where did you operate this new partnership? A.

Well, it's a little place called Pioneer, Tennessee, in Campbell County.

Q. I believe that is on the map over here of Campbell County. You have seen that map, Exhibit One? A. Yes, sir.

Q. And you started there in 1953? A. In July of '53.

280 Q. July of '53? A. Yes, sir.

Q. Did you have a railroad tipple? A. We had a railroad crushing plant and a loading point.

Q. You could load on the railroad cars at this crushing plant? A. That's right.

Q. Was that on a siding of the Southern Railroad? A. It was.

Q. How far from Pioneer? A. Oh, I imagine—oh, a mile and a half or two miles.

Q. And did you have a separation plant? A. We did, separating tipple.

Q. What kind of tipple would that be? A. Well, it's where you would put your coal in that's run of mine, and separate the block and egg and steam, make three grades of coal.

Q. Now, how did you transport the coal from the stripping pit to the respective loading points or tipples? A. By truck.

Q. Did you own the trucks? A. No, sir, we did not.

Q. Did you lease trucks, or how did you engage the

281 trucks? A. We hired the trucks and paid them so much a ton to haul the coal from the pit to the tipple, or to the loading point whichever—wherever we wanted to load it at that particular time.

Q. Then approximately how many trucks did you require in normal operation? A. Well, anywhere from six to ten, the days that we would operate.

Q. Now when you started up there at Pioneer with this new partnership, did Mr. Daniel come to see you all? A. He did.

Q. Did you see him yourself there at the mine? A. No, sir, I did not. My brother told me that he had visited him on the mountain.

Mr. Kramer: Of course, Your Honor, that would be objectionable as hearsay.

The Court: Yes, that would not be competent, that would be hearsay.

By Mr. Rowntree:

Q. Well, for some reason, did you and your partners discuss the signing of a collective bargaining agreement with the United Mine Workers? A. We did.

Q. What was the reason for that discussion?

282 Mr. Rowntree: May I ask that, Your Honor?

The Court: Yes.

The Witness: We had heard rumors and had been reading the paper—

Mr. Kramer: Just a moment, Your Honor. We object. I though you meant discussed it with a representative of the UMW. He's talking about discussing it among the partners themselves. We object to that as being hearsay and incompetent.

Mr. Rowntree: My question is, did they discuss this among themselves.

The Court: I think they can state the reason, but what they said would be hearsay testimony, and is not substantive proof of the truth of what was said, but it may go in the record of this union question that appears to be involved in the lawsuit. Go ahead.

The Witness: Well, the discussion between the three of us was we had been notified that we had moved into Campbell County—

Mr. Kramer: Of course, if Your Honor has ruled it is competent, I don't want to keep objecting, but he said they had been notified, and that would be hearsay.

The Court: The Court rules that that would not be substantive evidence to prove the fact they were noti-

283 fied, but it is competent as bearing on the question of what this partnership did, if anything, as a result of such alleged information.

Mr. Kramer: And Your Honor, I take it, intends also to limit it that it would not be competent evidence of the facts or claimed facts of which they were informed?

The Court: I have so ruled twice. It is not substantive evidence to prove what they heard was the truth. In other words, it would come within the hearsay rule and would not be competent, but it is competent as bearing on the question of what was done by this partnership, if anything, in relation to the UMW.

By Mr. Rowntree:

Q. Go ahead, Mr. Phillips. A. Well, we was very much worried about the United Mine Workers due to the fact that they was making a drive through Kentucky about that time for—a membership drive—and we was afraid that they was going to make a drive through our county. In fact, that was the rumors that we had gotten.

Q. Did you discuss this with anybody else? Don't say what was said, did you discuss it? A. Yes, we did. I did. I discussed it with my father-in-law, who was an active
284 member of the United Mine Workers.

Q. Did you—what did you decide to do? A. We decided we would either have to quit or join the union, and we couldn't quit because we had all of our money invested, so we decided we would have to join the union.

Q. Did you sign a contract? A. Signed a contract, yes, sir.

Q. Did you have a meeting with Mr. Daniel subsequent to that? A. We did.

Q. Where did this occur? A. It occurred at Caryville, Tennessee, by the side of the lake under a tree.

Q. And what was the substance of that conversation? A. Mr. Daniel told Mr. Pennington and myself that he had let us move into Campbell County—

Mr. Kramer: Before we hear this, Your Honor, I was asking counsel a question.

By Mr. Rowntree:

Q. Fix the aproximate time of this meeting at Caryville. A. It was in the morning, before noon—

The Court: He wants to know about the month and
285 the year.

By Mr. Rowntree:

Q. What date, as near as you can give it. A. I believe it was sometime in August of 1953.

Q. And give the substance, generally what was said at this meeting. A. Well, the substance was that he told us that he had let us move into Campbell County and get set up, and now it was time we had to join the union and sign a contract, so I explained to him that we was just a new company starting out, and I didn't think that we could pay the scale labor, whatever it was, or the forty cents a ton to the welfare fund, and operate. Mr. Daniel told us if we would sign a contract that we could work out our own working arrangements with our employees and pay whatever we could to the welfare fund, and he would take care of us.

Q. Did you all go back and talk to Burse after that? A. I told Mr. Daniel that we couldn't tell him anything definite that day, because we would have to talk to our other partner, and we would let him know.

Q. And did you talk to Burse later on? A. We did.

Q. What did you all decide to do? A. We decided, under those conditions, we would sign the contract.

286 Q. And did you yourself sign it? A. No, sir, I did not.

Q. Did Mr. Pennington sign it? A. Mr. Pennington did.

Q. Were you present? A. No. sir, I was not.

Q. Did Mr. Daniel make any statement to you that the union represented the majority of the employees of your company? A. He did not.

Q. Did any employee of your company speak to you with respect to your signing a United Mine Workers contract? A. They did not.

Q. Do you know of your own knowledge that any employee you had was a member of the union? A. To my knowledge, there wasn't any that belonged to the union.

Q. Now in April of 1955, before that, did you make any change in your wage scale after signing the contract? A. No, we did not.

Q. Did you talk to your men about signing the contract? A. We did not.

Q. Did you make any payments on the welfare fund? A. We did.

287 Q. How many payments did you make? A. I really don't remember without going back to the records.

Mr. Rowntree: I believe, Your Honor, that is included in the stipulation.

The Court: Yes.

Mr. Kramer: It is, Your Honor. It is already in evidence.

By Mr. Rowntree:

Q. What kind of wage scale were you paying? A. Well, on common labor, I mean hand labor, I believe we started out at a dollar an hour. Of course, the operators made more money.

Q. How much? A. I don't recall exactly. To the best of my knowledge, we was paying two dollars and a quarter for shovel operator.

Q. And what about a bull dozer operator? A. I think—I'm pretty sure we was paying bulldozer operators at that time, experienced bulldozer operator, two dollars an hour.

Q. Are all of the records with respect to the payments you made, they are in the records of the company? A. They are.

Q. Does opposing counsel have copies of all of
288 those records? A. They should have, I think they have.

Q. Did you advance men in their wage scale from time to time? A. We did, as they would—if we had what we call a day laborer and he wanted to learn to run a piece of equipment, as he would learn to operate, we would advance his wage scale.

Q. And did you have several men who took advantage of

that? A. We did.

289 Q. What kind of men generally did you employ with respect to skill when they first came to your company? A. Well, be shovel operator or bulldozer operator.

Q. Did you employ any men without experience? A. As operators?

Q. No. As employees. A. Sometimes.

Q. And did several of those men become experienced operators? A. Yes, sir.

Q. State whether or not you asked a prospective new employee whether or not he was a member of the United Mine Workers? A. I did not.

Q. Now in April 1955, give us, briefly, what you know about what went on there from what you saw, from what you heard with respect to what was going on in the coal field.

Mr. Kramer: Your Honor, we are starting a new field and it is about mid-morning. Could we take the mid-morning recess?

The Court: Yes, sir. Take a recess.

(A short recess was had after which the following proceedings were had in the presence of the jury.)

By Mr. Rowntree:

290 Q. Mr. Phillips, looking at the records, company records you have in front of you to refresh your recollection as to who the employees of the company were in the first week of October, 1953—by way of explanation, your Honor, that is the time the contract was signed. A. October what date?

Q. I think that week ends October 3, 1955. A. Yes, sir.

Q. I mean '53. A. Yes, sir, I have it here. We had eight hourly employees.

Q. And who were they? A. Fred Burnett, Palmer Van Huss, Lawrence Dupee, Levy Harness, Floyd Buttram, Arlow Hutson—

Q. H-u-t-s-o-n? A. H-u-t-s-o-n. Richard A. Hutson.

Q. Same spelling? A. H-u-t-s-o-n. Ewell Phillips.

Q. Now how many of those are still employed by the present corporation? A. Ewell Phillips, Richard A. Hutson.

Q. Is that all? A. That was all that was on the payroll in October of '53.

Q. Now with respect to Mr. Fred Burnett, and
291 there is another name that will be available for testifying here? A. Yes, sir.

Q. Who is that? A. That would be Ralph Phillips.

Q. Is he on the list, Ralph? A. I don't believe he came with us until a little later date. I can check on when he—

Q. Let me look at it A. There is something wrong. He signed up the same time they did.

Q. Mr. Fred Burnett will be available? A. He will be.

Q. Mr. Arlow Hutson, is he still employed? A. He is not.

Q. But he is available? A. He is available.

Q. Mr. Richard A. Hutson, is still employed? A. He is still there.

Q. Mr. Ewell Phillips still employed? A. He is still employed.

Q. All right. With respect to the other four did you know any of them over a long period of time? A. Lawrence Dupee had worked for me for several years.

Q. Do you know of your own knowledge whether he
292 was a member of the United Mine Workers at that time? A. To my knowledge he was not. He had never mentioned it or we had never talked about it.

Mr. Kramer: Just a moment. Your Honor, that "to my knowledge" is so indefinite. If he means "I do not know" that is one thing, but "to my knowledge he wasn't" may mean he is stating positively he was not a member. I think we are entitled to know what his answer is.

The Court: Yes. Can you tell them—can you be a little more plain with your answer, little more comprehensive?

The Witness: If they was a member of the United Mine Workers they never did tell me.

Mr. Kramer: Of course, hearsay testimony, whether they told him or not. It wouldn't be competent. But if he means

"I do not know", and I take it that is what the witness means.

The Court: Is that what you mean?

The Witness: Yes, sir.

Mr. Kramer: All right.

By Mr. Rowntree:

Q. Did you have any reasonable cause to believe that they were members of the United Mine Workers? A. I did not.

Mr. Kramer: I think that is objectionable, "rea-
293 sonable cause to believe" they were is not proof whether they were or were not, and I don't think that is competent for any purpose and I object to it.

The Court: I do not know the purpose of the question. What is the purpose?

Mr. Rowntree: We are getting into the applicability of these labor laws on the contract, and the—there is a case, I think I cited to your Honor, with respect to an employer signing a collective bargaining agreement without the majority of the employees being members or having authorized the union to deal for them, and it is in that area this proof bears upon.

The Court: Well, are you trying to find out from him whether these people were or were not members of the United Mine Workers?

Mr. Rowntree: I am trying to find out whether he had reasonable cause to believe that they were.

The Court: Well, he may answer if he can.

By Mr. Rowntree:

Q. Did you have any reason to believe that they were?

Mr. Kramer: Subject to our objection.

The Court: All right.

294 A. No.

Q. Will you look at your records there and refresh your recollection as to who were employees there in April, 1955? A. Had Fred Burnett, Richard A. Hutson, Willard Goad—

The Court: Who?

The Witness: Willard Goad.

A. (Continuing) Lloyd Dale, Ewell Phillips, Arlow Hutson, Ralph Phillips.

Q. Is that all? A. That is all. That was my employees in April of 1955.

Q. Now in early 1955 did you have bad weather? A. We did.

Q. Did you close down operations? A. We closed down our hauling. Road conditions were so we couldn't haul.

Q. Then what did you do about the equipment, was it in use for some purpose? A. We stripped for, oh, quite a while during the winter months when the weather permitted. We uncovered coal.

Q. You uncovered coal? A. Yes.

Q. Did you load the coal? A. Not at that time; no, sir.

295

Q. Beginning of April 1955, was that your situation with regard to your operation? A. That's right.

Q. What was the condition of the weather in early April? A. We was dressing off a road getting ready to haul.

Q. You heard the testimony of Mr. Jack Shattuck. Did you see him on April 6, 1955? A. I did.

Q. What did you do with respect to your operations on that date? A. After talking to Mr. Shattuck I shut our operation down.

Q. Was your operation down on April 11, 1955? A. It was.

Q. What occurred on that date? A. Well, there was a large group of men came to the tipple.

Q. Just say what you saw with respect to this incident?

Mr. Kramer: For the reasons heretofore given, your Honor, this testimony is objected to.

The Court: Same ruling.

296

A. You want me to go ahead?

Q. Go ahead. A. I was down the highway about a mile that morning for a cup of coffee when I noticed a convoy going by the restaurant. So—

Q. Mr. Phillips, will you go to the map over here so that we can better understand your testimony. A. All right, sir.

Q. This is Exhibit No. 1.

The Court: Give him the pointer, Mr. Marshal, please.

Q. (Continuing) I would like first to ask you, Mr. Phillips, is that the map, has there been any change in the area since the publication of this, map, April 1940? A. Yes, sir, there have been.

Q. What is that? A. The old road going from Pioneer, here, across Stinking Creek, has been changed, and a new road turns off here at what we call Titus Creek and goes up across and comes out in the gap of this mountain right here, and cuts out this part of the mountain here.

This road hasn't been used several years. The new road now goes from the mouth of Titus Creek Hollow up and joins this Stinking Creek road just on top of the mountain.

And the new aerial map that is out now shows this
297 road. It doesn't even show this old road.

Q. That road that you have referred to, does that connect over with the Lafollette to Jellico highway? A. This road turns off here at Titus Creek goes across and hits into the head of Stinking Creek, and comes on out into Highway 25 north of LaFollette, between LaFollette and Jellico.

Q. Now point out where you were when you saw this caravan. A. I was about a mile and a half south of Pioneer in a little cafe. This caravan came up this highway from towards Titus Creek, up Pioneer, and my tipple is located on top of the mountain or at Pioneer on the highway.

298 Q. What did you do when you saw those? And you can resume your seat.

(Witness returned to the witness stand.)

A. Repeat the question, please.

Q. What did you do when you saw this caravan? A. Well, as soon as they got by till I could get to my pick-up, I followed them up the highway to see where they was going.

Q. And where did they go? A. They went to our tipple.

Q. What did you do? A. Well, I drove in to see what they wanted.

Q. How many men were there? A. It would be hard to say. There was quite a number of them.

Q. And your operation was closed down at this time? A. It had.

Q. Can you estimate how many men were there? A. Somewhere between—I would say somewhere in the neighborhood of 50 or 60.

Q. How many automobiles, or did you count them? A. I didn't count them. It would be hard to estimate because my yard was full and they was parked all up and down the highway.

Q. Could you tell from license plates where the cars
299 came from? A. I noticed particularly several cars had 49 county tags on them.

Q. Tennessee? A. Yes, sir. And there was some pick-up trucks in the bunch.

Q. Now was there anything said on this occasion and just state what happened? A. There was. They seemed to have a spokesman that done most of the talking. However, there was several in the group that was talking and cursing, talking pretty mean to us.

Q. You say "us". Who do you mean? A. Well, referring to the company.

Q. Were you there with anyone else besides yourself? A. Well, I was the only one of the company there. However, there was some ladies in the little shack that we had built there close to the tipple.

Q. The, are relatives of yours? A. Well, the old lady was my aunt and the other lady was the wife of our shovel operator.

Q. But they weren't involved in this discussion? A. That is right.

Q. They were in the house? A. That is right.

300 Q. Can you tell us just what happened? Go on.

A. Well, the spokesman of the group said they had

come there to shut us down and if there wasn't enough in that bunch to do it, they had plenty more waiting down the road. I explained to them that I had already shut down and I also told them that we had signed a union contract, but they said that didn't make—I hate to tell just what they did say. They cursed and said it didn't make no difference whether I had or had not signed one, contract, that they was out to shut everybody down and was going to keep them down until they made everybody join the union, and they give us orders not to go back to work until all of our employees joined the union and until they come back and notified us.

Q. Did they leave after that? How long were they there? A. I imagine about 15 or 20 minutes.

Q. Later on did you discuss this with the people of the company and the partners and employees? A. I did, as soon as I could get in touch with them.

Q. Did you stay down? A. Yes, we did.

Q. What did you finally do and when? A. Well, several days after that—I don't remember just what day it was—why—

Q. Pardon me. Can you place this day with reference to the incident of the John Van Huss mine? A. I can.

301 Q. What day was it with reference to that? A. It was April 11.

Q. Were both instances the same day? A. They was.

Q. What did you start to say about what you did later on and when? A. Well, it was a few days later—I don't remember just the exact date. We decided to go to Jellico and see Ed Daniel.

Q. Did you go? A. We did.

Q. Who went? A. It was my brother and Mr. Pennington and myself.

Q. State what happened at Jellico. A. Well, we drove down in Jellico and saw Mr. Daniel on the street, so we parked and contacted him and we all went around in a little alley there for a discussion. I asked Mr. Daniel why the

mob or this bunch of men came to our mines. Mr. Daniel said, "Well, you don't expect us to let you run, and you are behind on your welfare and not a man that you have belongs to the union." So we asked him then what would be the best for us to do. And he directed us to go to Middlesboro and talk to the president at Middlesboro.

302 Q. Did you go to Middlesboro? A. We did.

Q. Who did you see over there? A. Mr. Albert Pass, who is the secretary-treasurer.

Q. What is this Middlesboro, what do they have there? A. That is the district office of the United Mine Workers, District 19.

Q. District 19. Who is Mr. Albert Pass? A. He is the secretary-treasurer, District 19, United Mine Workers.

Q. And what was said there? A. Well, we told Mr. Pass about the mob or this group of men visiting us and we had been to see Mr. Daniel, and he directed us over there. Mr. Pass told us that if we would have all of our men to join the union and pay our back welfare, that we could go back to work. And if we had any more trouble, to contact him and he would personally come over there and straighten it out. And he told us that he would send one of the field representatives to us in a day or so to sign up our men.

Q. Was the incident of the gang of men discussed in that conversation? A. It was. We told him about this gang of men visiting our mines.

303 Q. Did Mr. Daniel and Mr. Maddox later come to your tipple? A. They did.

Q. Do you know how that was arranged? Do you recall specifically the arrangements? A. I don't remember how we was notified, but they—we was notified to have all of our men there at a certain day, that they would be there. I don't remember whether it was by letter or by messenger. That is one thing I just don't remember.

Q. Did you have all your men there? A. We did.

The Court: Where? Have all your men where?

The witness: We had all of our men at our tipple.

By Mr. Rowntree:

Q. And what happened at that time? A. Well, I don't know much about what went on that day because they wouldn't let me in the meeting. They said everybody had to sign up but me.

Q. Why not you? A. Well, they said there had to be one boss and I was the only one that had mining papers.

Q. Did they have a meeting? A. They did.

304 Mr. Kramer: As I understood the witness, may it please the Court, he wasn't at the meeting and he is testifying what was said in the meeting. I don't know whether he meant what was said to him before or not,

Mr. Rowntree: Let me ask him.

By Mr. Rowntree:

Q. Was this statement made in your presence at that time with these people present about who had to join and who didn't? A. No, sir, not in my presence.

Q. It was not in your presence.

Mr. Kramer: I move to strike this evidence.

The Court: Sustained. The motion to strike is granted.

By Mr. Rowntree:

Q. Were you there? A. I was there.

Q. Did you participate in the meeting? A. I did not.

Q. Did you see the others who did participate in the meeting? A. I did.

Q. Was Mr. Burse Phillips in the meeting? A. He was.

Q. Was Mr. James Pennington in the meeting?

305 A. He was.

Q. How far from this meeting place were you? A. I judge about 50 yards. I was in the scale house and they met in our shack.

Q. The other employees were there in the meeting? A. That is right.

Q. State whether or not Mr. Daniel and Mr. Maddox were also in there? A. They was.

Q. Subsequent to that, did the employees—did the employees present checkoff cards? A. How's that?

Q. Subsequent to that meeting—when was this meeting? A. I believe it was the 25th of April.

Q. 1955? A. 1955.

Q. And subsequent to that meeting did the employees present union checkoff cards? A. They did.

Q. Was this the first time you had received union checkoff cards from any employee? A. That is right.

Q. Did all of them present cards at that time? A. They did.

306 Q. And do your records reflect when the company started checking off dues to the men? A. They do.

Q. Do they show when the first union checkoff dues were paid to the union? A. Yes, sir.

Q. Can you give us the date of that?

Mr. Kramer: Your Honor, I am going to object to any further testimony along this line for the reason that this deals only with an issue, if it be an issue, over which this court has no jurisdiction. The question of the membership and getting into the membership and becoming members is a matter within the jurisdiction of the National Labor Relations Board and has nothing whatsoever to do with this trial. It doesn't raise any issue in this case and it could be prejudicial. We object to any introduction of any of this testimony because it relates to an issue wholly outside violation of the Sherman Anti-Trust Law.

The sole jurisdiction with reference to an unfair labor practice, if anything at all, is what this would amount to, and under the federal acts, the sole jurisdiction with reference to an unfair labor practice is in the National Labor Relations Board and its agencies, and it cannot be a part of and is not a part of any anti-trust violation, and

307 we object, your Honor, to the introduction of this testimony.

Mr. Rowntree: If your Honor please, of course we have contended long and vigorously throughout the whole period of this case that the central part of this conspiracy, the effective instrument is the National Bituminous Coal Wage

Agreement, the method of imposing that contract on small mines, regardless of the will of the employees of the small mines.

We are showing how that phase of the conspiracy bore particularly on this coal company, part of this case. The development of why the union clause was in the contract.

Here we have an instance of this particular company, of the union getting a contract from the company, a contract with the union shop clause in it and then enforcing that union shop clause, even though before that it had nobody to represent in that company.

This is the method by which the conspiracy has been perpetrated on the small companies, and this—

Mr. Kramer: May I interrupt counsel just a moment?

Your Honor, we are at an issue that is far-reaching and material and raising legal questions that is going to call for substantial discussion. I really feel this ought
308 to be out of the presence of the jury, and I move your Honor, that this discussion on the admissibility of this type of proof be granted outside the presence of the jury.

The Court: All right, let the jury be excused.

* * * * * * * * * * *

309 Mr. Rowntree: Now, if Your Honor please, we have got a mass of proof, union records, from depositions of Mr. Lewis, Mr. George Love, president of Consolidation, we have developed to a high extent, we believe, the reason for the presence of the union shop clause in these contracts, the reason for the control of the welfare fund by the union. We say these things were necessary in order to dominate the industry, to enforce the uniform terms upon the small mines that they could not have been imposed upon the small mines any other way.

I think that that is perfectly obvious, and the whole plan and pattern, the conspiracy was to evade these—the labor statutes in a conspiracy in restraint of trade. Behind these

labor law violations and evasions was a conspiracy in restraint of trade, and that, too, we have developed by a mass of proof and documents. And one—this is just the essential link in the whole thing, because it shows how it bore on this particular company.

The Court: Well, does this proof have a bearing on the UMW phase of the case or on the trustees' phase of the case.

Mr. Rowntree: I would say that this bears particularly on the union's phase of the case.

310 The Court: The Court recognizes the difficulty in trying to try these cases at the same time. They should have been separated, and the Court wanted to separate them. The Court was advised that these operators just did not have the finances to go through two suits, and by reason of that advice, which the Court knows is correct, because it was stated by Mr. Rowntree in the presence of Mr. Rayson, and this was the reason that the Court consented for these cases to be tried at the same time for the reason that the Court felt that these operators might be deprived of a day in Court unless the Court consented to try these two phases of this litigation at the same time.

It would have been much more simple to the parties, much more simple to the Court, if we could have tried the trustees' phase of the case as one case separate and apart from the United Mine Workers phase of the case, but we are in both cases at the same time, and the Court has to do the best in can in ruling on this testimony.

Mr. Rowntree: Let me make one further comment, Your Honor. I didn't mean to imply that this had nothing to do with the trustees' case.

We have a case here that deals with the validity of the contract under the conspiracy in restraint of trade, and certainly this does bear upon the imposition of such

311 a contract upon this small company to put it and its employees out of business, and this is still part of that, because how did this company come to have a bargain-

ing agreement like this? Was it by the normal operation of the labor laws? No. We say that it was not by normal operation of the labor laws, that the way it came about was part of the conspiracy, the conspiracy to evade those laws so that these contracts could be imposed upon the small mines.

The Court: Well, the difficulty with that, Mr. Rowntree, is that that is an unfair labor practice, what this witness testified about. Now if it is an unfair labor practice, it is a matter for the National Labor Relations Board, and not this Court. This Court just cannot try these unfair labor practices, because it wasn't set up for that purpose.

Mr. Rowntree: Your Honor, we are not charging an unfair labor practice, we are saying that the anti-trust laws can be violated by all kinds of things, legal means and illegal means they used to evade—it is an illegal means that they used to violate the anti-trust laws, the conspiracy forcing the small mines out of business.

312 The Court: I get your point, Mr. Rowntree, but now how does it fit into the conspiracy, first insofar as the trustees are concerned, and then after you explain that to me, how does it fit into the conspiracy insofar as the UMW is concerned?

* * * * * * * * * * *

Mr. Rowntree: If Your Honor please, we say that the anti-trust law, a contract that violates the anti-trust law is illegal. The Court will not enforce a contract on the trustees' suit where the very enforcement of it will violate the anti-trust law. We say that the enforcement of this contract is a part of the plan to impose the contract upon the small operators, and then put them out of business, and that is exactly what is being done here.

The Court: Well, how does that fit into any conspiracy? It may be that which was done was illegal and wrong, but the Apex case holds the plaintiff's wrongdoing and things of that kind do not enter into the picture as to whether the union violated the Taft-Hartley Act. Now certainly violence

alone would not enter into the picture as to whether
313 either the trustees or the UMW violated the anti-trust laws.

Now tell me how it fits into your picture or your contention with respect to the violation of the anti-trust laws.

Mr. Rowntree: That, of course, is part of the bigger picture. As Mr. Robertson pointed out a while ago, you have got to start somewhere, and start picking out the toothpicks from the pile. We have a lot of proof, a mass of proof, on the relations between the coal companies—the major coal companies—and this union, and the reasons for this tying up of the union with these big coal companies and the reason for the inclusion of certain terms in this contract, and the enforcement of a nuion shop clause, just like this case.

All of those things were done because of the tie-up between the big companies and the union in 1950.

The Court: Well, but now, I can't understand why a big coal company, or a little coal company, would be interested in a union clause or non-union clause. The operators, how are they interested in those matters?

. . . . . .

314 Mr. Rowntree: Because they want this contract imposed upon the small companies. The proof will show that they and the union knew that the small companies couldn't pay it. The proof will show they knew that the small companies would go out of business. The proof will show that that was part of their plan and purpose, and they wanted that union shop clause in there, because it facilitated, it was necessary in order to control these men and keep them in line and make them members of the union, even though they had no say so whatsoever about it, because they wanted this contract imposed upon the small coal companies, and here we have a typical example of why they were able to do it, and how they would manage to get around the law.

The law says that the employees themselves will have this choice of whether they will sign a contract or not, and these employees, it's obvious, had no choice whatsoever. The law

is specific that it is up to the employee, and how in the world could they impose this contract on the small company if they followed that law?

The Court: All right.

Mr. Kramer: Your Honor, because this is reach-
315 ing clear across this lawsuit, Mr. Combs is going to talk for Mr. Rayson and myself.

The Court: All right.

Mr. Combs: May it please the Court, in the first place, counsel was talking about the enforcement of a contractual provision that the Court says does not constitute — the Courts, Courts of Appeal—does not constitute a union shop clause at that time.

The union doesn't claim that it had a union shop clause in effect at the time of this lawsuit. In the case of the Fentress Coal Company, and in the Quality Coal Company case and in the Peabody case, two of these cases by the Sixth Circuit that Your Honor is well aware of and one of the cases in the Seventh Circuit, and the Peabody Coal Company case on this clause, the Court held that the writing of that contract did not constitute a union shop clause.

That was the whole clause there, because if it did, it was concededly in violation of the National Labor Relations Act at that time. That clause in the contract in the manner and to the extent provided by law had to take into consideration certain things the union had to do before it could legally ask for the enforcement of that contract.

The Court: Mr. Combs, you are in closer touch
316 with those things than the Court. As the Court recalls in the Fentress case, Judge Miller held in substance that that clause wouldn't apply in Tennessee, because the Tennessee law forbade the union shop clause, and that the Court wouldn't assume that the parties to the contract would make a contract in violation of the law. Now, as I understand it, that was the holding of Judge Miller in the Fentress case.

Mr. Combs: Yes, Your Honor, that is exactly right.

The Court: That clause wouldn't apply.

Mr. Combs: In Tennessee.

The Court: In any state which had the open shop law or so-called right-to-work law, isn't that it?

Mr. Combs: That's right.

The Court: Isn't that what you mean?

Mr. Combs: That is correct. That is correct. That is exactly right, Your Honor, and what I am saying is just simply this, that all of counsel's contentions of during the time of this so-called conspiracy, the Court's have held and the union concedes to it, that they had no clause in the contract.

* * * * * * * * * * *

317 Mr. Combs: What do we have here when we keep talking about a union security clause? That the union was trying to force the employees of the mine to join a union against their will by virtue of that clause? What good did that clause do? You couldn't enforce it.

The Court: Didn't do any good in Tennessee according to Tennessee law.

Mr. Combs: And I might point out to Your Honor in the Peabody case, it didn't apply on the national level, because the union had not made the necessary reporting requirements nor had it held an election, so there is no claim whatsoever, and I want the Court to have that clear, that the union has made no claim at all that it had a union shop clause in its contract because it had not complied with the necessary requirements of having a union shop clause during the course of this lawsuit nationally or in Ten-

318 nessee.

What did he have here? Counsel is claiming that the union and operators were using something that wasn't true, I mean the clause of the contract, the implication being that they could enforce this clause. You couldn't enforce it in Court, and if you were going to do it by violence, like

they claim, to make the operator agree to it, the contract provisions had nothing to do with it. It was the violence they were using.

That is what they are trying to say here. They are trying to say a group of men went over and visited Mr. Phillips' mine to enforce the contract. There is nothing mentioned there that they said to Mr. Phillips, "You signed a contract that had a union shop clause."

319 So I can see no possible application of that clause, what he is talking about, and when you get to the bottom of this thing, and when you get to the clause, when you get to the heart of this question.

In the first place, under the Anti-trust Act, its violation had nothing to do with the Act. Secondly, concededly the Labor Board had jurisdiction of unfair labor practices of this kind. This is not a tort action or a claim. So the Board has complete jurisdiction of that, whether they are being coerced into joining a union or not.

And it just seems to me that we are getting into a situation here that if we are going to raise the question of whether it is legal or illegal, the union shop clause, or whether it is legal or illegal domination of the employees to try to make them join a union, that we are going to be trying an unfair labor practice here. Because I think we have a right to respond to any such claim and go into it. That is not the function of this court and I don't think it should be.

* * * * * * * * * * *

322 The Court: Do you not agree with Mr. Combs that under the Fentress Coal case that this clause which you refer to as a union clause, is not applicable to Tennessee because Tennessee has a law that is an open shop law and it would not apply to Campbell County, would it?

Mr. Rowntree: It would apply against this coal company, your Honor. That enforced something.

The Court: How could it apply if it was against the
323 Tennessee law? I had one of these cases right here, this iron company in Knoxville, and I held that—it

is a reported case—that a contract which embodied a union clause was illegal in Tennessee and it was not enforceable, and that case was not appealed. I held that that contract, because it provided for a union shop, was not enforceable.

Would not that rule of law apply to this situation in Campbell County?

Mr. Rowntree: The rule, I believe in your case was, that the union shop had some illusory language in it, and you held the illusory language cannot waive the fact that the clause violated the law.

The Court: Yes.

Mr. Rowntree: And we say the same thing is true here. This clause has got some illusory language in it, and we have tried to develop in the testimony of Mr. Lewis and others what that language means and we haven't got a very clear answer, but here we do have a clear answer what it means.

The Fentress case did not go into the question of what it does mean with respect to the intent of the parties.

The Perry Coal Company case, the 7th Circuit,
324 does. In that case there was no effort to enforce it, and the Court points that out.

Here we have got an effort to enforce it—employees of the employers to join this union, and we say that is what this clause means—it is to be enforced.

Under the conspiracy, the legality of the clause is not the question. It is a question of the intent and purpose in putting that clause in there and how it was carried out in the field.

The Court: Well, the jury cannot go into the intent of the parties in interpreting the clause, I don't think. I think that would be a question for the Court, an interpretation of the clause.

Mr. Rowntree: We charge that they did intend to evade the statute and I believe the proof will be absolutely clear on this.

The Court: Mr. Combs, did you have something to say?

Mr. Combs: No, your Honor, except to say that I think

that the Court did interpret that language. That is what the whole thing was about, whether the language of that contract was in violation of this law, and I think all three courts went into that.

325 And again—I want to emphasize this again. I want to say this, that there is no evidence here that I have heard where a dispute has risen between a union and any of these operators as to the application of that union security clause that they are talking about.

There is no dispute about that. What they are claiming here is something to be an unfair labor practice and an illegal act of a group of men marching in on an employer and tell them they had to do something—not that they signed a contract and had to comply with it.

* * * * * * * * * * *

326 Mr. Kramer: Before the jury comes back, I want to state this. That the objection we make on behalf of the trustees, your Honor understands, is in behalf of the United Mine Workers.

The Court: I fully understand.

The Court: That goes both to the violence and the unfair labor practice claims.

(Whereupon, the jury returned to the jury box and the following proceedings were had in the presence of the jury.)

327 The Court: Members of the jury, alleged unfair labor practices upon the part of the union are not issues in this case. If any unfair labor practice was committed by the union during the period of time covered by this lawsuit, that will be a matter for the National Labor Relations Board and not for this Court or for this jury.

The question of whether or not violence was committed by the union, or whether violence was incited by the union, or whether violent acts were acquiesced in or encouraged by the union during the period of time involved in this lawsuit, is not an issue in this case for the Court or for this jury.

The Court is permitting testimony of this witness on what

allegedly occurred at the time he was approached, or allegedly approached, by Mr. Daniel and Mr. Pass and possibly other union representatives, and what followed as a result, or alleged result, of the meeting with these union men; the Court is permitting testimony to be given by this witness about what was done by the employees of his company with respect to signing the union contract, for whatever bearing such testimony may have, if any, on the question of whether or not either the trustees or the union, UMW, one or both,
328 conspired with one or more of the coal operators to restrain trade or to monopolize the coal industry in the Campbell County area.

Before there can be any recovery upon the part of the Phillips Brothers Coal Company against the United Mine Workers, the jury must find, first, that there was a conspiracy in which the United Mine Workers participated with one or more alleged conspirators.

329 Second, that pursuant to that conspiracy, one or more overt acts was committed by one or more of the conspirators, alleged conspirators, to restrain trade or to monopolize the coal industry.

Third, as a direct and proximate result of that alleged conspiracy and the alleged overt acts committed pursuant thereto, that Phillips Brothers Coal Company was damaged and the extent of such damage.

Unless this testimony has some bearing on this conspiracy question or the alleged violation of the anti-trust laws on the part of the trustees or UMW, one or both, then it will not be considered by the jury for any purpose.

The question of whether or not the language to which counsel on each side has referred to many times during the course of this trial, union protection language or union clause language, that is language that mandatorily required the employees of these coal operators to join the union, is not an issue in this case. The interpretation of that language is not an issue in this case, and the interpretation of it is not an issue for the jury. But the Court is permitting

this testimony to go into the record solely and alone for what bearing, if any, it may have on whether or not there was a conspiracy and whether or not that conspiracy
330 violated either Sections 1 or 2, or both, of the Sherman Anti-Trust Law.

Gentlemen, with that explanation, I will allow the testimony to go into the record.

* * * * * * * * * * *

By Mr. Rowntree:

Q. There was one question. That is the records do show when the union checkoff started and what date was that? A. It was May 12, 1955.

Mr. Combs: May 7?

Mr. Rowntree: May 12. A. That was for the month of April.

By Mr. Rowntree:

Q. That was for the month of April? A. Yes, sir, dues and initiation on the men.

Q. Now, Mr. Phillips, who kept the records of your company? A. Well, me and my wife.

* * * * * * * * * * *

331 Mr. Rowntree: We are offering the records to show the tonnage—these are the records on which we
332 stipulated the tonnage. We are putting them in for the amount of receipts on this tonnage by the company. We are putting them in to get the average price per ton for the years of the case. These, of course, are summaries—you can't look at any one figure in the book to show those things, but we have to put the basic stuff in to get these final figures.

* * * * * * * * * * *

337 Q. Are these copies of your partnership income tax returns received from the Internal Revenue Department for the period 1953 through 1958? A. They are.

Mr. Rowntree: We offer those in series, the first exhibit, 1953 tax return as Exhibit 13.

(Exhibit No. 13 was marked for identification and filed.)

Mr. Rowntree: 1954 as Exhibit 14.

(Exhibit No. 14 was marked for identification and filed.)

Mr. Rowntree: 1955 as Exhibit 15.

(Exhibit No. 15 was marked for identification and filed.)

Mr. Rowntree: 1956 as Exhibit 16.

(Exhibit No. 16 was marked for identification and filed.)

Mr. Rowntree: 1957 as Exhibit No. 17.

(Exhibit No. 17 was marked for identification and filed.)

Mr. Rowntree: 1958 as Exhibit 18.

(Exhibit No. 18 was marked for identification and filed.)

By Mr. Rowntree:

Q. Now, Mr. Phillips, who prepared your tax re-
338 turns? A. A lawyer in Oneida, Tennessee by the name of Guy Jeffers.

Q. Have you recently gotten into those records? A. We have.

Q. Did you discover errors on your tax returns? A. I did.

Q. What is the nature of your job with the Phillips Brothers Coal Company?

Mr. Kramer: Nature of what?

Mr. Rowntree: His job with the Phillips Brothers Coal Company.

A. My chief job is the mechanic for the company.

Q. What else do you do? A. Well, I am the manager of the company. I try to keep all the necessary stuff on the job for the operation.

339 Q. And you keep the books? A. And I keep the books.

Q. With the help of your wife? A. That's right.

Q. What job do you spend the bulk of your time on? A. As a mechanic.

Q. Do you have any other mechanics on the job? A. No, sir.

Q. Do you have much equipment on this job? A. Yes, I have quite a bit of earth-moving equipment.

Q. What is the nature of this equipment? A. Well, bull-

dozers, power shovels, and tipples to keep running, and our crushing plant.

Q. Your 1958 book, Exhibit 7, have you checked that book to determine whether it jibe by your tax return? A. Yes, sir, and it checks with our tax return.

Q. Your tax return figure, where was it taken? A. It was taken—

Q. For gross income. A. It was taken off of the royalty reports that we sent to the land company, which is listed in our book.

Q. And that book also contains the amounts received per ton? A. That's right.

340 Q. Both rail tons and truck tons? A. Both rail tons and truck tons.

Q. And are those figures accurate with respect to what you actually received? A. Yes, sir.

Q. And that figure was put into the income tax return? A. That is right.

Q. As gross income? A. That's right.

Q. Does that jibe with your deposits? A. No, it does not.

Q. Are the deposits less than your amounts received per ton listing? A. Yes, sir.

Q. And why is that? A. Well, sometimes we would ship direct and have to sign our payments over to a bank as a note.

Q. Did you have notes outstanding at that time? A. We did.

Q. And you do not receive the payments for the coal yourselves, but it would be— A. We would sign it over to the bank.

Q. And the bank would receive it? A. That's right, and as the note was paid off, then they would send us

341 the cancelled note.

Q. So is your tax return correct for that year, 1958? A. It is.

Q. Did you suffer a loss in that year? A. I sure did.

Q. Did you use that loss as a carry-back for tax purposes? A. No, sir, I did not.

Q. Why not? A. Well, by not being a bookkeeper, I didn't know anything about the carry-back law.

Q. In 1957, does your income tax figure jibe with the amounts received per ton for coal? A. They do—

Q. In your listing? A. They do not.

Mr. Kramer: May I ask the question, what does counsel mean by income tax figure? As shown on the return that was filed.

Mr. Rowntree: As shown on the return that was filed, which would be Exhibit 17.

By Mr. Rowntree:

Q. Where was the figure of gross income for 1957 taken, that year? A. It was taken from our bank deposits
342 which had included some money borrowed from the bank and money borrowed from my brother which we had put into the business, and it was added into our gross receipts as income.

Q. Can you list those figures from the book? A. Yes, sir. I have one right in front of me, says "Cash borrowed, $4,000.00"; cash borrowed from my brother, 382.47; and cash on note.

Q. How much. A. $4,387.00. I have another item, cash on note, $4,500.00.

Q. And that was put in your deposits for that year? A. It was.

Q. Was that figure put on your tax returns? A. It was.

Q. As gross income? A. It was.

Q. Was that amount of deposits which you put in the gross income greater than the amount which you received on tons of coal? A. It was.

Q. In 1956, have you checked in the absence of the 1956 book, the royalty reports, Exhibit Five, which you made to the land company to determine how that total amount re-

ceived per tons accorded to the income tax figure?
343 A. Let's see, according to our 1956 reports to the land company—

Q. I'm talking about '56, I think I said '55. '56 is what I am talking about. A. Yes, 1956. It showed less profit than what we actually found when we went through the book.

Q. Now have you checked the 1957—what was the amount of the difference there? A. In—

Q. 1956, the 1956 difference? A. $4,951.54.

Q. And have you checked the 1955 books in a similar manner? A. I did.

Q. And again was the gross receipts on tax return taken from your deposit account? A. It was.

Q. And was the amount received per ton greater than that amount? A. It was.

Q. In what amount? A. 1955, there was $28,278.55 difference.

Q. That is greater income than you actually reported on your tax returns?

The Court: How much?

344 Mr. Rowntree: Twenty-eight—give him the figure.

The Witness: $28,278.55.

By Mr. Rowntree:

Q. Have you checked deductions as shown in your paid-outs for that year? A. We have.

Q. Have you compared them with the tax return deductions? A. We have.

Q. And is the difference which you have computed there on your deductions, deductions that you did not take on that tax return? A. It is.

Q. And how much is that difference? A. $7,256.69.

Q. What nature were those items of deduction that were not taken? A. Well, he had failed to list the explosives that we purchased and used, and the other items I would have to check through the books.

Q. What about repairs? A. And repairs, yes, I remember. Repairs was short by a few thousand dollars.

Q. Is repair a pretty big item in your operation?
345 A. It is our biggest item.

Q. How do you account for this—these differences in books and tax returns? A. Well, before he had taken our deposit receipts as our total income instead of using the gross sales at the end of each month.

Q. Well, why didn't you correct it? A. Well, after he prepared the books and turned them over to me, I didn't examine them any more. I just filed them away for that year.

Q. Have you taken this up with Internal Revenue? A. I have.

Q. What did you do? A. Well, I went to see them and explained that we had found these discrepancies, and we wanted to file some amended returns.

Q. Have you filed those returns? A. We have.

Q. Have you paid the individual taxes? A. We have.

Q. Are these the amended returns, '55, '56, and '57, for the partnership? A. Yes, sir, these are the returns for those years.

* * * * * * * * * *

346 Mr. Rowntree: Offer 1955 amended return as Exhibit 19; 1956 as Exhibit 20; and 1957 as Exhibit 21.

(Exhibits 19, 20, and 21 were marked for identification and filed.)

* * * * * * * * * *

347 Q. Did you give the government copies of all of these books? A. We did, with a lengthy letter of explanation.

Q. Now were you able to take the deductions for 1955 that were not taken on the original returns? A. No, sir, we was not.

Q. So actually those deductions should be made from the amended return figure to get at your actual profit for that year? A. That's right.

Q. And what would be the amount of actual profit taking

off those deductions? A. The actual profit should have showed $35,798.98.

Q. Now isn't that before the deductions? A. Let's see. Yes, that was before the deductions. It should have read after deductions $28,542.19.

348 Mr. Kramer: What year are we talking about?

Mr. Rowntree: That is '55.

By Mr. Rowntree:

Q. In 1956 what was the actual profit after the amended return? A. Profit in 1956 after the amended return was $17,325.79.

Q. Now we all make mistakes, did we find another error after we filed these tax returns, amended, in '57, pertaining to tonnage reports that you— A. Oh, yes. After filing these I noticed in the back of one of these ledgers some cars of coal that the auditors, who audit for East Tennessee Iron & Coal Company, had audited our record through our broker and had picked up some cars that we did not have any weights or numbers on and it was a year after the coal had been shipped before we knew about this coal.

Q. And that was put over somewhere in— A. That was put over in 1958 book and was paid the royalty on then, in 1958.

Q. Have you computed the amount of receipts on that coal which should have gone into 1957? A. We have.

Q. And after making that adjustment what is your net loss for 1957? A. Our net loss for 1957 is $20,000—

349 Q. Do you have a seventeen thousand figure? A. No, it is $16,712.85, that is for '57?

Q. Let's see it? A. (Handing book to counsel)

Q. This figure here. A. So much scribbling here. Oh, yes.

Q. What is your net loss for 1957? A. Net loss for 1957 was $17,741.97.

Q. Now the 1958 return which apparently required no adjustment, what loss does it show, net loss for the operating company. This is Exhibit No. 18. A. Loss was $12,311.28 in 1958.

Q. Have you computed the amount—I will ask you this, Mr. Phillips, what type of coal do you sell? A. We sell three grades of coal, or three types of coal you might call it.

Q. What are those? A. Block coal, egg coal and steam coal.

Q. What kind of market do you have for your block and egg; what type customer? A. It is coal yards and domestic. It is strictly a domestic coal on our block and egg.

Q. How is that carried from your operation? A. By truck.

350 Q. Trucks of customers, or how? A. That is right.

Q. What kind of price did you get for that coal, truck coal, block and egg? A. We get a pretty fair price.

Q. Have you computed the amount, the average amount of the price for your truck coal? A. I have.

Q. What is that for this period '55 through '58? A. Well, on truck coal the average price for 1955 was $5.31¼ a ton net us at the tipple.

Q. And what about 1956? A. Average price per ton in 1956 was $6.14½ a ton.

Q. What about 1957? A. 1957 the truck coal average price was $5.89 per ton at the tipple.

Q. What about 1958? A. 1958 average price for truck coal was $6.04-2/3 per ton, average, at the tipple.

Q. Did the truck coal hold up well through this period? A. Fairly well I would say.

Q. It showed no pattern of decline? A. No.

351 Q. Have you computed the tons of coal you shipped by rail for the period 1955 through '58? A. I have.

Q. And have you computed the amount received for rail tons for that same period? A. I have.

Q. And where did you get those figures from? A. From the reports that we would send in to the land company at the end of each month.

Q. Are those the figures that you have carried over into the bound volumes that you show your tonnage and your amount received per ton? A. They are.

Q. And are those figures accurate? A. They are.

Q. Have you figured the average price for rail coal in this period, 1955 through 1958? A. I have.

Q. What kind of coal goes by rail from your operation? A. Steam. Steam coal.

Q. And will you give the average price for rail coal for those four years. A. Average price per ton coal shipped by rail, 1955 averaged us $3.37½ per ton at our loading point.

1956 it averaged us $3.92 per ton at our loading
352 point.

1957 it averaged us $3.20-1/3 a ton at our loading point.

1958 it averaged us $3.13-1/3 per ton at our loading point.

Q. Have you set those various figures, those computations of total amounts that we have been talking about, down on that piece of paper? A. I did.

Mr. Rowntree: We offer that as Exhibit No. 22.

(Exhibit No. 22 was marked for identification and filed.)

Mr. Rowntree:

Q. Mr. Phillips, are there available records showing the destination of your rail coal? A. No, sir.

Q. In the period 1953 through 1955. A. Not in our possession, no.

Q. Do you know if a search has been made for records in your sales agency? A. They have.

Q. Who was your sales agency predominantly for that period of time? A. Well, the one that handled the most of our coal was Royal Fuel Company.

353 Q. At the beginning did you have some other sales agent? A. Yes, we had sold through several other sales agencies. Not to no great amount.

Q. In 1956 who was your customer for rail coal? A. 1956?

Q. Yes. A. Mostly TVA.

Q. And was that true for the balance of the period, 1956, 1957 and 1958? A. We sold—no, sir. We sold coal to Duke Power Company and to Tampa Electric Company during those times.

354 Q. And when would you make sales to those other customers besides TVA? A. Whenever we could get an order with them.

Q. Mr. Phillips, can you account for the rise and fall of the steam coal price? A. No, sir, I cannot.

Q. When you sold to these other customers besides TVA in the period '56 through '58, what comparison could be made between TVA price and the price that you got from these other customers?

* * * * * * * * * * *

A. I got a better price from Duke Power Company and Tampa Electric Company than I did from TVA during this period.

By Mr. Rowntree:

Q. In 1956 do you know if the TVA had opened up additional generating units? A. Yes, sir.

Q. In its Kingston steam plant, shortly prior thereto? A. Yes, sir.

The Court: What year was that?

Mr. Rowntree: 1956 was the year that we asked the question upon. Additional units had been put in a short time before that in the Kingston plant.

By Mr. Rowntree:

355 Q. Has there ever been a good steam coal market in this area? A. No, sir.

Q. Can you account for the fact that there was not a good steam market, say, in 1953 in your operation in this section? A. No, sir, I couldn't account for it.

Q. Can you account for the increase in the price in steam coal in 1956? A. No, sir.

Q. Can you account for the decline in the steam price after 1956? A. No, sir, I cannot.

Q. Turning to the equipment of the company just briefly, I believe your tax return depreciation schedules will show the nature of the equipment that you had? A. That is right.

Q. In your operation. Will you give us a resume — go through here and give us some idea of the kind of equip-

ment that the company used and the purchases of large additions to the equipment from time to time. A. 1953, we had some coal screens for a tipple. We have a power shovel.

Q. Give us an idea of the cost price of those things. A. Coal screen, we paid $1,000 for. A power shovel we
356 had purchased, $42,975. And a used D-7 'dozer was $4,000, and a new TD-24 bulldozer was $24,890. Electric welder we purchased, used, $550. Electric motors to run the screens, $576.97. A 1948 Jeep, $400.

Q. Is that all? A. No. A coal crusher, $889.08. And a power shovel, $2,550. And a horizontal drill, $2,750.

Q. Will you go through the later returns and show major items of equipment that you purchased and what they cost? A. Each year?

Q. Yes. Start with '54 there. The equipment you have just listed is what you had your first year of operation, I take it? A. That is right. 1954, 1953 Chevrolet pick-up.

Q. Just give the major items, A. You want the additions, what we added onto?

Q. Big items like shovels or 'dozers. A. Power shovel.

Q. How much? A. Horizontal drill, screen — power shovel we bought in 1954, $26,000. GI Truck bought that year for a thousand dollars. 1955 pick-up truck, $1,670.89. And a pick-up truck, $1,400.

* * * * * * * * * * *

357 Q. I think we have another major item here in '58, June 1, '58, is that right? A. That is right.

Q. What is that? A. That is a two and a half yard Lima shovel, $40,000.

Q. This TD 'dozer, 24 'dozer, that was not actually picked up in '57 but it was picked up in '56, isn't that right? A. That is right. We overlooked that. It shows it in '56.

Q. The cost of that was $33,000? A. $33,000.

* * * * * * * * * * *

359 CROSS EXAMINATION

By Mr. Rayson:

Q. Mr. Phillips, as I understand, you are president of

Phillips Brothers Coal Company, is that correct? A. That's right.

Q. Now the period we are concerned with, from 1953 through 1958, with exception of the incident that you described this morning when this group of men came to your mine and your discussion with Albert Pass, would you state whether or not you had any other difficulty of any kind at your mine during that five and a half year period, four and a half year period, rather? A. Not labor violence if that is what you mean.

Q. You had no labor difficulty of any kind during that four and a half year period other than the one which you have described? A. That's right.

Q. Did you have any contract with field workers during that time other than those you described in your direct examination? A. Not to my knowledge.

* * * * * * * * * *

360 Q. In April of 1955, how many days of work did you miss? A. We closed April the 6th, and the boys signed on April the 25th, I believe, and I believe we went back—I'm not positive as to that date—but I believe we went back the next day, which would have been April the 27th.

Q. In other words, you were not working for something like two weeks and two days? A. About twenty days, I'd say.

* * * * * * * * * *

361 Q. Now, you say that after you signed this con-
tract, you did not pay the wages called for by the con-
362 tract, is that right? A. That is right.

Q. Was this not true during the entire four and a half year period that you had this contract with the United Mine Workers? A. Well, I actually never did know what the scale price was on labor.

Q. Well, I believe that you explained to us this morning your wages ran from something like a dollar to two dollars and twenty-five cents for your top-paid men? A. In '53.

Q. And didn't that pattern more or less hold true throughout the four and a half year period? A. No. sir.

Q. Did your beginning wage not remain at one dollar per hour? A. It did not.

Q. What did it go to? A. Well, at the present time, it is a dollar and a half.

Q. I'm talking about during the four and a half year period. A. I couldn't tell you the exact dates when we made raises, because some of the laborers would want to learn to be operators, and as they advanced in learning, why we raised their wages.

363 Q. Well, I'm speaking about the wage that you paid a man, unskilled man, who came to work for you. Didn't that wage remain about a dollar or perhaps a dollar and a quarter throughout that four and a half year period? A. Well, I don't know just exactly how long it's been since we raised to a dollar and a half, but it ranged between a dollar and a quarter and a dollar and a half.

Q. And those were for your laborers and helpers and oilers and people like that? A. That's right.

Q. And whatever you decided to pay an individual was what you and he decided? A. That's right.

Q. And so whatever money you made or lost was based upon this labor agreement that you had with the men and not by reason of the wage scale set forth in the union agreement, is that correct? A. How's that now?

Q. So whatever you made or lost during this four and a half year period took into account the wages that you and your men agreed upon and not the wage scale set forth in the union contract. A. That's right.

Q. Now after you signed the agreement in 1953, I believe that you filed certain reports in writing with the United Mine Workers of America Welfare and Retirement

364 Fund, is that correct? A. That's right.

Q. That were substantially below the actual tonnage which you had? A. That's right.

Q. Now to refer to the April incident, as I understand

your testimony, you say you went to talk to Albert Pass in Middlesboro? A. That is correct.

Q. Did you say that Albert Pass told you that the men would have to join the union and that you would have to pay up your back welfare? A. He did.

Q. Fund royalties? A. He did.

Q. And did you say that that is what you did before you went back to work? A. We paid—we brought the time up to date as token payments like we had been before. We didn't pay no full forty cents a ton.

Q. Mr. Phillips, you recall the occasion that your pre-trial deposition was taken in this case, do you not? A. I do.

Q. And do you recall my asking you this question,
365 "What happened when you went over to Middlesboro? And I'll ask if this was not your answer, "We went in and Mr. Pass said he would talk to us, and so we told him about the mob visiting us and all, and he said, well, that all of our men would have to join the union, and we would have to pay up our back welfare before we could go back to work, so he told us to come on back home, and he would send Taylor Maddox to visit us, so that is what we done."

Was that your answer to that?

A. That is the substance of the conversation.

Q. Now, was it on April 25th, of 1955, that your employees joined the union? A. All I have to go by is a union card that one of my employees has with that date on it. To swear to the exact date other than this card with the date on it, I couldn't swear to it.

Q. That is your best recollection at this time? A. That is the best of my recollection.

Q. And you know that you went to work at about that time? A. Well, I think it was the day following their visit that we went to work.

Q. Now isn't it a fact, Mr. Phillips, that you did not make any report to the Welfare and Retirement Fund until July

29, 1955? A. I couldn't tell you the exact date without
366 checking back through the records. I don't remember when we made the payment.

Mr. Rowntree: If Your Honor please, that is contained in the stipulation that was filed at the beginning.

The Court: All right.

Mr. Rayson: May I approach the witness, Your Honor?

The Court: Yes, sir.

Mr. Rayson:

Q. I'm going to show you what purports to be a report to the United Mine Workers of America Welfare and Retirement Fund dated November 12th, 1953. It also purports to have your signature. Is that your signature, Mr. Phillips? A. It is.

Q. Now, what tonnage did you report on that particular report? A. 804.35 tons.

Q. And do you know what your actual tonnage was for that period? A. No, sir. It's in the records. I do not know it.

* * * * * * * * * * *

367 Mr. Rayson: We would file this as Exhibit Number 23.

(Exhibit 23 was marked for identification and filed.)

By Mr. Rayson:

Q. Now on January 19, 1954, did you also file this report with the Welfare and Retirement Fund? A. Yes, sir.

Q. Does this report also bear your signature? A. It does.

Q. And what tonnage does it indicate that you reported at that time? A. 482.66 tons.

Q. Do you know what your actual tonnage was at that time? A. No, sir, I do not.

Q. I'll ask you if it wasn't approximately four times the amount that you show on that report? A. I think we figured it about ten cents a ton.

Q. And now on July 29, 1955, some three months after the events that you testified to earlier in your testimony, I'll ask you if you didn't file a report with the Welfare and Retirement Fund covering several different periods of time?

A. I did.

368 Q. And what tonnage did you indicate on that? A. Well, it was several months, there was no indication, and 780.40 tons.

Q. Now, Mr. Phillips, you say there is no indication as to several of these periods, actually what you reported to the Welfare and Retirement Fund was that you had no production during several of those periods, is that not correct?

A. That's right.

369 Q. Did you not say on this that you had no production in the month of December 1953, and in January, February, March, April, May and June of 1954, that you had no production? A. I did.

Q. Did you not also say you had no production for the month of September, 1954? A. If that is my copy I did.

Q. Is this your signature on that report? A. It seems to be down here.

Mr. Rayson: We want to introduce copies of the last two reports to which I have referred, the one of January, 1954, as Exhibit No. 24.

(Exhibit No. 24 was marked for identification and filed.)

Mr. Rayson: And the one of July, 1955 as Exhibit No. 25.

(Exhibit No. 25 was marked for identification and filed.)

By Mr. Rayson:

Q. I believe you have filed two other reports with the welfare fund, one of December, 1955, and one of August, 1956; is that correct? A. It looks like this date has been changed. I don't remember just—it has been marked out. This

370 is my signature to this copy.

Q. Does that appear to be your signature? A. This is my signature.

Mr. Rayson: We would file Verifax copies of these as Exhibits No. 26 and 27, I believe.

(Exhibits No. 26 and 27 were marked for identification and filed.)

By Mr. Rayson:

Q. And referring to the report you filed in December of

1955, I think you say you had no production for several periods; is that not correct, Mr. Phillips? A. That's right.

Q. And at that time you brought your report up—it was only then that you brought your report up until April, 1955? A. It looks like brought up to June.

Q. This report covers from October, 1954 through June of 1955; is that correct? A. That's right.

Q. And so you don't report on April, 1955, the time you say all these events occurred, until December of that year; is that correct? A. That's right.

Q. Some eight months after it happened.

Mr. Rowntree: Is the purport of counsel's question
371 that no payments were made after the Middlesboro visit?

Mr. Rayson: The witness has testified that he talked to Albert Pass and that Albert Pass told him that he had to bring his reports up to date with the welfare fund, and the purpose of this examination, among other things, is to show that he did not do it at that time and did not do it until 7 or 8 months later.

* * * * * * * * * * *

The Witness: Mr. Pass told us if we did not have enough to bring it up at one time we could make the payments if we so desired.

* * * * * * * * * * *

Q. As a matter of fact, Mr. Phillips, during all of
372 these periods for which you reported that you had no production, you had a very considerable production, did you not? A. As far as running from the mines there was months we did not have. Sometimes we would have coal stocked on the yard that we would sell.

* * * * * * * * * * *

Q. Did you produce coal each month you were in business, Mr. Phillips? A. Not each month; no, sir.

Q. Aren't you familiar with the stipulation which has been filed in this case and which was read to the jury at the beginning of the trial which shows your monthly production month by month during this entire period? A. I am saying

that there was months that we would work out of the stock pile and not from the pit.

Q. There was no six months period for which you had no production, was there? You did not fail to produce coal for a period of six months as you reported to the Welfare Fund, did you? A. I would have to check back.

Q. Don't you know that you produced coal every month that you were out there, Mr. Phillips? A. I did not.

373 Q. You did not discuss with Albert Pass this matter of paying short to the Welfare Fund, did you? A. No, sir.

Q. So when Albert Pass told you you could take some time to pay it, he was not telling you that you did not have to pay on the production that you actually had; is that correct? A. The amount wasn't mentioned.

Q. Mr. Phillips, in 1953 your partnership filed its first income tax return, I believe. A. That is right.

Q. And you reported a loss of that year of $24,000.00; is that correct?

Mr. Rowntree: No, your Honor, it isn't correct.

Mr. Rayson: I am looking at what I thought was a Verifax copy of the income tax return. I will look at the ones that were filed. A. $2,438.04 loss in 1953. But we had only operated from July.

Mr. Rayson: I stand corrected. It was $2,438.04, your loss.

By Mr. Rayson:

374 Q. Now in 1954 your report, the partnership, showed a profit of $9,554.00? A. That is correct.

* * * * * * * * * *

Q. In 1955 when you first filed your partnership return you showed a profit of $7,520.00; is that correct? A. That is right.

Q. And now you have filed an amended income tax return on which you show or on which you claim a profit of $35,798; is that correct?

Mr. Rowntree: May it please the Court, we are getting

into some tax law here. There is a different statute of limitations for claiming deductions from reporting amounts of income not previously reported.

We had to file a return on the additional income but we could take additional deductions that were not previously claimed.

We do not say that there was a profit of thirty-five thousand. But we say it was thirty-five thousand less these deductions not previous claimed and which could not
375 be claimed at that time.

The Court: Yes, sir.

Mr. Rayson: May I say, this amended return, according to the copy I have, was filed 13 days before this trial started and six years after the year in question. And I think that certainly this goes to the credibility and propriety of this sort of — I think that at least we could ask preliminary questions about it today pending our full examination.

The Court: Yes.

Mr. Rowntree: We don't contest his right to answer the question, but we want our position clear.

We are not claiming any benefit in this case from any additional profit shown in this return.

The Court: All right.

By Mr. Rayson:

Q. In order that I may understand your previous testimony, Mr. Phillips, is it your contention by these amended income tax returns that your profit was thirty-five thousand and some dollars in 1955? A. That's right.

Q. In 1956—

Mr. Rowntree: I think that is exactly what I mentioned before, that it is not that but it is less the deductions.

* * * * * * * * * * *

376 By Mr. Rayson.

Q. You have also changed your figure to show an added loss or an added profit in 1956; is that correct—added profit? A. Yes, sir.

Q. Now in 1957, Mr. Phillips, would you explain the

changes which were made in your income tax return in that year? A. I will try to.

Q. Would you explain how you claimed a loss in that year of $20,000 on this amended return rather than a loss of $16,712 in your original return? A. In 1957 it was—let's see, $3,672.35 that we did not get credit on our dynamite and repairs that we should have had credit on for that year.

Q. And that is the basis for the change that you made? A. Well, with—where they had added borrowed money to our income, those two items made the difference in our changes in that year.

Q. In other words, you came up with an additional
377 loss of $3,672; is that right, additional expenses? A. That's right.

Q. And you added those expenses onto the loss you had which was originally reported as $16,712, and you came up with $20,385? A. And 20 cents. That's right.

* * * * * * * * * * *

382 Q. One more question, Mr. Phillips. On these reports that you made to the Welfare Fund, just above the place where you signed them, I want to ask you if you don't recall this language that is printed there: "The number of tons of coal produced for use or sale as shown above represents to my best knowledge and belief the total amount of coal produced for use and sale by this concern for the period specified." Do you remember that? A. I couldn't tell you what it says on that. No, sir, I couldn't.

Q. Would you examine this and see if this language is there just above your signature? A. It is there. But I hadn't read it.

* * * * * * * * * * *

383 JAMES M. PENNINGTON

called by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Rowntree:

Q. What is your name, sir? A. James M. Pennington.

Q. Are you one of the defendants and cross-plaintiffs in this case? A. Yes, sir.

Q. Are you a native of Scott County? A. Yes, sir.

Q. After World War II were you engaged in the mining business? A. Yes, sir, after World War II.

Q. What were you doing? A. I was working for
384 my father.

Q. Did he run a mine? A. He did.

Q. Whereabouts? A. At Paint Rock, Tennessee.

Q. Did you become a member of the United Mine Workers? A. I did.

Q. What were the circumstances under which you became a member? A. Well, there was a group of men came over and said we would have to join and so we did.

Mr. Kramer: If your Honor please, we don't know when this is. After World War II, 1945. Unless it is more closely tied up, even under your Honor's previous ruling, it would not be competent.

The Witness: It was around '46 or '47.

Mr. Kramer: I object to it as being beyond the scope of this lawsuit and having nothing to do with it.

The Court: Do you insist that has any relevancy?

Mr. Rowntree: Well, it seems to me, your Honor, it shows the method or a practice in the coal fields.

The Court: I sustain the objection on what occurred in 1946. I think that is too remote to the matters involved here, at the present time.

385 Mr. Rowntree: Yes, sir.

By Mr. Rowntree:

Q. You have heard the testimony of Mr. Phillips concerning the organization of Phillips Brothers Coal Company, the three member partnership? A. I have.

Q. Is that testimony accurate to your remembrance? A. It is.

Q. You have heard the circumstances under which the contract was signed with the United Mine Workers? A. Yes, sir.

Q. Had Mr. Daniel been to the operation and talked with you before the contract was signed? A. He had.

Q. And Mr. Raymond Phillips, was he present or was he not? A. He was not.

Q. Did that discussion partly cause the discussion about the contract?

Mr. Kramer: I object to that as leading. I didn't object to it as a conclusion before, but this is certainly improper and I object to it.

Mr. Rowntree: Strike it.

The Court: Sustained.

By Mr. Rowntree:

Q. Were the circumstances with respect to the signing of the contract related by Mr. Phillips in accordance with your remembrance?

Mr. Kramer: Now, your Honor, I object to that. When we get out just to fringes, I do not object to that sort of thing, but this proving by adoption of testimony I think is generally condemned by the courts and I object to it, your Honor.

The Court: Sustained.

386 By Mr. Rowntree:

Q. Will you relate the circumstances under which the contract was signed? A. From the time we first met?

Q. Yes. A. We met Mr. Daniel at Caryville. Do you want me to go back before that time?

Q. Well, yes. A. Well, I take care of a tipple is mainly my job, milling coal and such as that. I was at the tipple and Mr. Daniel, he come by every once in a while. I won't say how many times and I don't remember the dates because I didn't think it necessary at the time. He would come by and ask us how we was doing. He said we was going to have to sign the contract, and I figured that from the time we moved in Scott County. We, Buster, Burse, my

387 partners—

Q. Who is Buster? A. Raymond, Mr. Phillips. We got together and talked it over and so we met Mr. Daniel

at Caryville. He told us, he said now he would let us move in and it was time for us to sign the contract with the United Mine Workers and we told him we couldn't pay the 40 cent ton royalty, and we didn't think we could pay the scale, whichever it was.

Q. Speak louder, Mr. Pennington. A. We told him that we couldn't pay or didn't think we could pay the scale of wages under the UMW contract. He told us that if we could sign the contract, we could work out an agreement with our own men as to whatever we want to pay them, that that was our business, and he didn't have nothing to do with it. He said, "Pay in what you can to the welfare." We told him we couldn't sign it that day for we had another partner concerned and we had to bo gack and talk it over with him.

Q. Did you have a discussion? A. We did.

Q. What did you decide to do? A. We decided we was going to have to sign it or go out of business.

Q. What do you mean by that? Why do you say that? A. Well, a little afraid.

388 Q. Are you a man that is easily scared? A. I don't think so.

Q. What decorations did you receive in World War II?

Mr. Kramer: Your Honor, we object to that as being wholly irrelevant and immaterial.

The Court: I sustain that, Mr. Rowntree.

Mr. Rowntree: Could we ask him about his campaigns in the war? I want to get some tectimony that these men are not cowards.

The Court: I will let you show if he was in the war, how long, and if he participated in campaigns, yes. It may bear on this witness' credibility as a witness. Go ahead.

Mr. Kramer: We do have the objection, your Honor, as to being irrelevant and immaterial.

The Court: Yes.

Mr. Kramer, do you contest anything that he said about this? I understand the issues are going to be sharply drawn with respect to what this man has testified about. Am I

correct or incorrect in that?

Mr. Kramer: On some of what he testified, but not on everything.

The Court: The jury has a right to know the background.

Now, Mr. Rowntree, of course you can't go into
389 these minute details about these matters, but I will let you ask him enough to let the jury get some knowledge of this witness and his background.

By Mr. Rowntree:

Q. What campaigns did you participate in in World War II? A. Actually I was in seven, seven major campaigns.

Q. Where? A. North Africa, Sicily, went in on France on D Day, the spearhead for that is what the Army called it.

Q. You have heard the testimony of Mr. Phillips about the meeting of the employees at the tipple. Well, first, did you go to Middlesboro? A. Yes.

Q. With Mr. Phillips? A. I did.

Q. Did you go to Jellico before that to see— A. Yes.

Q. Will you state the conversation with Mr. Pass at Middlesboro? A. Well, when we went in the office, I believe that Mr. Pass was out, or a man coming in the door. We went on in and he greeted us. We told him our business there. I think he already knew it, but we told it anyhow. We asked him, told him about the group of men that congregated at our tipple on that certain date and asked him what
390 we could do about going back to work. It looked like we were going to have to go back to work. He said, told us that if we would make our men join the union and pay up our back welfare, that everything would be all right, and when we come back, if it wasn't all right, that he personally would come down and see to it.

391 Q. Were arrangements made for Mr. Daniel to— A. He did, he told us that he would send out a representative to meet with us.

Q. And were arrangements for that representative to meet the men made? They surely must have been, they came in the next day or two.

Q. And were you present? A. I was.

Q. Did you go into the meeting of the employees? A. I did.

Q. With the representatives of the union? A. I did.

Q. Why was that? A. Mr. — I believe Maddox — and Daniel said that Burse and I would have to join. One couldn't, had to be one boss, so under those circumstances, why we signed it.

Q. Did the men apply for hospital cards at that time?

Mr. Kramer: Now, Your Honor, we are still in the same field—we argued—

Mr. Rowntree: All right, strike it.

By Mr. Rowntree:

Q. Do you have anything to do with the record
392 keeping of the company? A. No. I do not.

Mr. Rowntree: You may ask him.

CROSS EXAMINATION

By Mr. Kramer:

Q. You say, Mr. Pennington, that you were a member of the union for some years, were you not? A. A few, I don't remember how many.

Q. When I say "union"; I mean United Mine Workers of America. A. Yes, sir.

Q. And you had personally worked as a coal miner yourself in different occupations or different jobs in the coal mines? A. No. sir.

Q. Never had? A. Never had.

Q. But you had been a member of the union in connection with your work around the mines, whatever you did? A. Yes, sir.

Q. Now when you formed this partnership, you became a member of the partnership when? 1955? A. '53.

Q. 1953, and you were a member of the union at that time?

A. I believe I was, I wouldn't swear to it.

393 Q. And had been for quite some months before that? A. I had been.

Q. Now on occasion when you met over at Middlesboro, after you had had the conversation with Mr. Daniel, and

he had suggested you talk to Mr. Pass in Middlesboro, you went over there. Who was with you? A. Raymond Phillips and Burse Phillips, my partners.

Q. Now, up to that time, during the years 1953—that was in '55, wasn't it? A. I believe it was.

Q. That was two years after you had become a member of the partnership, or approximately that? A. Yeah.

Q. And during that period of time, you knew that you were operating under a collective bargaining agreement with the United Mine Workers of America, didn't you? A. I did.

Q. And you knew you hadn't paid the welfare fund? A. I think I remember that we didn't.

Q. You think you were familiar with that? A. Yes.

Q. You haven't much doubt about it? A. Not much.

394 Q. And because you hadn't paid the welfare fund which is one of the provisions of the collective bargaining agreement, and you went and asked Mr. Pass why you couldn't operate, in substance, and he said, in substance, "You haven't paid the welfare fund." A. He did.

Q. And he said, "If you will comply with your contract and pay the welfare fund, and if your men will join the union, then you will have no further trouble." A. I don't believe he ever mentioned contract.

Q. Well, he mentioned paying the welfare fund? A. That's right, he did.

Q. Which you knew was under the contract. A. He did.

Q. And he told you he would come and talk with your men or send a representative there to join the union? A. You are going too fast for me, you will have to repeat that.

Q. But he did say he would send somebody over there to talk to your men, didn't he? A. He did.

Q. And of course, you knew that the man he referred to was a representative of the United Mine Workers of America, didn't you? A. That's right.

395 Q. And you knew the man coming over there for the United Mine Workers of America was coming for

the purpose of asking the men to join the union, didn't you? A. Yes, that's right.

Q. You had no doubt about that? A. No doubt.

Q. So that what the agreement was, two things there, we are going to send a man out over there and see if your men will join the union, and we want you to pay the welfare fund what you owe. You people left the meeting in Middlesboro, and in a day or two, a man did come over to your operations there. A. He did.

Q. And a man talked to your men about joining the union? A. That's right.

Q. And your men signed cards right there that day to join the United Mine Workers of America, didn't they? A. Yes, sir.

Q. And I'll ask if you didn't sign a card yourself to join it. A. I did.

Q. And those cards that were signed indicated a desire—strike that. Those cards were the regular form which
396 you were familiar with which indicated a desire of the individual men who signed those cards that they wanted to join the United Mine Workers of America. A. Now what is that?

Q. I'll ask it differently. You had signed cards before? A. Yes, sir.

Q. And this was a similar card to what you had signed before? A. Yes, sir.

Q. For membership in the union? A. Yes, sir.

Q. And the cards that the other men that were working for your company there were the same kind or cards saying, in substance, I want to become a member of the United Mine Workers of America, and I want my employer to deduct or check-off the union dues. A. Yes, sir.

Q. And that is what the men did there in your presence, and they signed those cards, didn't they? A. Yes, sir.

Q. And you people promised to pay the past payments to the welfare fund? A. I don't know whether we promised—

Q. Well, you did over at Middlesboro the day or
397 two before. A. Did I say I promised?

Q. Somebody promised on your part. A. I don't remember.

Q. You don't deny that that agreement was made over there by Mr. Phillips, do you? A. He told us we would have to pay up the welfare and make our men join the union.

Q. And you told him you would pay the welfare fund that day at Middlesboro. A. I don't remember. Mr. Phillips may have, I didn't.

Q. You are not saying he did or he didn't? A. I am not.

Q. Well, pursuant to the arrangement made there regardless of your recollection on that, the man came over and your employees—and I say the man came over, and I mean the representative of the United Mine Workers. A. Yes, sir.

Q. And your men did sign these cards? A. They did.

Q. And the cards were turned over to whom? A. I don't remember who they were turned over to, Ed Daniel, I guess.

Q. Well, somebody representing the United Mine Workers of America received the cards from the men say-
398 ing they had a desire to join and wanted to join the United Mine Workers of America. A. I would take it they did.

Q. Well, you haven't any doubt about it? A. Somebody got them.

Q. That is correct, isn't it? A. Yes, sir.

Q. And those cards did what you started to do beginning with April or when you opened operations, the last of April and beginning with May, to deduct the dues of the United Mine Workers of America and remit them to the office where they were suposed to go? A. Yes, sir,

Q. And pursuant to what these men asked you to do when they signed the cards themselves that day, your company did begin deducting dues and where your men hadn't been a member, you deducted the initiation dues? A. That I don't know.

Q. You didn't handle the bookkeeping end of it? A. I did not.

Q. And you people opened up to work there, didn't you? A. We did.

Q. And when did you have your next trouble with any labor with the United Mine Workers of America? A.
399 I don't remember what month it was. I believe it was in the year '55.

Q. This that we are talking about is in what year? A. About the same time.

Q. You didn't have any trouble after that? A. Not after—

Q. And the day those men voluntarily signed the cards in your presence there, did you ever have any trouble with the United Mine Workers of America? A. Not that I remember, no, sir.

Q. Never lost a single day from that day on, did you? A. No, sir.

Q. Never had any trouble of one kind or another? A. No, sir, not that I remember.

Q. Not that you remember. Do you remember who all were present that day when these men voluntarily signed these cards and said they wanted to become members of United Mine Workers of America? A. I probably could name some of them.

Q. Suppose you try. A. Well, there was Fred Burnett.

Q. He was one of your employees? A. He was. Arlow Hutson.

400 Q. Another of your employees? A. I believe Ewell Phillips, Ralph Phillips, Burse Phillips, and I don't remember any more, but anyhow, I do remember them.

Q. All right. Now you had been closed from the time these people come up there which I believe was on April 6th, if my memory is right, until the day these cards were signed, which was April 24th or 25th, wasn't it? A. I think that's about right.

Q. Six from twenty-five leaves about nineteen, and that includes about two Sundays and two Saturdays in there, so

that would be around sixteen days you were closed down? A. About that.

Q. And that is all the time that you lost? A. That I know of.

Q. There wouldn't be any that you didn't know of would there? A. I don't know.

Q. Can you tell us anything about the scale of wages that you were paying there subsequent to the signing of the agreement in 1955? A. None other than what Mr. Phillips testified a while ago.

Q. You have no independent recollection? A. No, sir.

Q. You worked at the tipple and crusher, didn't you? A. Yes, sir.

Q. And I am talking now about the time this agreement was signed and subsequent there to. A. That was my job practically all the time.

Q. What type of work did you do at the crusher and at the tipple? A. Well, I was more or less of a boss, overseer.

Q. Well, you were operator of it, you worked the crusher along with the men? A. I did.

Q. Didn't you? A. I did, I helped.

Q. In other words, if you were the boss, you were a working boss? A. Well, in our business, bosses work, too.

Q. And that is what you were doing? A. That's right.

Q. And you had signed the agreement. Now then what was Burse Phillips doing? A. Burse was looking after the strip pit.

Q. He was operating a machine on the strip pit, wasn't he? A. He did at times.

Q. What kind of machine? A. Any kind that was out there and there was no operator on it.

Q. Would that be a shovel sometimes? A. Sometimes.

Q. And sometimes a cutting machine, what do you call these— A. Bulldozers?

Q. Bulldozers. A. I don't think he fooled with the bulldozers much.

Q. And you and he are the ones in the organization who signed the cards? A. Yes.

Q. You signed the membership cards in the United Mine Workers of America? A. Yes, sir.

Q. Who officially signed the collective bargaining agreement between the union and the partnership? A. I did.

Q. You did on behalf of the partnership? A. Yes, sir.

Q. Now there were three contracts signed, I believe from what somebody stated here today, between the partnership and the United Mine Workers of America. You signed
403 this one in 1955. A. I signed the first one.

Q. 1953? A. 1953.

Q. And you signed the one in 1955? A. Was there one in between there?

Q. Well, yes, there was one in between there. A. Well, I signed two.

Q. You don't recall who signed the other one for the partnership? A. No, sir, I don't.

Q. But you signed two of the agreements? A. Yes, sir.

Mr. Kramer: That's all, Your Honor.

Mr. Rowntree: No other questions. Call Mr. Albert Pass.

ALBERT PASS

called as a witness by and in behalf of the defendants, after having been first duly sworn, was examined, and testified as follows:

DIRECT EXAMINATION

By Mr. Rowntree:

Q. State your name. A. Albert Pass.

Q. Where do you live, Mr. Pass? A. Middlesboro,
404 Kentucky.

Q. What is your occupation? A. Secretary-treasurer, District Nineteen, United Mine Workers of America.

Q. How long have you been with District Nineteen? A. I have been in District Nineteen since January, 1941.

Q. Have you served as secretary-treasurer all of that time? A. No, sir.

Q. Or have you served in other capacities? A. Other capacities.

Q. What capacity have you served? A. I served as bookkeeper, stenographer, secretary arbitration, and secretary-treasurer.

Q. What other officers of District Nineteen are there other than yours? A. There is the president.

Q. And who is president? A. J. W. Ridings. Vice-president, William M. Edwards.

Q. These were officers back in 1955? A. Yes, sir.

Q. What duties— A. Excuse me a second.

Q. Go ahead. A. I don't recall if Mr. Thompson
405 was president at that time or Mr. Ridings.

Q. What are your duties as secretary-treasurer of this district? A. To keep the records of the finances of the district and to perform any other duties that might be assigned me by the president of the district.

Q. Where does District Nineteen keep its bank account? A. In the National Bank of Washington, in Washington, D. C.

Q. Does it have any accounts in any of the local banks around Middlesboro? A. No, sir.

Q. Then I take it its only account is in the National Bank of Washington? A. Yes, sir.

Q. Was this true in 1955? A. Yes, sir.

Q. Is District Nineteen a self-sustaining district financially? A. No, sir.

Q. Who furnishes additional funds to help sustain District Nineteen? A. We request and have obtained loans
406 up to this time from the International Union to defray the expenses of the district.

Q. Now, I am thinking particularly now of 1955, and I'll ask you if all the funds which were transferred by the International to District Nineteen were in the form of loans? A. All of the funds that District Nineteen have received from the International Union have absolutely been considered as loans from the International Union, and of

course, that money that we do receive or did receive from the International Union was deposited in the District Nineteen treasurer, and we dispensed it according to the expenses necessary. As I understand, as secretary-treasurer of the district, not only does the district expect to pay the money back, but is expected to pay it back.

Q. Do you ever get any funds from the International Union as organizing expenses? A. I believe on occasions. I'm not positive. I don't have the facts at hand, but I believe on occasions we have, yes.

Q. And those are not loans, are they? A. Yes, sir.

407 Q. What position did Ed Daniel and Taylor Maddox occupy with the United Mine Workers during 1955? A. They were representatives, District 19, United Mine Workers of America.

Mr. Kramer: No question about that. We admit they were field representatives.

Q. Do you keep the records of expenses of District 19? A. Yes, sir.

Q. Do you have here today with you any of those records? A. Yes, sir.

Q. I believe we asked you for the ledger sheet showing expenses for the months of June and July, 1955? A. Yes, sir, you did.

Q. And do you have those with you here today? A. Yes, sir, I do.

Q. I wonder if you would look at your sheets, if you have them handy there, during June, 1955, and I will ask you if in those sheets it shows two payments, one to you and one to Mr. Ridings, both marked "organizing" each in the amount of $1,205.50? A. Yes, sir. On June 27th, 1955 there was a check made payable to Albert Pass for $1,205.50. And on June 27th, 1955, there was a check made payable to J. W. Ridings for $1,205.50.

408 Q. All right. Are those marked organizing? A. On the ledger, as I have testified previously, it is listed under the column of organizing which is erroneously, and

after the names of Albert Pass and J. W. Ridings it is listed as organizer, which is an erroneous entry on the ledger sheet.

Q. What were those funds used for? A. Those funds were used for legal services.

Q. Did you pay those sums to some attorney for legal services? A. Yes. I paid—we paid, rather, the sums to the attorney and secured receipts.

Q. Did you endorse those checks over to that attorney or how did you handle that transaction? A. I cashed one check and Mr. Ridings cashed the other check, and we delivered them to the attorney.

Q. Now I will ask you whether or not that cash was paid over to an attorney who defended those persons charged at Jacksboro in a criminal case involving the alleged beating of John Van Huss?

Mr. Kramer: We object because of its irrelevancy and immateriality, and we think it is not competent for any purpose.

The Court: The objection is overruled.

409 A. Yes, the cash was turned over to the attorneys who represented the people in the case you refer to.

Q. Do you know why those checks were issued? A. Yes, sir.

Q. Why? A. Well, in the first place I did not want to carry that much money over there myself, and I knew Mr. Ridings wouldn't. That is the only reason.

Q. I will ask you to look at the sheet for the date June 22, 1955. A. What was that now?

Q. June 22, 1955. And ask you if there was a disbursement at that time in the amount of $5,000.00.

Mr. Kramer: I object to this because this is a type of entry that may be on there—we had this in a previous case and your Honor is familiar with it and it was brought out before your Honor and I feel like I can state it to your Honor because your Honor has knowledge of it—to pay attorneys fees, perhaps, and if it is it invades the province

of attorney and client and not entered under organization, that they do not claim, so it invades the field of attorney and client. It is a privileged entry in going on those books and therefore cannot be introduced in evidence here. That privilege is not waived and it is claimed on behalf
410 of the attorney.

The Court: What is the point, Mr. Rowntree, of this. I remember we had the matter up in the other case but I do not remember the point?

Mr. Rowntree: We are tracing the International funds into the defense of the Jacksboro case, tracing it through the District into the defense of this case to connect the International union with the activities going on.

The Court: Overruled. Go ahead.

By Mr. Robertson:

Q. Do you find there an entry of an expense on June 22, 1955 in the amount of $5,000 to Mr. R. R. Kramer for legal services? A. Yes, sir.

Q. Do you find an entry on July 8th, 1955—

Mr. Kramer: We are continuing our objection, your Honor.

The Court: Are you objecting to it because of the size of the fee, or what?

Mr. Kramer: Well, do I need to answer that question, your Honor?

The Court: No, sir. Same ruling.

Mr. Kramer: After all, a fellow's got to live.

The Court: Same ruling. Go ahead.

411 By Mr. Robertson:

Q. July 8, 1955 in the sum of $3,130.13? A. Yes, sir.

Q. Paid to Mr. R. R. Kramer for legal services? A. Yes, sir.

Q. Mr. Pass, were these two sums that I have asked you about totalling $8,130.13, paid to Mr. Kramer for his services in defending those persons at Jacksboro to which I referred awhile ago? A. I couldn't say that that money was paid to Mr. Kramer for defending those people at Jacks-

boro. In fact, I did not employ Mr. Kramer or have any knowledge of his employment for defending those people at Jacksboro.

I do know this, however, that we have used Mr. Kramer and his law firm on several occasions to represent District 19, but I could not say that that money was used for that purpose.

Q. You do know that he was hired by the union to represent these defendants? A. No, sir, I do not.

Q. Mr. Pass, do you know Mr. Raymond Phillips? A. I don't know if I know Mr. Raymond Phillips or not.

Q. Let me go back just a minute and ask you in regard to the payment to Mr. Kramer. How did you know to
412 pay that money? A. The president of the District instructed me to write the check. Both checks, in fact. And I did, and signed them.

Q. Did you have anything documentary? A. No, sir, I did not.

Q. For the basis of that entry at all? A. No, sir, I did not.

Q. Did Mr. Ridings have such evidence? A. I don't know.

Q. Was it Mr. Ridings who told you to pay it? A. He did.

Q. Was he the president? A. I believe that, if I am not mistaken, I believe that Mr. Ridings was filling in in the place of Mr. Thomason who was ill. It could have been, of course, when he was representing the president of the District. It could be that maybe Mr. Thomason was there, but I think honestly he was ill and may have been in the hospital at that time.

Q. I believe you said you knew Mr. Raymond Phillips? A. No. I said I don't know whether I know him or not. I met one of those Phillips gentlemen at one time. I don't even know whether I would recognize him if I seen him again.

413 Q. Do you remember where you met him? A. Yes, sir.

Q. Where did you meet him? A. I met him at the headquarters of District office in Middlesboro.

Q. What was his announced purpose of being there on that occasion? A. Well, he came in and said he wanted to see me, and he came in and sat down. And he wanted to know how to go about getting his employees in the union. And, of course, I asked him if the company had signed a contract, and he said yes.

I said, well, have they ever signed checkoff cards, and he said no.

I said, well, the first thing will have to be done, we will have to get a field worker over there to sign those men up on authorization cards which will give you permission to deduct their dues and initiation fee. And he said all right.

I then showed him how to—or explained to him how to send the dues in and initiation fees, if any, and the dates that it was to be sent to the district office in accordance with the provisions of the contract.

Q. And he told you on that occasion why he was interested in seeing his men join the union? A. No, sir, he did not. He did not.

414 Q. Did you know why he wanted his men to join the union? A. He did not tell me.

Q. Do you know? A. No, sir, I didn't know, no, sir.

Q. Did you know about these roving bands that were going over the country at that time? A. Well, I read in the newspaper alleging that they were roving bands going over the country at that time, but I have no knowledge of that, except what I read about it.

Q. Do you know that the other officers of District 19 read the newspapers and knew that this was taking place? A. I was never with them when they read it to my knowledge.

Q. You had a good idea why Mr. Phillips was there wanting his men to join the union. Isn't that kind of unusual for an employer to come wanting his men to join the union? A. No, I wouldn't say so, no, sir.

Q. What is the advantage to him to want his men to join the union? A. Well, there is this advantage. When a man gets old, he has to look forward to some kind of livelihood

and, of course, there is a welfare fund which provides a pension. Most coal miners have large families and they have in most instances no way to pay for their medical services. Most instances, because of the dangers in
415 the mines, they can't obtain life insurance and they, of course, receive a death benefit from the Welfare Fund, and it is not unusual at all.

Q. Of course, he couldn't get these benefits unless he joined the union? A. No, sir, I wouldn't say that. My understanding is that the benefits of the Welfare Fund is either approved or denied by the trustees of the fund.

Q. I go back to my original question and ask you why a man would be interested in joining the union. A. Well, in addition to what I said, a decent standard wage rate, the right to assemble freely, working conditions and vacation pay, portal to portal, and proper protection under the social security laws of our country, and workmen's compensation coverage, unemployment insurance coverage, matters of that kind.

Q. Well, all those things, those are things which the employer furnishes, are they not? A. Provided that he has some assistance in seeing that the employer furnishes them, yes, sir.

Q. Can a man assemble freely without joining the union?

Mr. Kramer: Your Honor, I object to that. It is irrelevant for any purpose in this lawsuit.

416 The Court: Overruled.

A. Well, before we had a union they couldn't, I can answer it that way.

By Mr. Robertson:

Q. How about now? We are not talking about 1890. We are talking about in 1955. A. Well, me representing the people that belongs to the union, as far as I know they do now, yes, and then in '55, yes.

Q. It is the general impression of the people in the industry that in order to get these welfare benefits, they must

join the union? A. I don't know what the impression of the people in the industry is. I don't know.

Q. Well, it was your impr ssion just a few minutes ago, was it not? A. No, I didn' y that.

Mr. Kramer: He didn . say that.

The Witness: I didn't say that, no, sir.

By Mr. Robertson:

Q. I will ask you again, Mr. Pass, why would these employers come to you wanting their men to join the union unless they wanted to keep mobs off of their back?

Mr. Kramer: Your Honor, I object to that as being an argument. I don't think that calls for a question of
417 fact. He is asking this man to express an opinion of why somebody else does a certain thing. I think it is incompetent. It is argumentative, and I think it calls for a conclusion. I think it is improper and I object to it.

The Court: Gentlemen, I don't understand the procedure. Is this gentleman called under Rule 43 or is he called as a witness—

Mr. Robertson: He is under subpoena, your Honor.

The Court: Is he called under Rule 43? Are you putting him on under Rule 43 or are you putting him on as your witness? If so, then the objection is well taken. You can't cross-examine your own witness.

Mr. Rowntree: If your Honor please, we think he is an officer of the union—

The Court: I say, is he being called?

Mr. Rowntree: Yes.

The Court: Well, the Court has no announcement of that. Are you calling him under Rule 43 as an officer of the union?

Mr. Rowntree: We do, yes, sir.

The Court: All right, I will let you examine him then under that rule. Go ahead.

Mr. Kramer: Your Honor, may I be heard just a moment?

The Court: Yes.

418 Mr. Kramer: I recognize the difference between a person who is called as a witness under Rule 43 and

the ordinary calling as a witness.

The Court: Yes.

Mr. Kramer: He is called then as a representative of the opposing party?

The Court: That is right.

Mr. Kramer: Under 43, as your Honor indicated, but I do not think that gives the right to argue with the witness to ask him to express conclusions. You may have the right to lead him. There are certain of those rules that you may have the right to under 43.

The Court: That is right. You cannot argue with the witness.

Get me Rule 43.

Mr. Kramer: I have it right here.

The Court: I will read what can be done and what cannot be done under Rule 43.

Mr. Kramer: I don't have it marked, but your Honor will have no trouble finding it.

The Court: Under sub-section (b) of Rule 43 it is stated:

"Scope of Examination and Cross-Examination. A party may interrogate any unwilling or hostile witness by
419. leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief."

You are entitled to ask him leading questions. If he were not called under that rule, you could not ask him leading questions. You have heard what other differences there are in calling a witness under Rule 43 and the regular way as your own witness.

All right.

By Mr. Robertson:

Q. Do you remember the question?

A. No, sir, I don't.

Mr. Robertson: Read the question, please.

(Reporter read questions as follows: "I will ask you again, Mr. Pass, why would these employers come to you wanting their men to join the union unless they wanted to keep mobs off of their back?")

The Court: Well, "mobs off their back", is that
420 the part?

Mr. Kramer: Yes, your Honor.

The Court: We will strike that—

Mr. Robertson: I will—

The Court: We will strike that part of the question out.

Mr. Robertson: Let me reframe the question.

The Court: All right, you may do so.

By Mr. Robertson:

Q. Is it your testimony that the visit of Mr. Phillips and his party to your office, that that had no connection with the mobs at that time? A. My testimony is that Mr. Phillips only stated what I told you that he stated. He didn't mention anything about any mobs or anybody else, nobody.

Q. At that time there would it have even been necessary for him to mention any mobs for you to realize— A. If I had knowed—

Mr. Kramer: Just a moment. Would it be necessary for him to do something in order for you to realize? I do not think that is proper interrogation. I have no objection to him asking what this witness may know. He can cross-examine him, lead him, but when you get to these conclusions, I think it is objectionable under any rule of evidence and I do object to it.

421 The Court: Read the question to me.

(Question read.)

The Court: Sustained. Don't state your conclusion, Mr. Robertson. Just ask him the question. You put in a conclusion and then a question in the same sentence and that isn't

proper. I will let you lead him and you can ask him, but don't state your conclusions.

By Mr. Robertson:

Q. Mr. Pass, does District 19 have a welfare department? A. A welfare department? No, sir.

Q. Does it have a compensation department? A. Yes, sir.

Q. But it has no welfare department? A. That is exactly right. I might add the compensation department at this time is defunct.

The Court: Mr. Robertson, I will let you ask him the question that you undertook to ask him, provided you put it in the form of a question rather than a conclusion. I don't mean to cut you off on that question, so there will be no misunderstanding about the ruling of the Court.

Mr. Robertson: Yes, sir. May I have a conference?

The Court: Yes, sir.

Mr. Robertson: I have no further questions.

422 CROSS EXAMINATION

By Mr. Combs:

Q. Mr. Pass, in reference to the question that counsel asked you about the benefits of the Welfare Fund being payable only to members of the union, and you answered, I think, no. A. That is right.

Q. Now these funds, the welfare benefits as far as you know, do they apply to operators, employees who have not signed the contract? A. The regulations that I have observed refers to miners, to the best of my recollection, and it is my understanding that people other than members of the United Mine Workers of America can and have received benefits from the Welfare Fund, provided that they are in compliance with the rules and regulations of the trust fund.

Q. The question I asked, Mr. Pass, was whether or not the welfare payments are made to employees of operators who have not signed the contract? A. I can't recall of anyone in that category, but my understanding is that they do.

Q. They pay to non-signatory operators? A. Not non-signatories.

Q. That is the question I am asking. A. No, sir.

423 Q. You misunderstood the question. I want it clear. I asked you whether or not that benefits from the Welfare Fund were paid to employees of operators who had not signed the contract. A. No, sir. No, sir.

* * * * * * * * * * *

REDIRECT EXAMINATION

By Mr. Robertson:

* * * * * * * * * * *

425 Q. Is there wholesale unemployment in that area up in there now? A. Considerable unemployment.

Mr. Kramer: Wait a minute. I object to that, Your Honor. Now we are limited to a period that wound up December 31, 1958.

The Court: Well, now that is ordinarily correct. There would be no damages, any damages after that period.

Mr. Robertson: Of course we take the position that a conspiracy, once it starts, is a continuing thing, Your Honor, and anything such as unemployment, chronic employment, now which exists would go to show the result of this conspiracy during the period which we are talking about in this suit.

The Court: Read the question to me.

(The question was read by the reporter.)

Mr. Kramer: May I state this, Your Honor, our position is that of course the sole purpose is to show as a private litigation—it is not an anti-trust suit by the government—

The Court: That has no bearing on the damage question involved in this suit, but it may have a bearing on the results of—or the alleged result of the alleged conspiracy. I overrule the objection.

426 By Mr. Robertson:

Q. And I believe you answered that, did you not? A. Not yet. What did you say?

Mr. Robertson: Would you read the question and the answer?

Mr. Robertson: That's all.

The Court: Now, members of the jury, unless this alleged unemployment is connected up with the alleged conspiracy, that answer, that testimony would have no bearing in this case. It has to be connected up before it would have any bearing on any issue in this case.

* * * * * * * * * *

428 Mr. Rowntree: I would like to read some interrogatories here, if Your Honor please.

* * * * * * * * * *

430 Mr. Rowntree: We have a stipulation filed February 2, 1961, "It is hereby stipulated that the papers attached hereto are true and correct copies of the answers of the defendant United Mine Workers of America to the interrogatories propounded by the plaintiffs, as Set Number 2 and the Exhibits thereto as the same were filed on April 1, 1958, in the United States District Court," in the Osborne case.

Mr. Kramer: "In entering into this stipulation, the cross defendant, United Mine Workers of America, does not admit the competency, relevancy or materiality in this case, No. 3431," the present case, "of this stipulation and the papers attached hereto, but expressly reserves the right to object to the introduction thereof upon the ground of competency, relevancy or materiality if and when such stipulation and papers are offered in evidence in the case.

"It is further stipulated that this stipulation with the papers attached thereto shall remain under seal until offered in evidence upon the trial of this case and its contents shall not be revealed prior to such date to anyone except to the parties to this action and their attorneys of record.

431 The Clerk: Here are those interrogatories.

Mr. Kramer: I have them. Go ahead.

Mr. Rowntree: (To Mr. Combs) Do you want to raise a question now?

Mr. Kramer: Just a minute, if I may look at them.

Mr. Combs: There is one interrogatory we objected to. It is No. 31, I believe. That the Court overruled us on that objection. I am not too sure, the way it shows here. But when it comes to that I will appreciate it if he did not read that interrogatory until we see whether or not we renew the objection. Aside of that, I see no objection to reading the interrogatories.

The Court: All right.

Mr. Rowntree: I will start with this Question 3 on page 3. "Kindly file all correspondence relating to the request for and the disbursement of the money mentioned in the answer to Interrogatory No. 29 of interrogatories propounded by the plaintiffs, Set No. 1, or relating to disbursements mentioned in the reply to interrogatory No. 1 or 2 above."

Answer: "Attached hereto, and marked Exhibit
432 No. 1, is all the correspondence relating to the request for and the disbursement of the money mentioned in the answer to Interrogatory No. 29 of Set No. 1, and relating to disbursements mentioned in answer to Interrogatory No. 1 and No. 2 of Set No. 2."

Attached are a series of letters. I will read the first one, dated June 16, 1954:

"Memorandum to National Bank of Washington

"From: John Owens, Secretary-Treasurer.

"Enclosed is check for $3,000.00. Please credit this amount to the checking account of District 19, United Mine Workers of America, Middlesboro, Kentucky, and send them receipted deposit slip."

I think we had better read another one, dated July 9, 1954, from Mr. Ray Thomason, president, on the stationery of the United Mine Workers of America, District 19, Middlesboro, Kentucky, to Mr. John Owens, Secretary-Treasurer, United Mine Workers of America, Washington, D. C.

433 "We have a fixed expense in this district of approximately $11,765.00 per month. In addition it takes approximately $1,500.00 per month to operate our Compensation Department. Two attorneys are employed in

the Compensation Department and, as you know, the services of Mr. Turnblazer are used in administrative work in our Welfare Department and he also does considerable work for District 50.

"An annual assessment of $1.00 per year is levied against our working members to carry on the work of the Compensation Department. Our working membership for the month of May was 10,447. Our non-working membership averages approximately 5,500. Therefore, we find ourselves unable to operate on our fixed income and we find it necessary to ask you at this time to advance District 19 a loan in a lump sum or make us a monthly allowance.

"This arrangement should be made effective June 1, 1954. We have permission from the International Executive Board to levy our $1.00 assessment for our Compensation Department and we intend to place that assessment during the month that we feel that we may have peak employment. That, of course, will alleviate the necessity of requesting money to operate the Compensation Department. In the meantime we will attempt to cut our current expenses
434 wherever practical and not impair our organization.

"Trusting that you can see your way clear to grant this request, I am

"Sincerely yours, Ray Thomason, president."

There are a series of letters after that with reference to certain funds transferred from the account of the International Union to the account of the district.

Dated May 27, 1955, one of these letters states—this is from the secretary-treasurer to National Bank of Washington:

"Gentlemen: We are enclosing check in the amount of $4,000.00, which is to be deposited to the account of our District No. 19, Middlesboro, Ky.

"Please send receipted deposit slip direct to that office."

The next letter, June 9, 1955, secretary-treasurer to National Bank of Washington:

"Enclosed is check in the amount of $5,000.00 made pay-

The Reporter (Reading): "Q. Is there wholesale unemployment in that area up in there now?

"A. Considerable unemployment."

able to Albert Pass, Secretary-Treasurer of our District No. 19, Middlesboro, Ky.

"Will you please deposit this to that account and send the receipt to the office at Midlesboro, P. O. Box No. 116?"

The next letter, June 9, 1955, from secretary-
435 treasurer to Mr. James Ridings, international board member, District 19, Middlesboro:

"As requested by you over the 'phone yesterday afternoon, and approved by President Lewis, I am depositing check in the amount of $5,000.00 to District No. 19 account in the National Bank of Washington, Washington, D. C. I as asking the bank to send you a receipt for it.

"President Lewis has advised us to charge this as a loan to District No. 19."

The next letter, June 14, 1955:

"Memorandum to Mr. John L. Lewis from Earl E. Houck.

"Today in a long distance telephone conversation with Mr. James W. Ridings, Acting President of District 19, I earned that the District is temporarily in sore financial straits, without sufficient funds to carry on its current affairs and discharge current obligations.

"In order that it may maintain current status in all of its financial affairs and thus discharge promptly its administrative obligations incurred for District needs and purposes, I recommend, at Acting President Ridings' request, that a loan in the amount of $5,000.00 be advanced to District 19 and that the proceeds of such loan be promptly trans-
436 mitted, with the understanding that the District recognizes it as a loan subject to repayment in due course."

June 15, 1955, the next letter:

"Memorandum to Earl R. Houck from Secretary-Treasurer John Owens."

Apparently it deals with the same transaction.

Now turning back to the interrogatory—

Mr. Kramer: Of course, we understand, your Honor, only the letters read are in this present record and the only interrogatories read.

The Court: Yes, sir.

Mr. Rowntree: Interrogatory No. 10, at the bottom of page 4:

"Were the amounts involved in said disbursements paid out by the International Union at one time for each year or at various times, and please give the dates of the various payments."

* * *

"As to the answer of this Defendant to Interrogatory No. 29 of Set No. 1, the loans were made at the following times and in the following amounts."

I think it is agreed these are loans coming from the International Union to District 19. Is that correct?

Mr. Kramer: Yes, that is correct.

437 Mr. Rowntree: And these amounts are included in that answer in Interrogatory No. 29 of Set No. 1.

"$3,000—June 16, 1954.
"$3,000—July 14, 1954.
"$6,000—August 4, 1954.
"$3,000—October 25, 1954.
"$2,000—December 28, 1954.
"$3,000—January 26, 1955.
"$3,000—February 23, 1955.
"$4,000—April 27, 1955.
"$4,000—May 26, 1955.
"$5,000—June 9, 1955.
"$5,000—June 15, 1955.
"$4,000—August 24, 1955.
"$3,000—September 29, 1955.
"$4,000—October 31, 1955.
"$4,000—November 30, 1955.
"$1,000—December 15, 1955.
"$2,000—January 3, 1956.

"$1,500—February 27, 1956.
"$1,500—March 29, 1956.
"$2,000—May 1, 1956.
"$2,500—May 31, 1956.
"$3,000—June 29, 1956.
438 "$2,000—July 2, 1956.
"$3,000—July 30, 1956.
"$5,000—August 31, 1956.
"$3,500—September 26, 1956.
"$5,000—October 31, 1956.
"$3,000—November 30, 1956.
"$2,000—December 28, 1956."

* * * * * * * * * * *

459 Mr. Rowntree: May it please the Court and ladies and gentlemen of the jury, we were dealing yesterday with sums of money paid from International to District 19 in response to a question in Interrogatory No. 29.

The next question is this Interrogatory No. 1:

"With respect to the answer of the defendant International Union to Interrogatory No. 29 of Set No. 1 of the interrogatories propounded by plaintiffs, please state whether or not the amount mentioned with respect to the years 1954, 1955 and 1956 constituted all the money (other than welfare benefits) that was disbursed by the International Union in those years on account of Union activities in the area covered by District 19, whether the disbursements were to or through District 19 or otherwise. If not, please give the other amounts disbursed by the International Union, the dates of such disbursements, and to whom paid."

Answer: "The amounts mentioned in this Defendant's answer to Interrogatory No. 29 of Set No. 1 did not constitute all the money disbursed by the International Union in the area covered by District 19. In addition thereto, the following amounts of money were disbursed:

460 "$4,000.00—8/4/54—Ck #37077, payable National Bank of Washington.

"$10,000.00—6/28/55—Ck #43377, payable Albert Pass, Secy-Treasurer.

"$1,000.00—10/6/55—Ck #45207, payable Albert Pass, Secy-Treasurer.

"$1,500.00—10/17/55—Ck #45496, payable Albert Pass, Secy-Treasurer.

"$13,500.00—10/17/55—Ck #45498, payable Albert Pass, Secy-Treasurer.

"$6,000.00—11/10/55—Ck #45858, payable Albert Pass, Secy-Treasurer.

"$10,000.00—8/1/56—Ck #51035, payable Albert Pass, Secy-Treasurer."

The letter exhibited, dated June 28, 1955, addressed by Secretary-Treasurer to Mr. Albert Pass, Secretary-Treasurer, District 19, Middlesboro, Kentucky:

"In compliance with the request of Mr. James W. Ridings of June 27, 1955, we are today depositing Ten Thousand Dollars ($10,000.00) for credit to the account of District 19, UMWA, maintained in The National Bank of Washington, Washington, D. C. This deposit represents funds transmitted to District 19 for organizing purposes. Receipt will be mailed to you from the Bank."

461 We next will read the deposition of Mr. John L. Lewis.

Mr. Kramer: May I make a statement to the Court with reference to the deposition? Mr. Lewis will probably be called as a witness in person. This deposition is taken under Rule 43(b), if I am correct, so, of course, our scope of examination was so much limited that there is little cross examination here. It was not under Rule 20, your Honor.

The Court: Yes, sir.

Mr. Kramer: So the Court understands.

Mr. Rowntree: The deposition of John L. Lewis, taken on behalf of defendants and cross-plaintiffs, Tampa, Florida, 18 and 19 of January, 1961.

(Mr. Rowntree and Mr. Robertson read the deposition as follows:)

"JOHN L. LEWIS

produced and sworn as a material witness, testified as follows:

"DIRECT EXAMINATION

By Mr. Rowntree:

"Q. What is your name, sir? "A. John L. Lewis.

"Q. Where do you reside, Mr. Lewis? "A. I am resident in Washington, but I am a citizen of the State of
462 Illinois.

"Q. Are you one of the plaintiffs in this case which was brought by the Trustees of the United Mine Workers of America Welfare and Retirement Fund? "A. Yes.

"Q. And you are one of the Trustees on that Fund? "A. Yes.

"Q. Are you Chairman of that Board of Trustees? "A. Yes.

"Q. How long have you been Chairman of the Board of Trustees of the Fund? "A. Perhaps twelve years.

"Q. Would that include the period before the 1950 contract? "A. Partially.

"Q. You were also president of the United Mine Workers of America International Union? "A. Formerly, yes.

"Q. When did you become President of the International? "A. Vice President, 1917. Acting President, 1919. President in fact, 1920.

"Q. And you were President of the International Union from 1920 up until the time of your resignation? "A. Yes, sir.

"Q. And when was the effective date of your resignation? "A. January, 1960.

463 "Q. 1960. Are you presently President Emeritus of the International Union? "A. Yes.

"Q. Are you still on the same salary basis as you were as President of the International Union? "A. No. I have a pension.

"Q. You have a pension from the Union. During the time that you have been on the Board of Trustees of the Welfare Fund did you receive compensation as such Trustee from the Fund? "A. No.

"Q. The pension that is paid to you by the Union currently, is that from the Pension Trust established by the Union for its own employees? "A. Yes.

"Q. It is not paid out of the United Mine Workers of America Welfare and Retirement Fund?"

• • •

"A. No.

"Q. In other words, the Union has a separate pension arrangement for its own employees and officers besides and beyond any Welfare and Retirement Fund under contract with operators? "A. The benefits of the United Mine Workers Welfare and Retirement Fund are covered by the provisions of the joint contract in the industry and ap-
464 plies only to the employees of the signatory companies; and the agents of the United Mine Workers —employees, clerical, executive, or field—are not covered by that plan, and the organization has set up a pension plan covering its own employees; I mean the United Mine Workers of America—covering its employees.

"Q. And that latter pension plan is the one that you drew your pension from? "A. As a former employee of the United Mine Workers of America I am eligible for a pension under that plan.

"Q. I just wanted to clarify that because there are two pension arrangements there that I didn't want to have confused.

"Now, Mr. Lewis, is the International Convention of the United Mine Workers of America the highest official body of the International Union? "A. It is the supreme authority in the Union."

• • • • • • • • • •

"Q. Does it customarily meet every four years? "A. By constitutional requirement it meets every four years now;

but of course special conventions can be constitutionally inaugurated or held when required in the opinion of
465 the International Executive Board.

"Q. But you have held conventions in the years 1948, 1952, 1956, and 1960; is that correct? "A. Well, I don't follow your arithmetic but every four years.

"Q. Who has the supreme authority in the International Union when the Convention is not in session? "A. The Executive Board. The International Executive Board of the United Mine Workers of America.

"Q. Now most of the activities of the Union, particularly with respect to negotiations with operators on collective bargaining, occur when the International Union Convention is not in session; is that correct? "A. Yes.

"Q. Now, does the Convention have any way of knowing what the International Executive Board and the International Officers of the Union have done in between conventions, or do they have any privilege of approving such activities? "A. If negotiations are complete or are in existence during the time the Convention is in session, it will come before the Convention. It frequently has in the history of the organization.

"In the meantime, however, the constitutional provisions covering such matters provide for proper attention
466 to be given to it by the officers of the Union, by the International Executive Board, and by an International policy Committee, which the Convention sets up as an Advisory Board to the Scale Representatives and to the qualified officers of the Union, representative of all districts.

"Q. If negotiations are completed and a contract
467 is signed after a convention session has terminated and before the next convention session, does the next convention have any way of passing upon the activities of the officers in that interim?

"A. The conventions of the future exercise no function because the preceding convention has designated its authority passed on that to the Policy Committee which is

created according to the provisions and is representative of all districts. The Policy Committee acts in the meantime as an intermediate body between the conventions and the Executive Board and the elective officers.

"Q. Well, does the next succeeding convention have any way of knowing what has transpired in the meantime? "A. A full report in detail is made to the convention about the work of the organization during the preceding four years and it is subject to their approval, subject to the Convention's approval.

"Q. The reports that are made by the officers and the Executive Committee, do they give full, correct information to the Convention of what has transpired? "A. It is certainly given correct information; and 'full' is a relative term. They certainly give all pertinent facts, but, of
468 course, do not crush the Convention delegates with excessive detail.

"Q. These reports are prepared to present to the next succeeding convention? "A. Which reports?

"Q. The reports that you mentioned, of the activities of the officers and Executive Committee? "A. They are prepared in advance of the convention date which is fixed by the constitution.

"Q. Are they prepared by a duly authorized officer of the union? "A. Yes.

"Q. These reports are set forth in the Minutes of the Convention? "A. Yes. The record of the convention.

"Q. And the action of the convention in passing on those reports is reflected in the Minutes of the Convention? "A. I have always assumed so, that they truly reflect it.

"Q. The International Convention maintains complete minutes of what transpired at each convention? "A. Well, the convention employs a public stenographer to take down what requires a stenographer, and, to the best of my knowledge and belief, they are verbatim records of what transpires in the convention.

469 "Q. And they are kept to maintain a record of what did transpire and what action the convention did take on various matters? "A. Well, they are printed in book form, like the books in front of you and are circulated to the membership. Most of it is published in the United Mine Workers Journal and a full and complete distribution is made, and they are available for record.

"Q. Now, on Interrogatories which we addressed to the Union, Set Number 1, Interrogatory Number 15, we asked for the filing of Convention Minutes of the Conventions of 1936, 1948, 1952, and 1956, and I believe that there was a limited number of those copies, and I believe that Mr. Kramer has those here; and I would like to ask that they be marked as Exhibit Number 1 to this deposition. I don't believe that they have actually been filed under the Interrogatories."

Mr. Rowntree: We would like to have those marked at this time, and then we will let counsel have them back. And I would suggest that we file only Volume One of each year.

Mr. Combs: That is satisfactory. As a matter of fact, some of those records are so far back, and we don't have but one copy, and we would like to have it back.

470 The Court: All right.

Mr. Kramer: You are only going to file just the Volume One?

Mr. Rowntree: Volume One. We offer as Exhibit 28 Volume One of the proceedings of the Constitution Convention of the United Mine Workers of America for 1936.

(Exhibit 28 marked for identification and filed.)

Mr. Rowntree: Offer as Exhibit 29 the proceedings of the International Convention, United Mine Workers of America for 1948.

(Exhibit 29 marked for identification and filed.)

Mr. Rowntree: We offer as Exhibit 30, proceedings of the International Convention, United Mine Workers of America for 1952.

(Exhibit 30 marked for identification and filed.)

Mr. Rowntree: We offer as Exhibit 31, proceedings of the International Convention, United Mine Workers of America for 1956.

(Exhibit 31 marked for identification and filed.)

(The reading of the deposition was continued.)

"Q. Mr. Lewis, a part of the International Officers
471 report to the 1956 Convention is entitled United Mine Workers Journal, and I refer to page 289 and 290 of the 1956 Convention Minutes, Volume Number 1, —"

Which would be Exhibit 31.

* * * * * * * * * * *

(The reading of the deposition was continued.)

"The first paragraph of that portion of the report states: 'The United Mine Workers Journal, official publication of the United Mine Workers of America, has the primary function of being the direct link of communications between the Union and the membership. As such, the Journal makes every effort to report fully and faithfully all official UMWA activities by the International Union, the district and the local unions. In addition, the Journal reports activities of the UMWA Welfare and Retirement Fund and the Anthracite Health and Welfare Fund. The Journal also attempts to keep the membership informed on outstanding new developments of our industries, both anthracite and bituminous.'

"Mr. Lewis, is that a correct statement of the purposes and functions of the Journal?

"A. That is a correct statement of the policy and intent of the organization, to have the Journal report in the fashion thus described.

472 "Q. Mr. Lewis, this is a somewhat involved case. As we go along, I would like to state our contentions as to which specific questions are addressed to you. It is for the benefit of counsel as well as yourself.

* * * * * * * * * * *

473 Mr. Rowntree: Well, it is almost necessary to do that right at this time. Our first series of questions

here is with respect to a contention that we point out to the witness here, that is that we make in this case a contention that the conspiracy charged was formed with the making of the 1950 National Bituminous Wage Agreement, that the reaching of an understanding between the union and the large coal operators in 1950 is indicated by the contrast in bargaining before 1950 and after 1950.

Now I go on and ask him a question.

* * * * * * * * * *

474 "Q. Now, as general background, Mr. Lewis, do you recall that the 1952 wage increase was brought before the Wage Stabilization Board for approval? "A. I do not now recall it as a fact nor recall the details, as these succeeding new wage contracts through the years become dim in retrospect.

"Q. Yes, sir, "A. And if it is of record that that was the case, I don't question the record.

"Q. Now this paragraph that I am referring to there on that page 106 states — this being a letter addressed to the Economic Stabilization Administrator by Mr. Welly K. Hopkins, General Counsel, UMWA—he states in this letter that Mr. Moses, President, Bituminous Coal Operators Association, had filed a statement in support of a requested review of the Wage Stabilization Board's recent ruling on the bituminous coal contract of 1952, and he states:

" 'This letter, in behalf of the Union, the United Mine Workers of America, is to affirm and supplement the
475 presentations made in Mr. Moses' statement.'

"I believe, Mr. Lewis, that pages 79 through 97 of that volume contain that statement of Mr. Moses that had previously been filed.

"Now I will ask you does not this statement filed by Mr. Moses, there at pages 79 through 97, does that not give a condensed history of the bargaining between the Union and the Operators in the period before the 1950 contract?

476 "A. I presume that it purports to do that, yes. As to whether or not it does, I don't know.

"Q. The reports of the International officers and Executive Committees, as found in the various Convention Minutes, would amplify and show the correctness of any statements made in this summarization on those particular pages? "A. I do not know that it would. I have had no opportunity to digest this document in relation to other documents filed or statements by counsel for the United Mine Workers to the governmental agency.

"I presume that basically it gives to the government tribunal full information on the wage contracts as required from both parties by the governmental agency, and antecedent to possible approval by the government of the contract.

"I have no keen recollection of any of the details which might be or which might not be contained in this record.

"Q. The record would have to be searched and studied in order to be fully familiar with all of these details. And isn't it true that some of these conventions involve pretty long reports by the International officers to the various Conventions? "A. Quite voluminous."

477 Mr. Rowntree: I would like to read at this time, your Honor, this condensed version of the bargaining between the coal companies and the union before 1950.

The Court: All right.

Mr. Kramer: You are reading from the 1952 Minutes?

Mr. Rowntree: Reading from 1956 Minutes, Exhibit 31, pages 79 and 97.

* * * * * * * * * *

Mr. Kramer: Your Honor, because the question that we want to raise will be applicable to many instances, I think we can shorten this proceeding if we might in the absence of the jury take up a question that is presented here.

The Court: All right. Let the jury be excused temporarily.

(The jury was excused from the courtroom and the following proceedings had in the absence of the jury.)

The Court: All right.

478 Mr. Kramer: Your Honor, the particular statement that counsel seeks to introduce at the moment, your Honor, is one by a man by the name of Moses who was connected with one of the alleged—

(Remarks of the Court off the record.)

Mr. Kramer: The paper that they purport to read at this time, or a portion, comes from the Journal of International Conventions, is a statement which they say that Harry M. Moses, who was president of the Bituminous Coal Operations Association, wrote to Mr. Lewis.

Now, the members of the Bituminous Coal Operations Association, at least some of them are, are alleged to be conspirators in this case.

We do not think, your Honor—first, object to it—that they can introduce statements of an alleged co-conspirator whether he is a party to the lawsuit or not—it is really immaterial to this question—but in this instance his company was not a party, is not a party to this lawsuit although he is claimed to be a conspirator. And before statements made by an alleged co-conspirator can be admitted in evidence the conspiracy itself must be proven.

Then the statements of co-conspirators can be introduced to show intent or purpose and scope or something of

479 that sort. But there is not in this instance, your Honor, proof of the existence of a conspiracy. And until—under the decisions of the Supreme Court—until that proof has been established this type of evidence is inadmissible and it cannot be connected—if your Honor cares for citations, I have them here—it cannot be connected by going ahead and putting in the alleged statements of claimed co-conspirators and later establishing the conspiracy.

The conspiracy, outside of the statements of the alleged conspirator, must first be shown before this evidence becomes even competent, and it is not a question in this in-

stance of connecting up by later proof like in some fields, but in this particular field you cannot introduce any statement of an alleged co-conspirator. It is pure hearsay. And while the conspiracy rule takes out—rules of evidence of conspiracy testimony takes out the hearsay rule after the conspiracy has once been established. And we object, your Honor, for that reason.

* * * * * * * * * * *

482 The Court: Is the Moses statement contained on page 79?

Mr. Rowntree: Start at page 79 and it goes on over several pages.

In other words, the purpose of this, your Honor, is to present the history of bargaining before 1950 between the big coal companies and the union in its most condensed form that we can possibly present it.

These pages give a concise statement of what happened in the bargaining between the major companies and the union before 1950. This is a background to the conspiracy that we are talking about in this case. It shows the sharp contrast in the relations of the major coal companies and the union before and after 1950, the year that we say this conspiracy started.

The Court: Well, you are familiar with the rule to which Mr. Kramer alluded, namely that unless and until the conspiracy is established, declarations of alleged con-
483 spirators are not binding on the co-conspirators.

What about this rule as applied to the Mose statement? What do you say about that?

Mr. Rowntree: Well, if your Honor please, we think, particularly on this statement here, as Mr. Lewis stated in response — as was read into the record awhile ago, the union has written a letter to an official of the government stating that it affirms and supplements this presentation by Mr. Moses. In other words, they have adopted it for an official matter.

The Court: Who wrote that?

Mr. Rowntree: That was signed by Welly K. Hopkins, general counsel of the United Mine Workers of America.

The Court: To whom did he write the letter?

Mr. Rowntree: He wrote it to the Economic Stabilization Administrator.

The Court: He said that he adopted this?

Mr. Rowntree: That is right. He "affirms and supplements the presentation here made".

* * * * * * * * * * * *

492 Mr. Kramer: Of course, it is our position that the rule cannot operate so as to permit this type of statements until, as the Supreme Court says, the conspiracy has been otherwise established, and we don't think it has.

But the second proposition, another ground of objection. This particular letter here purports to have been addressed to a governmental agency for the purpose of getting the governmental agency to approve something.

Under the very recent case that I know Your Honor is familiar with, the Noerr case, you are not guilty
493 of a conspiracy or of violating the law by appealing to or seeking some favorable result.

The Court: That's right. In other words, you can go to your legislators, Congressmen, and your Senators and people who meet in Nashville and say, "Now we want this act passed," or "We don't want it passed," and you don't violate any law by doing that. That is what the Noerr case holds.

Mr. Kramer: Yes, but it goes further than to any legislative bodies; it goes to administrative body as well.

The Court: That was a fight between the railroads and the truckers, and you are familiar with those fights. You know they get rather heated at times. Now the railroads, or the truckers, claimed that the railroads conspired to have the state legislature to pass certain legislation detrimental to the truckers.

Mr. Kramer: And to get the governor of certain states—

The Court: Of Pennsylvania, I believe, and the Court said that wasn't a violation of the anti-trust laws. Of course, that is sound law, isn't it, Mr. Kramer?

Mr. Kramer: Yes, that is sound law, Your Honor.

494 The Court: All right, bring the jury back.

(Thereupon, the jury returned to the courtroom, and the following proceedings were had).

The Court: Members of the jury, counsel is about to read to you certain statements allegedly written or made by a Mr. Moses. Now Mr. Moses purported to represent some coal companies in making those statements. Whether he did or whether he did not will be a question of fact for the jury to decide. But there is a well-established rule of law that a declaration or a statement made by a third party or made by a co-conspirator is not competent as evidence, and cannot be considered by the jury, the tryer of the facts, unless and until first a conspiracy is established; second that the alleged statement was made in furtherance of the conspiracy.

Now, unless a conspiracy is established in this case, and unless the jury finds that the UMW and one or more of the coal companies named were a part of this conspiracy, and unless the jury finds that the statements that counsel is about to read as evidence, or purported evidence, in this record were made in furtherance of the alleged conspiracy, then the jury will not consider this evidence for any

495 purpose in the record.

All right now, with that explanation, the objection is overruled.

Mr. Kramer: I don't know whether counsel has stated, but it is admitted that this was written to a governmental agency?

Mr. Rowntree: Yes, the Economic Stabilization Administrator.

496 "Historically, there have arisen problems in labor relations that are peculiar to this industry. In the last decade, failure of the collective bargaining process to

function has inevitably led to seizure and operation by the Federal Government.

"The first instance of this was in 1943. This seizure lasted for five months and twelve days from May 1, 1943 to October 12, 1943.

"Twenty days later, on November 1, 1943, the industry was seized again. This seizure lasted for six months, from November 1, 1943, to May 31, 1944. This seizure was not terminated in the southern producing area until June 21, 1944.

"There was a third seizure of certain coal mines that became involved in supervisory strikes during September and October 1944.

"There was a fourth seizure, involving certain mines from April 10, 1945, until June 3, 1945.

"The fifth seizure occurred when the coal industry was seized on May 21, 1946. This period of seizure and operation by the Federal Government continued for more than thirteen months until June 30, 1947. A more detailed recital of the events of this last seizure period may be found in the review of post-war wage contract negotiations
497 which is attached herewith as Exhibit 1."

The attachment commences on page 87.

. . . . . .

498 "Before the Economic Stabilization Administrator, Economic Stabilization Agency.

"Background of the Negotiation of the National Bituminous Coal Wage Agreement of 1950 as Amended September 29th, 1952.

"Post-War Wage Contract Negotiations in the Bituminous Coal Industry.

"A proper perspective of the negotiation of the 1952 Amended Agreement in the bituminous coal industry requires a consideration of the course of the industry's post-war wage contract negotiations.

"On March 2, 1946, the United Mine Workers of America

served notice of the termination of the National Bituminous Coal Wage Agreement of 1945. Negotiations for a new contract were carried on during that month and thereafter with an Operators' Negotiating Committee representing the management side of the industry.

"The negotiations failed to produce agreement and a nation-wide coal strike started on March 30, 1946. This strike continued for 52 days until May 22, 1946, when the Federal Government seized the coal mines under the authority of the War Labor Disputes Act.

499 "On April 12, 1946, the Secretary of Labor conferred separately with the operators and the union in an effort to achieve a settlement. His efforts continued over several weeks without success.

"On April 22, 1946, the Director of the United Nations Relief and Rehabilitation Administration appealed for coal to save Western Europe from communism.

"As May 10, 1946, approached, stockpiles became depleted, steel furnaces were banked, electric power was curtailed, and almost all phases of the nation's industry were approaching a virtual stand-still. The number of unemployed due to the strike mounted to over 1,500,000 and many of the nation's cities faced black-outs after first resorting to brown-outs. A conference of the parties with the President of the United States was scheduled for May 10, 1946, but, three hours before the conference, the union offered two-week truce. This truce was accepted by the operators but was rejected by some of the union locals.

"The majority of the mines resumed operation; the Solid Fuels Administration for War imposed priority controls upon the coal produced during the period.

500 "On May 16, 1946, the President of the United States made the following statement:

" 'Mr. Lewis and Mr. O'Neill came to see me again at 10 o'clock this morning. They told me that after further consultations with their committees last night, they had come to the conclusion that negotiations in the coal mine dispute

had completely broken down and that further negotiations would be useless. I, therefore, proposed arbitration. I asked them to consider this proposal carefully and report back to me with their decision at 5:30 o'clock, Eastern Standard Time, this afternoon.

" 'Some 35 or 40 joint meetings have been held between the operators and the miners without agreement. The country is in desperate straits as a result of the recent strike of the coal miners. Coal must be got out of the ground. The whole life of the nation has suffered from the coal strike and will suffer increasingly if there is another stoppage.'

"This proposal was accepted in part by the operators and rejected by the union.

"On May 21, 1946, the President of the United States issued Executive Order 9728 directing the Secretary
501 of the Interior to seize the coal industry. The Secretary issued a mine seizure order effective at 12:01 a. m., May 22, 1946, and appointed Vice-Admiral Ben Moreell as Deputy Coal Mines Administrator. This governmental seizure and operation of the coal industry was to continue for 13 months. This action was not without precedent, for governmental seizures of the coal industry had occurred previously in the years 1943 and 1944.

"The Executive Order of the President of the United States contained the following preamble.

" 'WHEREAS after investigation I find and proclaim that there are interruptions or threatened interruptions in the operation of the mines producing bituminous coal as a result of existing or threatened strikes and other labor disturbances; that the coal produced by such mines is required for the war effort and is indispensable for the continued operation of the national economy during the transition from war to peace; that the war effort will be duly impeded or delayed by such interruptions; and that the exercise, as hereinafter specified of the powers vested in me is necessary to insure the operation of such mines in the

502 interest of the war effort and to preserve the national economic structure in the present emergency:'

"On May 22, 1946, the Secretary of the Interior and the president of the union began wage contract negotiations.

"The Coal mines were again idle on May 27, 1946, following the expiration of the two-week 'truce.'

"On May 29, 1946, an agreement between the Secretary of Interior, J. A. Krug, and the United Mine Workers of America was executed. This agreement, commonly referred to as the Krug-Lewis Agreement, provided for an increase in wages of $1.85 per day and established for the first time a welfare and retirement fund into which it was required to pay 5 cents per ton on all coal produced for use or sale. The agreement continued the 9-hour day with time and one-half for all time worked over 7 hours each day and over 35 hours each week. It added provisions relating to a mine safety code, union safety committees, coverage under workmen's compensation laws, and unionization of supervisory employees. The annual vacation pay was increased
503 from $75 to $100.

"On May 31, 1946, the Krug-Lewis Agreement was approved by the National Wage Stabilization Board.

"In July and September of 1946, attempts were made to stimulate negotiation between the union and the operators looking toward negotiation of a contract that would terminate Government seizure, but these proved of no avail.

"On October 21, 1946, the United Mine Workers of America served on the Secretary of the Interior a 10-day notice of a request for a negotiating conference. This was procedure avowedly leading to termination of the Krug-Lewis Agreement, and was based on allegation of breaches of contract and significant changes in Government wage policy. The controversy centered around pro-rata vacation payments and measurement of the tonnage to which the welfare and retirement fund payments applied.

"The Secretary denied any contract breaches or any term-

ination right; however, representatives of the Coal Mines Administration met with representatives of the United Mine Workers on November 1, 1946. On November 7, 1946, these discussions were recessed until November 11, 1946.

"On November 9, 1946, the President of the United
504 States ordered an immediate abandonment of all governmental controls over wages and salaries, and virtually all governmental controls over prices. He stated:

" 'Today's action places squarely upon management and labor the responsibility for working out agreements for the adjustment of their differences without interruption of production.'

"The Secretary of the Interior met first with the operators and then with the president of the union, on November 13, 1946, in an effort to get the parties together in negotiations.

"On November 14, 1946, the Secretary of the Interior proposed a procedure for negotiations between the operators and the union whereby Government possession would end in 60 days.

"The President of the United States, on November 15, 1946, issued the following statement:

" 'Secretary of the Interior Krug delivered to the president of the United Mine Workers, yesterday afternoon, a written proposal containing the details of a plan under which the operators and miners could negotiate their differences and the mines would remain in operation.

" 'I am thoroughly familiar with this proposal and I consider it eminently fair to both workers and opera-
505 tors.' "

* * * * * * * * * *

507 Mr. Rowntree: May it please the Court and ladies and gentlemen of the jury, reading the paragraph where we were before:

"On the same day, November 15, 1946, the United Mine Workers of America rejected the proposal of the Secretary

of the Interior, and served notice of termination of the Krug-Lewis Agreement as of 12 o'clock midnight, November 20, 1946. The Attorney General of the United States advised the President of the United States and the Secretary of the Interior that no right of termination existed."

* * * * * * * * * * *

We will skip through the rest of the Krug-Lewis Agreement period. Skip to the second full paragraph, page 91:

"* * * the President of the United States proclaimed 'the cessation of hostilities of World War II, effective
508 twelve o'clock noon, December 31, 1946.' This meant that the power of the Government to operate the coal mines would cease on June 30, 1947, under the termination provision of the War Labor Disputes Act."

* * * * * * * * * * *

"Negotiations between the operators and the union looking toward a wage contract that would become effective upon the expiration of government seizure (when the War Labor Disputes Act terminated on June 30, 1947) began on April 29, 1947."

509 Skip a paragraph dealing with the passage of some law and a paragraph about a vacation period.

"After many sessions dealing with a multitude of issues, the negotiations culminated on July 8, 1947, in the execution of the National Bituminous Coal Wage Agreement of 1947, which became effective on July 1, 1947. This contract provided for a $1.20 per day wage increase, reduction of one hour in the workday from the wartime nine hours to eight hours, and establishment of the United Mine Workers Welfare and Retirement Fund with the payment increased from 5 cents per ton to 10 cents per ton. The detailed basis of the pension payments and welfare benefits were to be worked out by the trustees.

"The trustees were unable to agree on the basis for pension payments and on March 12, 1948, the president of the union announced that the operators had 'dishonored' the contract. A nation-wide coal strike began.

"On March 18, 1948, the Director of the Federal Mediation and Conciliation Service met separately with the operator trustee and the union trustee to explore the issues involved in the dispute.

"Since the neutral trustee had resigned on January 31, 1948, the operator trustee petitioned the United States District Court for the District of Columbia on March
510 20 for the appointment of a successor neutral trustee and for the disposition of any other matters that might arise in the dispute.

"The Interstate Commerce Commission ordered a 25% reduction in coal-burning passenger train service on March 21.

"On March 22, 1948, the Director of the Federal Mediation and Conciliation Service proposed the appointment of a fact-finding board to a joint meeting of union and operators' representatives.

511 "The next day, March 23, 1948, the union rejected the Director's proposal, and the President of the United States issued Executive Order 9939 creating a Board of Inquiry under the national emergency provisions of the Labor-Management Relations Act, 1947. The Board consisted of Judge Sherman Minton, chairman, Dr. George W. Taylor, and Mark Ethridge.

"On March 24, the Interstate Commerce Commission ordered a twenty-five per cent reduction in coal-burning freight train service.

"The Board of Inquiry held hearings in Washington, D.C., on March 26, March 29, and March 30, and filed its report with the President of the United States on March 31, 1948.

"The report stated in part as follows:

'Up to date, more than 35,000,000 tons have been lost due to the stoppage. There is today approximately a fifteen-day overall supply of coal, but since coal is not evenly distributed there are places entirely out of coal today. Rail-

roads have curtailed services and some carriers will be in dire straits within a week or two . . .

". . . We find the stoppage was not independent—'

512 I will not read that paragraph.

"On April 3, 1948, the President of the United States requested the Attorney General to seek a national emergency injunction, expressing the opinion that the strike, if permitted to continue, would imperil the national health and safety."

Skip a paragraph.

"Meanwhile, on April 10, 1948, the management trustee and the union trustee agreed upon United States Senator Styles H. Bridges to be the new neutral trustee of the Fund. On April 11, 1948, Senator Bridges submitted a pension resolution which was adopted by a 2-1 vote of the trustees.

"Litigation to determine the propriety of the Bridges resolution was instituted by the management trustee in the United States District Court for the District of Columbia.

"Negotiations for a new contract were commenced on May 18, 1948, but could not be carried to a conclusion until the pension issue was resolved. After numerous negotiating sessions dealing with a great many issues, matters appeared to be at a hopeless impasse on June 15, 1958.

"On that date, the Director of the Federal Media-

513 tion and Conciliation Service notified the parties to meet with him on July 17. Such meetings occurred both on June 17 and June 18. However, nothing was resolved, and the Director so reported to the President of the United States.

"On June 19, 1948, the President issued Executive Order 9970 creating a Board of Inquiry to report on the coal controversy by June 23. Those named to the Board were David L. Cole, chairman, E. Wight Bakke, and Waldo F. Fisher. The operators testified before this Board on June 21.

"The next day, June 22, the District Court upheld the propriety of the Bridges resolution. Later in the day, both union and operator representatives appeared before the

Board, stated that the court decision had clarified the situation, and accepted the Board's suggestion that negotiations be resumed, with progress reports to be made to the Board. That night, and during the next two days, negotiating sessions were held. Substantial agreement on contract terms was reported to the Board of Inquiry late on June 24.

On June 25, 1948, the National Bituminous Coal Wage Agreement of 1948 was executed; it provided for an increase of $1.00 per day in wages and an increase of 10 cents per ton in the Fund payment, raising it from
514 10 cents per ton to 20 cents per ton.'

"The coal mines owned by various steel companies (commonly referred to along with out consumer-owned mines as 'captive' mines) were struck for seven days because of a dispute over the union shop issue. These companies filed unfair labor practice charged and the General Counsel of the National Labor Relations Board instituted injunction proceedings in the United States District Court for the District of Columbia. A stipulation providing for further processing of the litigation was agreed to by the parties and approved by the court. The steel companies then executed the Agreement and the strike terminated."

Skip the rest of that paragraph dealing with the findings.

"The term of the 1948 Agreement was marked by two national strikes and it was to be twenty months before another contract was to be executed.

"On March 11, 1949, the union declared a memorial period in which coal production East of the Mississippi was to cease from March 14 to March 28 in protest of the appointment of Dr. James Boyd to be Director of the U. S. Bureau of Mines. During this period about 62,700 railroad employees were laid off.

"From June 13, 1949, to June 20, 1949, the union,
515 purporting to exercise its 'contractual options,' observed a 'stabilizing period of inaction.'

"In the meantime, negotiations for a new contract had been instituted. These negotiations were marked by controversy over the clause that permitted unrestricted 'memorial periods' and the clause that stated the contract covered the employment of the workmen only so long as they were 'able and willing.' When no agreement was reached prior to expiration of the contract, the union instituted a three-day workweek in the bituminous coal mines East of the Mississippi River. This continued until September 16, 1949, when it was announced that the Fund was forced to suspend the payment of pensions and other benefits. This precipitated an all-out national strike which continued until November 9, 1949, when the union ordered the men back to work until November 30, 1949.

"Thereafter, the national strike was resumed. On various dates around the turn of the year, the coal operators filed unfair labor practice charges against the union. The General Counsel of the National Labor Relations Board issued a complaint and instituted injunction proceedings in the United States District Court for the District of Columbia. An injunction was issued.

516 "The events of these months are best summarized by the report of the Board of Inquiry created by Executive Order 10106 issued by the President of the United States on February 6, 1950. Those named to the Board were David L. Cole, chairman, W. Willard Wirtz and John T. Dunlop. Portions of this report are quoted hereafter:

'On February 6, 1950, the President created this Board of Inquiry to report to him on the current labor dispute in the bituminous coal industry. Executive Order 10106, issued that day, directed the Board to present its report on or before February 13, 1950.

'The critical importance of the bituminous coal industry in our national economy is widely understood and needs no elaboration here. Labor relations in this industry have attracted wide public attention in recent years. Two Boards of Inquiry, one in March and the other in June 1948, have

highlighted for the public certain important aspects of these relationships.

517. "'The Operators are organized for collective bargaining purposes into three main groups. The first of these includes northern and western commercial operators located largely in the States north of the Ohio River, or west of the Mississippi. These Operators are represented by the National Bituminous Coal Wage Conference. Their production is approximately 55 per cent of the national total. The second group, also commercial operators, in the States south of the Ohio, particularly in West Virginia, Kentucky and Tennessee, are represented by the Southern Coal Producers' Association. These operators account for a quarter of the national production. The last group, the so-called "captive mines," are owned or managed by companies which consume their production, mainly in the steel industry.

"'United Mine Workers of America is the collective bargaining agent for the employees in all three groups. This union has had agreements with these operators for many years.

"'Negotiations for a new national agreement have been in progress intermittently for more than 8 months. They have received considerable publicity. It was the most recent break-down of these negotiations, followed by a widespread stoppage of work in the mines which led to the crea-

518 tion of this Board of Inquiry.

"'The National Bituminous Coal Wage Agreement of 1948, negotiated during the tenure of a Board of Inquiry, carried forward and modified the 1947 agreement. On April 21, 1949, the Southern Coal Producers' Association gave the union notice of termination effective at the expiration of the agreement on June 30, 1949. On May 13, 1949, the union gave notice of termination covering coal mines operated by United States Steel Corporation and its subsidiaries, and on June 14, 1949, similar notices were served on all other signatory companies.

"'Following these notices of termination of the 1948 agreement, a series of bargaining conferences were begun between the representatives of the United Mine Workers and the three principal groups of operators. The Southern Wage Conference, held at Bluefield, West Virginia, commenced on May 25, 1949; the "captive" conference was begun on June 13, 1949, at Philadelphia; the northern conference convened at White Sulphur Springs, West Virginia, on June 22, 1949.

"'The Southern Wage Conference met for a total of 44 days and was terminated by the operators on No-
519 vember 2, 1949. The Southern Coal Producers' Association nonetheless dispatched a telegram, dated November 25, 1949, offering to resume negotiations with the Union. The Union did not reply.

"'Negotiations between the Union and representatives of certain captive mines were conducted at 11 meetings between June and the end of September, 1949. Thereafter informal conversations were held a number of times. These discussions were allowed to lapse with the understanding that either side might call the other by telephone and arrange further meetings.

"'The Northern Conference met a total of 27 days of sessions prior to October 21, 1949, when these negotiations were terminated by the operators. They were resumed in February 1950.

"'The Federal Mediation and Conciliation Service, which had been closely following all these developments, arranged a conference among all the parties on October 7, 1949. A subsequent conference, called for November 9, 1949, failed to materialize when the representative of the union indicated he could not attend. On many other occasions the Director of the Service met with the parties in diligent effort to effectuate a settlement of this controversy.

520 "'Throughout the period of these negotiations there has been sporadic and unstable production. On June 8 the union ordered a "brief stabilizing period of

inaction," and from June 13 to 20 little coal was mined. On July 5, 1949, the union placed into effect a 30 day work-week. From September 19 to November 9 there was a general cessation of work in the mines. On December 5, the 3 day week was again instituted. The Christmas holiday period and complete stoppages in Illinois and late in the eastern district created further uncertainties regard production.

"'In this period since the termination of the 1948 contract, there has been frequent resort to court actions and other legal proceedings affecting collective bargaining over the terms of a new agreement."

Skip the rest of that paragraph.

"'This series of lawsuits has brought into question many provisions of the last agreement of the parties. In these proceedings there is further reflection of the break-down of genuine collective bargaining in this industry.

"'On January 25, 1950, the northern Operators
521 wrote the Union offering to negotiate a new contract "on the basis" of a number of designated conditions. The union accepted the invitation, stating it would meet "to negotiate in good faith, without stipulation, qualification, or commitment." The negotiations which followed on February 1 and February 2, 1950 broke down without any effective bargaining as the parties debated "conditions precedent to bargaining." The operators withdrew.

"On January 31, 1950, President Truman sent telegrams to the parties proposing the resumption of 'normal' production for a period of 70 days and the establishment of a fact-finding board authorized to make recommendations. The operators accepted the proposal, but on February 4 the United Mine Workers rejected the proposal. The President appointed the present Board of Inquiry, under the Labor Management Relations Act, 1947, following the general stoppage of work on February 6, 1950."

Skipping a number of paragraphs about the condition of the country at the time. Next to the last paragraph.

"On February 11, 1950, the President of the United States received the report of the Board and, expressing an opinion that the strike, if permitted to continue, would imperil
522 the national health and safety, directed the Attorney General to seek to enjoin the continuance of the strike.

"The United States District Court for the District of Columbia issued a temporary restraining order. Following the granting of the order, the president of the union issued instructions for the union members to return to work. However, there was very little, if any, compliance with these instructions. The Government moved for a citation for contempt of court against the union and its president. The proceedings resulted in a verdict of not guilty.

"Negotiating sessions continued with the Director of the Federal Mediation and Conciliation Service and the Chairman of the Board of Inquiry in attendance.

"On March 3, 1950, the Interstate Commerce Commission ordered further cuts in train service on coal-burning railroads, reducing freight traffic to 60 per cent of normal and passenger traffic to 35 per cent.

"On March 3, 1950, the President of the United States requested the Congress to pass legislation authorizing the seizure of the coal industry."

523 Skip the rest of that about that. Down to middle of the page, the paragraph starting:

"Two days later, on March 5, 1950, the operators and the union executed the National Bituminous Coal Wage Agreement of 1950."

That is all we read from these sections. Page 18.

(The reading of the deposition was continued.)

"Q. Now, that covers the period before 1950, and we would like to take up later on in a little while, the period after 1950; but first I would like to consider certain language in the 1950 contract, how that language happened to be in there—speaking particularly about the Union Security clause and the Welfare Fund provisions of the 1950 con-

tract, and the similar language in the contracts of 1947 and 1948."

* * * * * * * * * * *

"Q. Mr. Lewis, a principal duty that you had to perform as International President was to negotiate for collective bargaining contracts, is that not right? "A. I had general supervision over those negotiations under the constitution and the authority granted the President's office."

* * * * * * * * * * *

524 "Q. At some time in the period of 1947 up to, say, the contract of 1952, you did realize, did you not, that the law would not permit a welfare fund to be used exclusively for the benefits to Union members? "A. I had a general concept that that was true, certainly.

"Q. And also did you not realize sometime in that period that a welfare fund, run by the Union itself, would also be illegal? "A. No.

"Q. Was it your concept all the way through that the Welfare Fund could properly be operated by the Union? "A. Certainly.

"Mr. Combs: Let's get this clear just a minute, Mr. Rowntree. You are saying 'the Welfare Fund' or 'a Welfare Fund.' To what are you referring?

"Mr. Rowntree: I am talking about the United Mine Workers of America Welfare and Retirement Fund as established in the 1947 contract and also as established in the 1950 contract.

"Mr. Combs: I don't think Mr. Lewis understood your question.

525 "Mr. Rowntree: All right, sir.

"By Mr. Rowntree:

"Q. Would you like to correct the answer? "A. Would you repeat your question?

"Q. At some time in this period of time we are talking about . . . between 1947 and 1952, did you realize that the operation of the United Mine Workers of America Welfare

and Retirement Fund by the union itself would be illegal? "A. Well, as to what the final arrangement of the Welfare Fund, in its contractual provisions that gives it life, refines all the questions involved into express provisions of an agreement.

"I could not undertake to say now what my varying views were as I was required to modify a position or found that I could expand a position. It gets down into the atmosphere of negotiations and there is a great deal of flexibility in those negotiations and they are prolonged oftimes over a long period of time, and I do not retain the details of those in my mind.

"Q. Was it your desire that union members exclusively participate in the Welfare Fund benefits? "A. Not necessarily, no. The employees of the signatory operators.

"Q. Was it your desire that the union actually run
526 the Welfare Fund as closely as it could? "A. Naturally it is parallel to the case of the Metropolitan Club in New York, for instance. It extends its benefits only to its own members. The Union was not primarily concerned with the well-being of non-members of the union, because there were a hundred and fifty million of them, more or less, and we couldn't undertake to devote our lives to their interests.

"Q. You are talking about all the citizens of the country? "A. I'm talking about the population of the country, yes.

"So the thing was refined down to the employees of the negotiating and ultimately signatory operators.

"Now, as a matter of fact, membership in the union is not a basic requirement to receive the benefits of the Welfare Fund.

"Q. Now, let's go into that. I believe that the 1947 contract first established the Welfare Fund between the Union and the Operators. It established a Welfare Fund. And there had been a preceding arrangement with Mr. Collison,

representing the Government, during the period of the Government's seizure of 1946, with respect to a Welfare Fund.

"Is that your recollection?

527 "A. I do not follow or confirm your usage of dates and terms.

"The Welfare Fund first came into being in the industry on May 29, 1946, by an agreement with the Department of the Interior of the United States who were operating all the coal mines in the United States.

"The Fund was finally activated; and finally the coal operators induced the government to return the mines which they have previously yielded to the Government, and the negotiations properly fell between the representatives of the coal operators, who were the employers of the industry, and the United Mine Workers of America.

"Q. That arrangement with the operators was first in 1947? The contract? "A. If you say so. I do not confirm it because I would have to check the date.

"Q. Refer to page 68 of the 1948 Convention Minutes, Volume Number 1."

Mr. Combs: That was phrased as a question by Mr. Rowntree. Would you mind reading his answer to that.

Mr. Rowntree: All right.

(The reading of the deposition was continued.)

528 "A. Supplementing, I might say that Mr. Collison was the first Trustee representing the employers, the employer being the United States of America. He was an officer and agent of the Department of the Interior. He was appointed to that place by Secretary Krug of the Department of the Interior. He served for a time as Trustee. He received the stipend of $35,000 a year for his services, as Trustee, from the Fund.

"He demanded compensation of that magnitude. The Fund, through my objection, refrained from agreeing to this, saying it would not do so without an opinion from the Attorney General of the United States that it would be legal for the Fund to pay Mr. Collison this stipend.

"Mr. Collison later filed such a legal opinion, signed by the Attorney General of the United States—who happened to be Mr. Thomas Clark, now a member of the Supreme Court.

"Q. Did he sustain the paying of the compensation? "A. He sustained, in toto, believe it or not—the demand
529 for a $35,000 salary, and thus the Union rate for Trustees was fixed in the Welfare Fund by the Attorney General of the United States, in behalf of the Government of the United States which was the employer of all coal miners at that time.

"Q. Then in 1947 there were negotiations with the operators after the government seizure terminated? "A. I would so assume—without, again, confirming your arbitrary dates.

"Q. Yes, sir. I refer you to page 68 of that volume there and ask you if that correctly shows the negotiators for the 1947 contract?

"Q. Without being able to give this serious analysis and to digest it in the manner that it should be, I will aver that it seemingly does what you suggest."

Mr. Rowntree: The page reference there, quoting:

"A conference was held on June 27, 1947 at the Carlton Hotel, Washington, D. C. Representing the mine workers: John L. Lewis, John O'Leary, Thomas Kennedy, John Owens. Representing the industry: Benjamin Fairless, George Humphrey, George Love, Harry Moses, Charles O'Neil."

(The reading of the deposition was continued.)

"Q. Then on the next page, Mr. Lewis, there starts
530 off the 1947 contract, and on page 72, at the top of the page, it seems that the royalty payable by the operators to the Welfare Fund was ten cents a ton under that contract. "A. That is in accordance wth my recollection, yes.

"Q. And that language on that page also shows the naming of the Trustees—Mr: Van Horn for the operators, and yourself for the Union—these parties to name a third Trus-

tee.

"Is that your recollection from this language here?

"Do you recall that those two individuals—

"A. I think I do.

"Q. —did serve as Trustees? "A. That is correct.

"Q. I believe Mr. Murray was named as third Trustee.

"A. Mr. Thomas Murray, of New York.

"Q. And, Mr. Lewis, I notice on that same page and on the top of the next page, the language in the portion of the contract dealing with benefits that refers to membership in the United Mine Workers of America—I notice about ten lines up from the bottom of that last full paragraph on page 72, it states:

" 'Including the making of any or all of the fore-
531 going benefits applicable to the individual members of the United Mine Workers of America and their dependents.'

"And also in the next paragraph dealing with the setting aside of a Pension Fund it states, 'Providing for pensions or annuities for the members of the United Mine Workers of America or their families or dependents and such other persons as may be properly included as beneficiaries thereunder.'

"Language referring to membership in the Union was included in the 1947 contract?

'A. Only in the restrictive sense that the United Mine Workers of America were not authorized and did not represent the interest of any employees in the industry that were not members of the United Mine Workers of America and were not negotiating for non-members of the Union, as they had no authority and were without jurisdiction. And naturally, language of this character would be used under the circumstances. But you will note the words, 'and any other persons properly qualified.'

"Q. All right, sir, and do you recall that under this 1947 contract a dispute between you and Mr. Van Horn arose?

"A. I recall that there were sometimes differences of position on policy.

"Q. And I believe that the history of that—the question arising between you and Mr. Van Horn—is shown
532 in the reports of the officers, in the 1948 Convention Minutes; and, for the benefit of counsel, I would like to refer to the pages that we will rely on with respect to that dispute."

Mr. Rowntree: I will just refer to a little bit of this. We have already seen two or three paragraphs of it on the other reading.

I would like to read or maybe summarize the first letter in this series, a letter from Mr. Lewis to Mr. Fairless and Mr. Humphrey, dated January 20, 1948, in which he states that the agreement of 1947, the National Bituminous Coal Wage Agreement of 1947 created a welfare and retirement fund.

The next paragraph, he states that Mr. Van Horn, representive of the other employers, has consistently refused and continues to refuse to agree to any of the pending proposals which seek to designate such pension fund.

Next paragraph, a dispute has continued for several months. A dispute has impaired and prevented the activation of the welfare and retirement fund. The fund is an integral part of the national agreement and the dispute runs to the integrity of the contract. The dispute is more acute by the resignation of the third trustee, Mr. Thomas E.
533 Murray. The agreement provides the disputes, if national in character, shall be settled by the use of free collective bargaining.

The next paragraph: "The facts require" * * * "me as president of the United Mine Workers, to hereby officially notify you of the existing and unresolved dispute and to call upon you as joint principals to the agreement to settle and determine said dispute" * * * "by free collective bargaining."

* * * * * * * * * * *

534 (The reading of the deposition was continued.)

"Q. Now I believe that the 1948 contract left the Welfare Fund provisions unchanged from the 1947 contract; referring to pages 145 and 146 of the 1948 Convention Minutes."

• • •

535 "Q. My question is that 1948 contract did not change the provisions of the 1947 contract with respect to the Welfare Fund? "A. With respect to the tonnage rates or with respect to what?

"Q. Any portion of the provisions with respect to the Welfare Fund? "A. If the record so avers, I accept."

• • • • • • • • • •

536 (The reading of the deposition was continued.)

"Q. Now, Mr. Lewis, we contend that there were some five different means adopted, starting in 1948, to tie the Welfare Fund benefits to Union membership and to tie the operation of the Welfare Fund to the Union.

"In the first place we contend that an effort was made in 1948 to exclude from participation in Welfare Fund benefits those individuals who were part time workers in the industry and, through exclusion of those individuals from Union membership by way of increasing the initiation fees.

"In the first place, we refer to page 347, 1948 Convention Minutes, at the bottom of the page. We refer to that resolution Number C16, which carries over to page 348."

Mr. Rowntree: This resolution reads:

"Whereas, since we have the Health and Welfare Fund established, we have thousands of people that are not practical coal miners that are drawing money from this fund. They are such as farmers and various types of industry that they have been connected with other than the coal mines, but still are drawing from this fund. They are drifting into the mines from the farms and various in-

537 dustry throughout the country and securing jobs around truck mines. They are working a few months,

establishing their membership, and from there they drift to the Health and Welfare Fund. In reality they are not actually practical coal miners; be it

"Resolved, that this convention go on record in increasing the initiation fee to at least $100. We feel that by doing this, that it would correct this unjust situation; be it further

"Resolved, that in order for anyone to be eligible to draw Health and Welfare Fund money that their initiation fee be paid up in full and that the constitution as it now reads be observed 100 per cent by the local union officers who fill out forms for the people who are drawing money from the Health and Welfare Fund.

"The Committee concurs in the spirit of this resolution and recommends that Section 7 be amended to read as follows:

538 " 'Unless a dispensation has been granted in accordance with Section 2 of Article 9, the initiation fee shall be fifty dollars, but no applicant shall be eligible for initiation until he has started to work for a mine under the jurisdiction of a local union. Where application for membership is made, applicants for membership must pay the full amount of the initiation fee into the local where application is first made, the full amount to be paid within five months or the first payment shall be forfeited. The initiation fee shall be divided as follows: twenty dollars to be retained or forwarded to the local union, and thirty dollars forwarded to the International Secretary-Treasurer.'

"Secretary Mitch moved the adoption of the recommendation. The motion was seconded."

Mr. Combs: Counsel, are you through with that particular resolution?

Mr. Rowntree: On page 348. Let's see. The action taken on page 356, the recommendation of the committee was adopted.

Mr. Kramer: There is some confusion.

Mr. Combs: That is what I wanted to point out. I am

sure counsel wants to get this straight. You will find on page 352 that particular resolution was defeated.
539 Quite a few were passed, but that particular one was defeated.

Mr. Kramer: The adoption deals with something else.

The Court: All right.

Mr. Rowntree: The adoption—

Mr. Combs: On page 352, where it was put to a vote.

Mr. Rowntree: The counsel is right, the statement there. The motion is lost and the delegate has the floor. At that point a delegate, Bill Lewis, Local Union 5767, District 29, stated:

"Mr. Chairman, I rise to bring before you the necessity which now exists in the local union, and I also arise to wholeheartedly support the recommendations of the committee to raise the initiation fee to fifty dollars to those who for fifteen long years we tried to get into the Mine Workers organization.

"Yes, I wholeheartedly favor the increased initiation fee to the amount of fifty dollars."

I think that is the proposal in there, in that resolution, is to make the local union keep twenty dollars and the—

Mr. Combs: May it please the Court, without interrupting counsel, we are perfectly willing to stipulate
540 what the constitution provides about initiation fees, and what the local union is to take. What counsel is reading there are simply speeches made by delegates.

The Court: We don't want to hear any of those if we can avoid them.

Mr. Combs: There were twenty-six hundred of those delegates.

Mr. Rowntree: Will counsel stipulate on what action was taken with respect to the initiation fee?

Mr. Combs: The action of the 1948 convention is incorporated in the 1948 constitution, and we certainly would be glad to supply that to counsel, and that sets out specifi-

cally what the initiation fees are and what the convention did do.

Mr. Rowntree: The original proposal was to split this initiation fee twenty dollars to the local and thirty dollars to the International, and that failed. This proposal here—

The Court: Mr. Combs, can you tell us what they are?

Mr. Combs: Yes, I think I can.

The Court: All right, let's have that.

Mr. Combs: It won't take but a second. I don't think there is any dispute about it, and certainly if he
541 wants to get into a debate about what he thought they ought to pay and who should keep what—

Mr. Rowntree: One of these—

Mr. Combs: Are you trying to make a proposal?

Mr. Rowntree: One of these proposals was adopted.

Mr. Combs: Yes, one was adopted.

Mr. Rowntree: It is immaterial which one.

The Court: Get the figures when you can.

Mr. Combs: I don't have the '48 constitution with me.

The Court: You will get them and give them to Mr. Rowntree?

Mr. Combs: I will be very happy to.

The Court: All right.

(The reading of the deposition was continued.)

"I take it these minutes correctly reflect the discussion and the actions taken with respect to that resolution? "A. I agree the convention increased the initiation fees fifty dollars, yes.

"Q. In the second place, it is our contention that a system was established whereby the Union officers at the local and district level, would process Welfare Fund ap-
542 plication papers.

"In this connection we refer to pages 350 and 353 of these minutes, wherein delegates who were local secretaries talk about their added responsibilities in processing Welfare Fund papers.

"Do you recall that the local and district officers did have a responsibility in processing Welfare Fund applications?

* * * * * * * * * * *

543 Mr. Kramer: We will stipulate that insofar as they were called upon they did that. They did not process all applications. Mr. Lewis explains that. They did process some applications, and we do not deny it. They did not process all applications.

Mr. Rowntree: Well, we will go on with that on the stipulation.

The Court: All right.

(The reading of the deposition was continued.)

"Do you recall that the local and district officers did have a responsibility in processing Welfare Fund applications? "A. Yes. It was a voluntary service. The only source that the information could be gotten respecting our members and contribution to the cost of administration of the Welfare Fund—this expense was borne by the United Mine Workers and for no other reason.

"Q. In the third place we contend that the Welfare Fund recipients were required, commencing in 1948, to retain their union membership. Here we refer to page 423 and 424 of these same convention minutes of 1948.

"Do you recall that?

* * * * * * * * * * *

544 "A. I recall that, and I say again that it is merely an incidental matter of administrative convenience, because the United Mine Workers of America were not equipped to offer similar services to non-members of the organization. The agents of the United Mine Workers of America were only required to serve members of the United Mine Workers of America, whose agents they were.

"Q. Mr. Lewis, I will read this statement, by you, which appeared on pages 423 and 424 of that volume.

President Lewis: May the Chair say that there is no question of raising revenue involved in this recommendation of the committee.

545 Mr. Rowntree: In order to make it clear, Your Honor, I will have to read the recommendation of the committee here. It is from the committee.

* * * * * * * * * *

Mr. Rowntree: "Retired members and disabled members receiving aid and also members temporarily unemployed through no fault of their own shall pay one dollar per month dues to be forwarded by the local union to the International Secretary-Treasurer, and a record of all such members filed with the District Treasurer."

Going on.

(The reading of the deposition was continued.)

"'It is merely a question of retaining some sort of legal relationship between the beneficiary and the man who is not working and the organization itself. It is a question, in view of the numerous statutory provisions and the punitive provisions of the Taft Hartley Act, whether a man who pays nothing in the form of dues for an extended period of time to the organization could maintain a legal relationship and be adjudged a legal member. The one dollar represents the utmost minimum to which the organization could reduce those dues and still maintain
546 that definite, tangible relationship. It is not a revenue raising matter. It is not any desire to take any money away from these people but in the consideration of this subject and the inquiry made, we thought it was the most practical and the safest arrangement that could be recommended to the convention to meet the requirements of the situation.' "A. The word 'legal' is used in a restrictive sense there, as appertaining to the organization, and the joint relationship with the operating end of the industry as expressed by the contract; and was merely to define the relationship and to qualify the representatives of the United Mine Workers of America to act as agents in processing these claims for benefits, when all the men who processed hitherto had been members of the United Mine Workers. It did not require anyone to become a member in order to

receive benefits. But in the service of these benefits, the conditions would arise ad interim through the years. They qualified the agents of the United Mine Workers in that respect. The words 'legal relationship' were used, in its entirely restricted sense, under the constitution of the United Mine Workers of America. No other reason.

"Q. In the fourth place, Mr. Lewis, we contend that in 1948 the system was established empowering the
547 International officers to pass on the membership of applicants for Welfare Fund benefits. And we refer here to pages 342 and 343, 1948 Convention Minutes.

"Do you recall, Mr. Lewis, that an International Executive Committee committee—"

Mr. Rowntree: The committee under the committee.

(The reading of the deposition was continued.)

"—was appointed to pass on the membership of applicants for Welfare Fund benefits? "A. Only in the interest of providing—of expediting applicants for admission ad interim the International Executive Board meetings, and to qualify scores of thousands of men who came in and rejoined the union, and there was a question of fact involved as to whether or not they were employees under the contract of the industry.

"This committee was created. It had nothing to do with anything except the convenience of the members and the granting of complete equity and full protection to the applicants if they were justified in rejoining the organization.

"I think counsel will understand that, under the constitution of the United Mine Workers, a man must
548 have employment in the industry or in the United Mine Workers of America; in order to join the union we will not take into the United Mine Workers a man who was not employed in the industry or had no relationship to the United Mine Workers; and that was an important factor.

"Mr. Combs: Does Counsel have any objection to his

reading into the record at this place the provision of the constitution relating to that matter?

"Mr. Rowntree: I have no objection.

* * * * * * * * * * *

"Mr. Combs: Mr. Lewis, if you will read the italicized print there, which is the provision Mr. Rowntree is talking about.

"The Witness: 'Article 9 of the constitution. Duty of Officers. Section 30. The committee recommends that a new paragraph be added to section 30;'—this is the constitutional committee of the convention reporting to the convention its recommendations—that is in parentheses—'new paragraph be added to section 30 as follows: The board is authorized and empowered with the rights or original jurisdiction, to investigate and determine the ques-
549 tions of membership or as affecting individuals who, through neglect or other good and substantial reasons, caused the membership of such persons to have lapsed; provided that such persons, so affected, shall not have worked in other places or industries to the extent that the payment of dues and assessments was required to sustain the membership of such persons.' Adopted in the convention.

550 "By Mr. Rowntree:

"Q. And the fifth and last thing that we contend with respect to tying the Welfare Fund operations to the Union was the control of the Union over the Trustees.

"Now, in this respect, you yourself have been a Trustee on the Fund from the 1947 contract on up to the present time. Is that correct? "A. I have been a Trustee during whatever period of record it is. Nominated by the United Mine Workers of America.

"Q. Yes, sir. "A. Under the terms of the contract with the Government and continued since that time.

"Q. Continued under the contracts with the operators? "A. Continued under the current contracts with the operators.

"Q. We have already talked about Mr. Van Horn's period as a Trustee.

"Mr. Murray resigned, did he not, in that 1948 period of dispute there; do you recall? "A. He resigned eventually. I would not know the date.

"Q. And Senator Bridges was appointed as the third Trustee. "A. On the recommendation of the Speaker
551 of the House of Representatives; Mr. Van Horn and Mr. Lewis concurring.

"Q. Mr. Lewis, is it not true that in the 1949-1950 negotiations for a new contract, the identity of the individuals who were to serve as the operators' Trustee and as the neutral Trustee were an important issue in those negotiations? "A. Do I gather that you mean the personality of the individual?

"Q. Yes, the name of the individual and who it would be? "A. To the best of my knowledge, the United Mine Workers of America have never taken any position except to give—to concede the full right of the operators to select their own nominee for that position. I do not think that in any way it was based upon personality.

"Q. The representatives of the operators, in that period of negotiation, did take the position that the Union was attempting to name these two trustees, did they not? "A. I do not recall such a position on their part as such.

"Q. Well, here we refer to page 96 of the 1952 Convention Minutes, the statement by Mr. George Love.
552 "A. What page?

"Q. Page 96, the next to the last paragraph. Where Mr. Love states:"

Mr. Kramer: Now your Honor, we are going to object to what Mr. Love, connected with one of the alleged conspirators, and for the reason given this morning, that conspiracy not having been proven in advance, you cannot prove it—lift it up by its own boot straps, in other words. This evidence is not competent.

Mr. Rowntree: Mr. Lewis confirms this is a fact.

Mr. Kramer: What he confirms, I am not objecting to that, but I am objecting to what Mr. Love may have said. I do not object to anything that they quote from Mr. Lewis in this record. Your Honor understands that.

The Court: What Mr. Love may have said is not binding on the union unless the union ratified it and approved it.

You may read it as part of the story.

(The reading of the deposition was continued.)

"Q. Page 96, the next to the last paragraph. Where Mr. Love states:"—

Mr. Rowntree: I did not mean that the union said
553 that what Mr. Love said was true, but—well, I will read it and you will recognize what I mean when I come to it.

(The reading of the deposition was continued.)

"Q. Page 96, the next to the last paragraph. Where Mr. Love states:

554 "'The blank check contract Mr. Lewis is trying to force on the industry would increase the already high wage rates of the miner and give Lewis and two stooges of his own selection, theoretically representing the operators and the public, some $150,000,000 a year to distribute haphazardly to anybody he chooses.'

"I take it that Mr. Love did make such a statement as this during the course of these negotiations? Or do you recall? "A. I concede that Mr. Love may have made such a statement, if it is reported correctly; but of course this was a propaganda statement being made by Mr. Love, who is the titular head of the coal operators and the spokesman for them, and he was undoubtedly in a highly emotional state when he made that statement and, like many orators, was carried away by his own fervor, to make untrue and incorrect statements.

"As I recall, I refuted Mr. Love's statement in his presence in various conferences; and I add that the United Mine Workers of America at no time, in any year, on any occasion, under any circumstances, undertook to control

or improperly influence any director of the Welfare Fund representing the varied interests thereon.

"We conceded then and we concede now, in all equity and good conscience and good faith, the right of the
555 various representative interests to select, without interference, their agents or their nominees.

"We further assert, then and now, that after nomination of such individuals by any one of the three interests, and his qualification and his actual seating as a Trustee, that he no longer was an agent of either of the parties which nominated him and placed him on the Board. That his sole fealty and obligation thereafter rested with the trust, the Welfare trust; and that his duty, under the law, under equitable procedure, and all moral rules, was to operate that trust for the purposes specified and in the manner prescribed by law. That he no longer was an agent of the coal operators or the United Mine Workers as the case may be, or the public at large representing the public trustee. That was our concept then; that is our concept now. And meticulous adherence has been given by this individual to the good faith administration of that policy through the years.

"Mr. Van Horn was told that on the Board by this witness. Mr. Murray was told that on the Board by this witness. Mr. Collison, the present Trustees, and their predecessors.

"We resent deeply the allusion or the inference or the statement that any improper attitude was ever taken on that question by any agent of the United Mine Work-
556 ers of America."

Mr. Combs: May it please the Court,—

The Court: Members of the jury, the statement made by Mr. Lové and which has just been read to you, shall not prejudice the rights of the union in this lawsuit. It should not be chargeable to the union, and—

Mr. Rowntree: We agree, your Honor.

The Court:—and so far the Court can see no relevancy in the statement to any of the issues involved in this suit, and that statement should be stricken unless you are expecting to connect it up.

Mr. Rowntree: Oh, yes, indeed.

Mr. Combs: May I say something, your Honor?

The Court: Yes, sir.

Mr. Combs: There is one thing I would like to make clear here that I don't think is clear. The statement that he is quoting from made by Mr. Love shows in the record here that this statement of George Love, December 28, 1949, was made at Pittsburgh. I think the record will show that.

The Court: That statement is not binding on the union, members of the jury, and it shall not prejudice the rights of the union in this lawsuit.

You can see from the context in which it was made
557 that it wasn't made by the union and the union is not bound by it in any respect.

Mr. Rowntree: That is right, your Honor. We are just putting it in to show the background of the conspiracy. Mr. Lewis has acknowledged that the operators were taking that position, and we will go on and connect it with what happened subsequently.

The Court: All right.

(The reading of the deposition was continued.)

"Q. Now, Mr. Lewis, the operators, during that period of negotiations, were seeking to establish Judge Charles I. Dawson— "A. To establish what?

"Q. Charles I. Dawson, as the Trustee named by the operators on the Welfare Fund. Is that right? "A. I recall that, yes, sir. It came about through the operators' loss of confidence in Mr. Ezra Van Horn, who was then a director of the Fund."

Mr. Rowntree: And Mr. Kramer points out that that should be "trustee" of the Fund.

"The Witness: Yes."

Mr. Rowntree: Go to page 47, the witness at the top of page 47.

(The reading of the deposition was continued.)

"The Witness: They purported to find out for
558 the first time that Mr. Van Horn was drawing a salary of $35,000 a year from the Fund while at the same time they purported to believe that they were paying the salary to him personally in his position as secretary of the Ohio Coal Operators' Association; and it resulted in a more or less artificial lack of confidence in Mr. Van Horn; and the internal rumblings among the operators group finally resulted in his resignation.

"By Mr. Rowntree:

"Q. Mr. Van Horn did resign? "A. He did resign. However, his act of resignation was not in any way connected with the United Mine Workers or its position but, rather, to the dissatisfaction and cavilling within the coal operators' group.

"Q. Is Mr. Van Horn still living? "A. No.

"Q. But the operators did take the position that Charles I. Dawson would be appointed as a Trustee. I refer to the bottom of page 98."

1952 Proceedings. Quoting from a letter from Operators' Negotiating Committee, to President Lewis.

"(F) Funds shall be administered by a Board of Trustees. Charles I. Dawson, of Louisville, Kentucky, or his duly-designated successor (who shall be appointed
559 by the Operators) shall be the Operators' representative on said Board of Trustees, with a representative of the Mine Workers, whomever they shall designate, and a neutral Trustee to be selected by said two Trustees."

Mr. Combs: Counsel, pardon me just a minute. I believe it would be much clearer for everyone if he would show at least what he is reading from.

This was a letter from the Operators' Negotiating Committee, National Bituminous Coal Conference, 1949, to

President Lewis, January 25, 1950, addressed in Pittsburgh, Pennsylvania, January 25, 1950, and he is reading from paragraph (F). So that I think at least we ought to identify that because it would be much easier to refer to that.

I just make that suggestion and not as an objection.

The Court: That is correct.

(The reading of the deposition was continued.)

* * * * * * * * * * *

559A "Do you recall that the operators were contending that Judge Dawson should be named for them on the Welfare Fund as a Trustee?

"The Witness: They so notified me that he had been designated by them and received a majority tonnage vote in the industry among the various members of their association.

"Q. Mr. Lewis, I show you Exhibit Number 2 here, page 4 of the exhibit filed by Judge Dawson to his deposition in this case, and call your attention to the two telegrams contained on that page and ask you do you recall that exchange of telegrams? "A. Yes."

Mr. Rowntree: May we stipulate that or shall we read them.

Mr. Combs: We will stipulate that they were sent.

Mr. Rowntree: The telegrams were from the operators' representatives to—well, I think I had better—

The telegrams refer to the resignation of Mr. Van Horn as Trustee and the appointment of Judge Dawson as operators' representative on the Board of Trustees.

The Court: Can you stipulate to that?

560 Mr. Combs: We can refer to those telegrams. We have no objection. If he wants to go ahead, we can refer to them.

Mr. Kramer: I am not sure that is quite an accurate statement, but we can get them and read them.

Mr. Rowntree: We will bring them up later when we read Judge Dawson's deposition.

Mr. Kramer: They are exhibits.

561 The Court: All right.

"Q. Did Judge Dawson demand payment from the Welfare Fund as Trustee? "A. Judge Dawson was never qualified as a Trustee and did not in any formal sense, demand payment as a Trustee; and it was my impression at that time that he would not demand payment as a Trustee because he had accepted the commission of the operators and was guaranteed a $50,000 fee to take this position and put over the operators' program on the Fund; a commitment on which the operators later defaulted and caused a serious controversy between the Judge and the operators and resulted in one or two companies having to find the entire amount of the fee to satisfy the Judge's claim. And it developed that many operators who were committed to pay part of the $50,000 fee, in the end declined to do so because they said they didn't want to pay for a dead horse, and that Judge Dawson had failed to perform.

"Q. Did you have two meetings with Judge Dawson together with Senator Bridges, as Trustees of the Welfare Fund? "A. Two Trustees' meetings were held at which Judge Dawson was present, according to the best of my recollection; and he was not present not as a Trustee but under a privilege to make his statements to the encumbent Trustees as to his right to be qualified as a director.

562 "Q. And was he claiming at those meetings that he was a duly qualified Trustee? "A. Yes. Which claim was not accepted by the Trustees.

"Q. Are there minutes of those meetings? "A. I so assume.

"Mr. Rowntree: I would like to file as Exhibit No. 2, as a late filing, copies of the minutes of those meetings.

"Mr. Kramer: Well, as attorney for the Trustees, I will make an effort to locate such minutes. I assume they exist and, if so, they will be filed or be furnished to counsel for filing."

Mr. Rowntree: May we have such minutes? May I inquire are there no minutes or can we put them in later?

Mr. Kramer: We have made an effort, your Honor, and the trustees to locate minutes of this and they have not been found. If they are found, they will be produced, and representatives of the trustees will be here in due course in this trial.

(The reading of the deposition was continued.)

"Q. At the same time that we are talking about here, during the course of these meetings at which Judge Dawson attended, Senator Bridges failed to approve meas-
563 ures which you proposed at those meetings. Is that right? "A. In my memory, Senator Bridges' position was a little cloudy, because the Senator agreed with certain things that I advocated and he agreed with Judge Dawson on certain things that he advocated, and was so badly mixed up that one wasn't ever quite sure what Senator Bridges' position was on the entire matter.

"Q. Now also, in this period of negotiations, I call attention to page 57, a statement of Southern Coal Producers Association signed by Joseph E. Moody, president, specifically page 57, the third full paragraph from the end, which reads:

" 'The Union paid no attention to our request and Mr. Lewis openly declares that the fund is not to be changed. Mr. Lewis is one of the Trustees. Without consultation with the Southern Coal Producers Association or any other bargaining agent for the bituminous industry, he recently named two other trustees who undoubtedly would be completely subservient to him, and apparently intends to insist that these Trustees be accepted by operators who agree to a new contract.'

"Do you recall that position taken by Mr. Moody?"

Mr. Kramer: Of course, your Honor, we are continuing our objection on the line earlier made.

564 The Court: Those statements are not binding upon the union unless the union makes such statement or unless the union ratifies them, and do not let such statements as those prejudice the rights of the union. The jury will understand those matters.

(The reading of the deposition was continued.)

"A. The statement apparently appears as being made to members of the Board of Directors of Southern Coal Producers Association by Mr. Joseph Moody, who was its president, and naturally represented a partisan point of view and, in my judgment, exceedingly biased; and, in my further judgment, exceedingly inaccurate."

Mr. Rowntree: The last question page 52:

"Q. Mr. Lewis, can you recall in detail what happened at these two meetings at which Judge Dawson attended? "A. Only in general because the conversation was informal. It is entirely possible that much of it was of such a nature that it was not incorporated in any minutes, if minutes were kept. It was a long time ago and my memory is rather dim and I do not know how Judge Dawson's statement appears. There is something in quotations there that comes from something that purports to be a record of what he said, as I glance on the next page; and I do not know how he could have assumed the hazard of quoting verbatim in the kind of meetings that were held. His attendance there was merely as a courtesy as a Judge. He had had a dis-

565 tinguished career and was a prominent citizen of Kentucky and of the United States and all parties were exceedingly anxious to defer to him with every courtesy and dignity; and he was given every privilege aside from the privilege of serving as a Trustee. He was not seated by the Trustees or recognized by them, and his attempts to participate in the meetings by the making of motions or demands that the Chair do this or that were considered as being gratuitous, ineffective, and not binding and not of concern to the Trustees.

"Mr. Van Horn had made a qualified resignation and the

situation was still cloudy as to Mr. Van Horn, as to whether or not he was legally out as a Trustee. The Trustees had not accepted his resignation and the whole matter was pending.

"Q. Judge Dawson testified, Mr. Lewis, that he represented fifty-one per cent of the bituminous tonnage under the contract. Do you know if there was any other requirement as a predicate for this recognition as Trustee? "A. The mere certification of his nomination by the coal operators, as being the individual of their selection, having received a vote representing a majority of the tonnage mined annually by the signatories to the agreement, was not in itself a compulsive document.

"The manner of conducting the election—the man-
566 ner of the separate coal companies making responses to the so-called ballot on the selection of a Trustee—was itself open to criticism; because, to my personal knowledge, many of them would write in the annual rated capacity of their operating mines, whereas, the production of coal in most instances, with most companies, was far below the rated capacity as carried in the reference books of the industry of their operating units. All questions.

"There was no compulsion upon the Trustees in a legal sense or otherwise, to accept the nominee if it appeared that he was not duly qualified.

"So the Trustees withheld action on the seating of Judge Dawson.

"Q. Senator Bridges was in favor of seating Judge Sawson as a trustee, was he not? "A. I think that part of the time he was and at other times, when his own counsel advised with him or the people with him he conferred, whether they were politicians or attorneys, he varied in his positions. He was in public life and the question had political overtones and, like some politicians whom we all know, his position at times was fluid.

"Q. We have been talking, Mr. Lewis, about the Wel-

fare Fund for quite a while here and I would like to turn attention to this Union Security Clause of the con-
567 tract and I believe that the 1947 contract has this clause in it, and we refer to page 69 of the 1948 Convention Minutes and the contract of 1947, in the first paragraph reading in part—the second paragraph, I'm sorry:

" 'It is further agreed that, as a condition of employment, all employees shall be or become members of the United Mine Workers of America.' "

Mr. Kramer: Now, your Honor, we want to renew our objection. You are again getting into the clause of the violation of your Walsh-Healy Act, and we think—and other federal acts—and we think the decision—I take it your Honor hasn't had an opportunity to read it—it came out from the Supreme Court a day or two ago—

Mr. Rowntree: We do not take the position here that the contract clause was illegal. What we are doing here is showing the jockeying around of the parties with respect to language in the contract and how it bore upon the agreement made in 1950. That is all.

Mr. Kramer: We say, your Honor, the use of that contract could not be an element of a conspiracy for the reasons we gave the other day and for the reasons that I think your Honor will find in the decision that came out of the Supreme Court of the United States on Monday of this week.
568 We do not think—

The Court: I have lost the connection, Mr. Kramer. What is the point you are making about that?

Mr. Kramer: Well, as we understood—now counsel seems to say something different here—as we understood, they were taking the position that the inclusion of this clause in the collective bargaining agreement or in the welfare provision of the agreement made the contract violative of the law, that we were using or being used by the trustees of the UMW, and as such it was an element of conspiracy.

Mr. Rowntree: Since your Honor's ruling yesterday—

Mr. Kramer: Your Honor ruled that out yesterday.

Mr. Rowntree: We cannot put it in for that purpose. We are just showing the activities of each side, their attitude, their jockeying around with respect to terms and conditions and how they changed after 1950. Assuming that it is all legal. We show their course of conduct and it bears upon what they did in 1950.

The Court: What is it you want to put in right
569 now?

Mr. Rowntree: We are going into a short space here of what the parties did with respect to this union shop clause, the positions they were taking before 1950 and the positions they took after 1950.

The Court: That testimony may go into the record for the limited purposes indicated by counsel. The jury will not consider the clause as being an illegal clause. It is not offered for that purpose. It is just offered, as I understand counsel, as a part of the picture of the whole picture there.

Mr. Rowntree: That is right. The contrast in the attitude of parties before 1950 and after.

The Court: Well, it may go in the record for those limited purposes only.

* * * * * * * * * *

570 Mr. Rowntree: May it please the Court, ladies and gentlemen of the jury, we refer to page 69 of the 1948 convention minutes and the contract for 1947 in the first paragraph reading in part—the second paragraph, I'm sorry—quoting:

"It is further agreed that as a condition of employment all employees shall be, or become, members of the United Mine Workers of America."

That is a straight union shop clause, that is it means what it says.

(The reading of the deposition was continued.)

"Q. Now, Mr. Lewis, do you recall that Mr. Harry Moses, representing the captive mines in the 1948 contract negotiations, took the position that that clause should be rescinded

or amended? I refer now to pages 146 and 147 of the 1948 minutes, setting forth the statement by Harry Moses, representative of the captive group. And I refer to the third paragraph from the bottom of page 146 where he states:

Mr. Kramer: Of course, Your Honor, we continue our objection for the reasons given. This is the same Moses referred to this morning.

571 The Court: Yes, sir.

(The reading of the deposition was continued.)

" 'These captive coal mine operators repeat their willingness to accept the new labor contract recently negotiated between the commercial bituminous operators and the United Mine Workers of America provided the union shop provision contained therein is qualified so as to p vide that it does not become effective until authorized by their employees in the manner specified in the Taft-Hartley Act.'

"Do you recall the background of that statement? The requirements of the law with respect to a vote? "A. Only in general. Not in detail.

"Q. But this was the position of Mr. Harry Moses at that particular time on that part of the contract? "A. I agree if it is so recorded.

"Q. He further stated at the top of the next page:

'These captive coal mine operators are hopeful that immediate action will be taken by the General Counsel of the National Labor Relations Board to have this issue judicially determined at as early a date as possible.'

"Do you recall whether or not they started such a case in the National Labor Relations Board?

* * * * * * * * * *

572 Mr. Combs: For the purposes of clarification, I would like to state what he is reading and quoting from.

The Court: All right.

Mr. Combs: Statement of Harry Moses, representative of the captive group, dateline, Washington, July 2nd. It was made by Harry Moses probably at a press conference.

It isn't clear. Counsel is reading from two paragraphs from a letter containing at least seven or eight paragraphs, and the captive mines only, this only had to do with the captive mines in 1947, '48, and captive mines are not charged in this conspiracy here.

Now the relevancy of this, I just don't know, because this clearly will go on ahead, it is clearly—it was in the contract, we are not disputing that. They had a Labor Board case. Now what light this would throw to Your Honor, I don't know. I have no objection if you want to read it, but I say it is irrelevant to this case.

573 Mr. Rowntree: We are showing the position of the parties before the conspiracy and what the contrast was after the forming of the conspiracy.

Mr. Kramer: But Your Honor, when the captive mines are not claimed to be conspirators, suppose they changed positions, they are not alleged conspirators.

Mr. Rowntree: The thing is, Mr. Harry Moses became the principal spokesman for the conspiratorial group, we say.

Mr. Kramer: At what time?

Mr. Rowntree: After 1950. This was his position before that time.

Mr. Combs: I don't think any dispute developed over that clause is my point, so how could it be his position, Your Honor? The union allegedly accepted that.

Mr. Rowntree: We show why they accepted this. What we are showing, Your Honor, is the position of the parties before and after the conspiracy.

The Court: And that is the only purpose for which you are reading these statements?

Mr. Rowntree: That's correct.

Mr. Kramer: They are not parties.

Mr. Rowntree: This is a statement of the principal spokesman of the large operator group after 1950.

The Court: All right.

* * * * * * * * * *

574 "A. The question of the captive mines and the relationship of the companies to the union and the membership of the employees was a matter that was more or less a controversy over a period of several years beginning with the resistance of those companies, those captive companies, to the right of their employees to join the union.

"Various shut-downs occurred from time to time, stoppages of work; and the companies resorted to the usage of the coal mine police of Pennsylvania, which were then extant, and repetitious conferences were held with officials of the United States Steel Corporation and other steel companies, and the whole thing assumed an air of continued controversy with new attacks from different quarters from time to time on the integrity of the agreement and on the right of the employees to belong to the union or on the necessity of the employees belonging to the union.

575 "There was governmental intervention several times into these controversies.

"Passage of the Taft-Hartley Act put a new phase on it, and I think in the end it was clarified with due regard to all the statutes made and provided.

Mr. Kramer: Now, Your Honor, the record does show our objection. I don't want to interrupt again. We have made our argument.

The Court: Yes.

Mr. Kramer: All right, Your Honor.

The Court: Members of the jury, these statements appear to refer to what counsel has described as the union shop clause which was discussed apparently in these meetings to which the minutes refer. Now a union shop clause in the contract would not make the union liable in the lawsuit of this kind. Before there could be liability in this suit, the jury would have to find from a preponderance of the evidence that the union made an agreement with one or more of these coal operators to either restrain interstate commerce insofar as it related to these small operators, or to

monopolize the bituminous coal industry in interstate commerce for the purpose of driving these small operators out of the industry before there could be any liability in this case.

576

The Court is allowing this documentary evidence to go into the record for what bearing it may have on the dealings between the union and the coal operators, or for what bearing it may have, if any, on the alleged conspiracy that is charged in the cross action. So keep in mind that this clause to which counsel is referring from time to time, this union clause, is not a predicate for liability upon the part of the union and shall not prejudice the union in any respect and the jury may only consider it for what bearing it may have on the alleged conspiracy that is involved in the litigation.

Now for those limited purposes, this evidence is being received.

Mr. Combs: As a matter of fact, to save the Court's time a little, I think just a few pages here, it shows that counsel stipulated this particular union shop clause and said that the court's decision in that would be the question that would decide that. As a matter of fact, what we are talking about here, Your Honor, is the 1948 contract. It had a union shop clause in it at that time. Captive mine owners said it was illegal and on stipulation approved by the court, this matter was litigated to the Supreme Court and came back down on whether or not the 1948 clause in the contract was legal or not, because of the passage of the Taft-Hartley Act. The Supreme Court sustained the Labor Board that it was as contained in the '48 contract. It was not continued thereafter, and I think can be of no possible relevancy in this case. This is not the union security clause we are talking about in the 1950 contract; this is something contained in the '48 contract which went to the Supreme Court of the United States and was decided by that Court. I don't know of any higher tribunal.

577

The Court: And what did the Supreme Court—

Mr. Combs: The Supreme Court held that the union shop clause in the '47 contract was strictly legal, but the Taft-Hartley Act became effective after that. The operators said that that clause incorporated in the '48 agreement, the captive operators said that clause was illegal because of the passage of the Taft-Hartley Act.

There was a legal question that I won't try to go into here of the effective date of the Taft-Hartley Act, whether it was a current contract or one in the future, and before the United States District judge in the District of Columbia, that was to be litigated, and was left out until it was
578 litigated, and the Court said it was illegal under the '48 contract as it existed because of the passage of the Taft-Hartley Act.

It was dropped, it was complied with. The Labor Board's order was complied with. The union has a letter of compliance that they did comply with all of the orders of the Board with reference to that. It was closed, and my point was that here we have the situation now in this case of bringing the negotiations having to do with something that the Supreme Court settled by the agreement of the parties, litigated to the Supreme Court. There is no question about the union's compliance to that that I know of, and the only thing I am saying in regard to this, I have no objection to counsel, if he wants to pursue that, and under the rulings of the Court, but the thing I am pointing out, when we start to put on our case, I don't think it should be necessary to have counsel and all of these Board cases and all of these things to show exactly what happened. I don't think they are relevant in this case, but if counsel is going to make it an issue and going to the jury for some purpose—

579 Mr. Rowntree: Actually, counsel has gone beyond our purpose. We are not intending to show the result of that case. We are not intending to show at this time whether that contract clause was legal or illegal. We are

showing a position taken by a party. The principal spokesman for them.

We are showing the position he took with respect to a union shop clause in the contract before the conspiracy, and his later attitude with respect to a union shop clause will be shown subsequently after the conspiracy was joined. And it is only for the proof that some agreement was made.

The Court: Mr. Combs, wasn't the wording in the so-called union shop clause in 1947, or prior to the Taft-Hartley Act, different from the wording in the present contract?

Mr. Combs: Yes, sir.

The Court: The wording on the so-called union shop clause, as I understand, in the present contract, only applies in states which allow union shops. But in Tennessee the clause would not apply because Tennessee has what is called an open shop law. Isn't that the situation?

Mr. Combs: Your Honor is exactly right. And the thing I am trying to point out to counsel, regardless of
580 whether he wants to bring that out, we would have to present our side of the situation, both sides.

What I am trying to point out is this, that the clause that he is talking about now, was declared, because of the passage of the Taft-Hartley Act, by the National Labor Relations Board and by the Supreme Court of the United States to be in violation of that Act under those circumstances at that time.

Now the union and the operators negotiated the 1950 contract under the guidance of the Supreme Court decision and under the injunction from the District Court, who say that you can't put that clause back in that contract.

The Court: Could we save time by stipulating on that?

Mr. Combs: We tried to stipulate at the deposition but we would let the court's decisions speak for themselves. I don't know whether counsel thinks that would help or not.

The Court: Can we?

Mr. Rowntree: Yes, sir, I will agree with what counsel has said.

The Court: You stipulate what Mr. Combs said
581 about this so-called union shop clause is correct?

Mr. Rowntree: Yes, sir.

The Court: Now doesn't that finish it?

Mr. Combs: I think so.

The Court: You will note that the Court sometimes confuses these open shops and closed shops. That is because, Mr. Combs, that the Court is not used to these terms like you are, and if the Court does confuse them it does not intend to.

Mr. Combs: I realize that, and it is complex, and we are talking specifically now of the clause as contained in the 1948 contract, and that is what we are stipulating about—that it was a clause that was declared by the labor boards that it would be illegal to insert after the effective date of the Taft-Hartley Act and that was not re-inserted in the 1950 contract and has got nothing to do with it.

Mr. Rowntree: All right.

The Court: All right.

Mr. Rowntree: It was just to show the jury.

The Court: All right. That is the stipulation.

Mr. Rowntree: And skip to the top of page 62.

582 "The operators or the Southern Coal Producers' representatives were likewise taking a legal position on that question there; do you recall that? "A. The Southern Coal Producers Association was a minority group in the production volume of the industry. The leadership substantially was asserted by the operators of the bituminous coal operators association representing the bulk of the Appalachian Range and a good deal of tonnage in outlying districts in the far western areas. So it was the habit of the Southern Coal Producers Association, after the fact of developments in the industry—or to authorize Mr. Moody to aver, saying in substance, "Me too. Me too." So, as a matter of fact, I never paid much attention to Mr. Moody's utterances because he had been an officer in the National Association of Manufacturers before he was em-

ployed for that position and, later of a machinery company in York, Pennsylvania, and I considered him to be more or less an anti-union propagandist; and he seized upon every possible occasion to sound his horn.

"I knew Mr. Moody quite well. As an individual I like him very much. I think he has many fine, able qualities. I think that the years have ripened his judgment and added to his wealth of experience and his ability to understand the condition of the industry is much greater. That was one of his great handicaps in the early days: His
583 lack of knowledge of the industry and its problems and the personnel of the industry, and I think that he has ripened and grown with the years and now occupies a very influential and important position in the industry.

"Q. What is his current position? "A. He is president of the National Coal Policy Conference.

"Q. Has his attitude toward the union changed since these days that we are talking about? "A. I could not say as to that with any degree of reliance upon my opinion, except that he is working in a position now where that problem is not a question.

"Q. This 1950 negotiation involved the President's appointment of a three-man Fact Finding Board again. Do you recall that? "A. 1950?

"Q. 1950. "A. I am sure there was a Fact Finding Commission but, again, the sequence of dates I am not sure of.

* * * * * * * * * * *

584 "Q. We have been talking here, Mr. Lewis, about the Welfare Fund provisions of the contract and the union shop provision of the contract and the positions of the parties on that, particularly the positions of the operators.

"There were certain other basic issues, were there not, in those 1950 negotiations? Specifically, a wage increase was in issue? "A. Every conceivable item that ran to the well-being of the members of the United Mine Workers employed in the coal mines was always an issue in every

joint conference, susceptible of consideration and analysis; and certainly the agreement, in its final form, must run beyond academic questions or legal questions.

"The prime consideration was bread and butter. Reasonable hours, so that a man would not have to labor to the point of exhaustion and become physically impaired before his time. The living standards which were
585 affected highly by the bread and butter consideration and compensation. The health of the miners. The occupational diseases. The question of why life expectancy was shorter in the coal mining communities of this country. The specialized illnesses of the coal mines.

"For instance, the pneumonia rate in the coal mines of this country averaged, for many years, ten per cent above the national normal standard.

"Why? Because he worked in the coal mines. Because he was subject to temperature changes and inadequate oxygen in the air. Mine gases and all those things that contribute, so the medical profession says, to the higher incidence of deaths by pneumonia.

"Just the same as in the Kentucky-Tennessee-Southern West Virginia area, deaths from childbirth were two and three times the national average.

"Why? Because of inadequate medical facilities.

"All those things are pertinent matters which may have been discussed and no agreement reached; and the final contract, finished contract, drawn up and executed—and confirmed by both sides and accepted in the compromise of those positions—represented the best that could be achieved at that time under the circumstances and conditions prevailing.

586 "Q. Mr. Lewis, one of the principal issues in the 1950 negotiations was the question of stabilizing the industry. "A. The what?

"Q. Stabilizing the industry. "A. I thought you said 'vaporizing'; pardon me.

"Q. A problem arising from the fact that there was too

much coal for the market. Do you recall that? "A. Oh, yes. That is a term frequently used—somewhat loosely but as a generic word.

"Q. We refer here to pages 296 and 297 of the 1948 convention. A statement by President Lewis at the 1948 convention. * * *

"I would like for you to read particularly the first paragraph under your name there, the name of President Lewis. The first paragraph and also the paragraph starting at the bottom of page 296. These two paragraphs. And also the second full paragraph on page 297."

Mr. Rowntree: That states as follows:

"President Lewis: May the Chair say this in relation to the general subject matter: The productive capacity of our coal industry exceeds at any normal time the consuming capacity of our markets. For many long years the coal industry was developed to a degree that the work-time of industry was intermittent, and in the majority of
587 coal-producing states was almost chronically under 200 days per year work-time opportunities. A comparatively small number of special-purpose company mines, producing special-purpose coal, were able to work almost full time. Yet there were times when extraordinary conditions—world demand, wars and rumors of wars—made more demand for the product, and when we oftentimes found that an inadequate car supply prevailed and men in specialized areas on special rates were deprived of a reasonable opportunity for work participation."

Down to the bottom paragraph.

"The Mine Workers had a bitter experience in that matter and we have taken some profit from it. In the Anthracite industry we made it an issue, and due solely to pressure from our organization and the policies which we suggested we were finally able in the Anthracite region, covering Districts 1, 7 and 9, to put into effect a joint commission consisting of representatives of the Operators,

representatives of the three Districts of the United Mine Workers, and representatives of the State of Pennsylvania, to allocate the work time for the Anthracite industry, so that such work time as was available would be shared
588 by all of our members in as substantially equitable a manner as could be made effective. This arrangement has proven to be a great stabilizing influence in the Anthracite industry. Its maximum of efficiency has not yet been demonstrated because of the existence of a World War and the fact that the industry has been taxed to supply more and more coal."

The second full paragraph on page 297.

"I merely want to say this in connection with this matter. When this market condition comes to a point in the Bituminous industry that it threatens the stability of our contract and the working conditions of our people, when the disparity of employment get to a point where it constitutes a rank injustice and lack of opportunity for our members to work, the United Mine Workers of America itself may find it necessary to advise our members how many days a week they need to work. We have that contractual right, because the contracts are written to permit that. It is a matter of self-preservation for our Mine Workers; it is a matter of self-preservation for the investors in the industry. If the Operators of this country can't give any leadership on the commercial side of this industry, the United Mine Workers of America can and will.

* * * * * * * * * *

589 "So next year, in 1949 or at any other time, when evil days come upon this industry, you will find the United Mine Workers of America moving in, and if there are only three days' work in this industry we will all have the three days' work. These things are of the utmost importance. Conditions are not now as they were in the old days. Years ago our Contracts were staggered and they expired at different times. Large segments of the industry

were not organized and the men had to work under inhuman conditions."

This is a statement made at the 1948 convention.

Mr. Combs: I would like to point out, your Honor, that Mr. Lewis was addressing himself to a resolution offered by Local Union No. 6938 at Cannelton, West Virginia, and that this resolution, subject matter was a guarantee for regular employment. It particularly asked for the government to make an investigation of the coal car shortage in the industry. That was what Mr. Lewis was addressing his remarks to, and I think it would clarify it, if it
590 were known.

The Court: Yes, sir.

(The reading of the deposition was continued.)

"Do you recall this statement? "A. Oh, yes, and I may say that those observations merely relate to one thing: The equitable distribution of work opportunity in the coal industry and the desire of the United Mine Workers to have the work opportunity more equitably distributed. It had nothing to do with any other subject.

"Q. And in 1949 and 1950, during the period that the negotiations for the 1950 contract were going on, you did set three-day work-weeks and other types of work-weeks in the industry? "A. We set a three-day work-week, yes, to distribute the work and the opportunity for work; and for no other reason."

Mr. Rowntree: There are references here to communications from mine workers with respect to the setting of three-day work weeks.

* * * * * * * * * * * *

591 Mr. Rowntree: Page 66. This is a statement by Mr. Lewis June 23, 1949 to the joint conference that was in session at that time of the new contract after the termination of the 1948 contract.

"There comes up at this conference, we think, the question of some regulation of the working time, some stabilization in the industry."

Mr. Rowntree: "The Mine Workers have gazed at some degree with admitted apprehension at the tendency of the industry to reduce their prices in the face of increasing competition. Frankly, we think the industry has been too hasty."

Dropping to the last full paragraph:

"There has been much talk lately about a stabilization plan, much of it is affecting the Mine Workers and the Operators. It has no basis of fact and cannot be con-
592 sidered practicable. It is true, however, that we do have a s gment of the coal industry operating under a plan that brings about a distribution of working opportunity (Mr. Lewis then explained the plan that had been worked out in the Anthracite Industry). We would like to talk to you in this conference on some improvements and stabilization which is a question of magnitude in the minds of the men as affecting the investment in the industry. We would rather deal with you when you are opulent rather than when you are poor. We like to negotiate with you when you are full, when you are satisfied, when you can pay your board at first-class establishments, and we can, too."

The next paragraph beginning at the top of page 67:

"There are a number of things in the Agreement affecting working conditions and joint relationship which we think ought to be improved. We think there ought to be set forth in the Contract, in principle, a definite rule for the industry to follow on seniority and the reduction of manpower; because that is going to be a question that is germane for attention in the industry as we go forward. The manpower of the industry is going to decline for the reason we all understand. The productivity of the industry is going to increase. It is increasing and I see no reason to be-
593 lieve that it will stop increasing for an indefinite period. The labor cost per ton is declining and will continue to decline."

Mr. Combs: I would like to point out for clarification that the quotes that counsel read from are parts of two paragraphs and some other paragraphs from a statement made by Mr. Lewis in June 23, 1949, and that that statement in the minutes consisted of three pages. And we will refer later on to other parts of the statement. I just wanted to clarify that.

* * * * * * * * * * *

"Q. Mr. Lewis, do you recall this statement apparently made June 23, 1949, in the joint conference? "A. Yes.

"Q. Did not the operators' representatives protest your effort to set the working time in the industry? "A. Yes. As I recall, they did."

Mr. Rowntree: We here refer to specific objections and statements at page 81 of the 1952 convention, also
594 page 84 of the 1952 convention and the statement of the Southern Coal Producers Association, page 48, 1952. We won't read those.

"They were not interested, Mr. Lewis, in letting the industry work a three-day work week. These operators' representatives were not interested in a three-day work week in the industry? "A. No. As I recall, they protested.

"Q. We have been talking about issues in these 1950 negotiations and there were many days of short work weeks and many periods of time of no work during these negotiations, is that right? "A. It varied with different companies, and the mine workers were interested in equality of opportunity for employment. That was the sole consideration.

"We do not and have not sought any privilege in management or in the coal industry beyond the production problems. The United Mine Workers of America do not follow through the coal to the market. They are interested in volume and not in prices. We have always recognized the right of the operators to make the prices in accordance with their judgment but have sometimes doubted the soundness of their judgment, and we thought at times it was done to be able to pull a poor mouth in the wage negotiations and

secure a contract for lesser wages than might have
595 been the case, by pleading poverty.

"In addition to that, there are some coal companies owned by outside interests who are perfectly willing to put their coal companies in the red for the tax advantage in equalizing on other holdings they might have in industry. That is certainly true to a marked degree in certain instances.

"But the mine workers were interested only in equality of work opportunity. We wanted to get away from the feast-and-famine thing to a certain degree. Excessive production in times of stress or market improvement—demand, and no work at all under some circumstances.

"Q. Finally, the supply of coal in the country in 1950 ran exceedingly short before the 1950 contract was finally signed, did it not?

"A. I don't agree with your words. I agree that the storage was used up to some degree but not in any sense that it created apprehension and danger."

* * * * * * * * * * *

598 "Q. Well, would you say, Mr. Lewis, that the country was experiencing difficulties and dangers because of shortage of coal in that period? "A. No. I would say that the threat of possible shortage of coal might have caused some apprehension among nervous citizens, and the whole theory of stoppage of production in an indus-
599 try is an unpleasant concept for the average citizen to face. He would like for a normal condition to prevail.

"Q. Particularly a basic industry like coal. "A. Quite so. But we have so many industries now that are on an equal basis. We couldn't do without any of them.

600 "Q. Coal remains the fundamental, basic industry? "A. Yes, but food comes before that and shelter and transportation, before the coal can be gotten to these places.

"Q. It goes around in a circle, in other words? "A. It

is all interdependent. It is a marvelous, complicated economy we have erected here.

"Q. Mr. Lewis, that brings us to the signing of the 1950 contract."

* * *

"It is our contention that this is the point where the conspiracy was formed that we allege in this case.

"You had been negotiating with Mr. Love, Mr. Moses, these various representatives of the operators over a period of many months and you knew them very well, I take it. You knew their companies and their respective positions in the industry, of these various companies represented by Mr. Love and Mr. Moses. "A. At that point let me intervene, if you please.

"Q. Yes, sir. "A. They were representatives of the industry. It was not only their units of production that were concerned. And while I knew a good deal, I think, concerning their problems as minor producers of coal, I knew equally as much about all the principal units in the
601 country. That was my business. It didn't make any difference where a man came from; if he operated a sizeable mine we had certain information on it, factual information that would run to questions of our interests. We knew what his bank was. We knew what his capitalization was. We knew what his dividends were, if he had any. We knew the banks that he was in debt to; the banks that could influence him. The companies that he sold to. The problems of mining. The different irregularities and the natural conditions that made for a higher or lower cost of production. The quality of the coal. The efficiency of his preparation of it for the market. We know that about all the companies.

"So in that respect I knew no more about Mr. George Love's plant than I did about anybody else's plant.

* * * * * * * * * * *

602 "Q. Mr. Lewis, we refer to the 1952 convention minutes, pages 72 through 81. A statement by you at

White Sulphur Springs, October 16, 1949, wherein you describe the relationships of certain individuals to certain companies.

"These statements were made as statements of fact
603 by you, I take it, with full belief that they were true statements? "A. I failed to catch the last three words.

"Q. I mean this statement made by you on these pages, you believed to be true at that time, and you still believe them to be true? "A. That is characteristic of all my utterances.

"Q. Yes, sir. This is your conclusion as to th place that these various companies, referred to here, filled in the bituminous coal industry? "A. If you will pause just a moment—

"Q. Yes, sir. "A. —I am trying to identify to whom this statement was made.

"Q. All right, sir. "A. Do you have it? What date did you say?

"Q. October 13, 1949. "A. Yes, but to whom was it made? Was it an address to the conference? Was it a public interview?

"Q. I would say it is a public interview, from the contents."

* * * *

"A. I would assume from a cursory examination of this, that in an address to a joint conference, of the Ap-
604 palachian Joint Conference, and that present were all the negotiating operators and all the representatives of the United Mine Workers, a considerable number. And I reasonably conclude that it is an accurate transcript of what I said.

"Q. Yes, sir. "A. Without knowing.

Mr. Rowntree: At this point, we read the statement made on October 13, 1949, page 72 and parts of the next four pages starting at the second sentence in the last paragraph on page 72.

"The so-called captive mine companies owned by steel companies have an annual production of about 52,000,000 tons—the coal mined by the wholly owned subsidiary corporations of operating steel companies. In addition to mining that coal, the same steel companies buy an enormous tonnage of coal from commercial producers, which forms an important item in total business volume for an operating year. The captive mine production together with the production of the Pittsburgh Consolidation Coal Company, which is the largest so-called commercial coal producer with several other companies closely allied to them in financial structure, sales and operating arrangements, amounts to about one hundred million tons.

605 "There is another group similarly, though more remotely controlled, in the South, which heads up with the tonnage of the Island Creek Coal Company, the Pocahontas Fuel Company and certain others, which operates through the Southern Coal Producers' Association.

"The Southern Coal Producers' Association is a holding association composed of about fourteen regional associations. And in negotiating with the Southern Coal Producers' Association, we are one move further from the operating coal companies. They first hide behind their regional association and secondly, hide behind the Southern Coal Producers' Association.

"The Southern Coal Producers' Association, however, is a false front for the Appalachian Coal, Incorporated, which is a sales organization which levies a brokerage rate on about forty to about forty-five million tons of annual production making sales contracts for the entire volume for a mine or a company and charging a percentage commission for the handling of that tonnage.

"The interests of the Island Creek Coal Company which control the Appalachian Coal, Inc., therefore, have vast influence with any companies that sell coal through that organization and it would be commercially and to some

606 degree financially disastrous for those companies, members of the Southern Coal Producers' Association, to take any other attitude than the attitude taken with respect to wage contracts by the Island Creek Coal which dominates Appalachian Coal, Inc.

"Therefore, another set of controls is set up which affects about an additional ninety to a hundred million t[illegible] of production. The Island Creek Coal is controlled by the Cleveland Trust, the family trust for which that company is trustee. And Mr. Isadore Freiberger, the chairman of the Cleveland Trust, member of the board of directors of Island Creek Coal, Pond Creek, representing the estate which controls the company with a completely free hand, can dictate the policies of the Island Creek Coal. He is doing it in association with and in cooperation with the major financial groups in the steel industry who are seeking to avoid the necessity of establishing a contributory pension plan and welfare arrangements in the steel industry.

"That amounts to about two hundred million tons of the nation's so-called five hundred million or more national bituminous production.

"In addition to that, there are certain groups of
607 companies operating in the industry, like the corporate concern owned by the Koppers Company which mines about fourteen million tons a year, completely dominated by the Mellon financial interests.

"In addition, there are a great number of captive mines, not ordinarily covered by that terminology, which are wholly-owned subsidiaries of commercial manufacturing companies and which furnish coal to those companies—automobile companies and other concerns of a miscellaneous nature. They are captive mines except they are not ordinarily included in that terminology when it is used to describe certain types of mines.

"These interests are in association with the interests that are in the steel industry and have taken this stand against

pensions and welfare in the contract in the steel industry. These interests include all the companies interested in steel. They include the representation on their Board of Directors from various industries, such as Mr. Walter Gifford, representing the empire and all the employees of the American Telephone and Telegraph Company as he sits on the Board of the United States Steel; Mr. Sewell Avery, representing the great gypsum company and Montgomery Ward and other interests as he sits there, and the representatives of
608 the great major insurance companies which have large investments in industrial enterprises and have representation on these Boards.

"So, we have a combination of powerful financial leaders, not necessarily great in number but tremendously influential in the magnitude of their financial representation. That includes practically all the major automobile companies, with the exception of Ford. It includes practically all of the steel industry. It includes the insurance companies. It includes the DuPont family and their great investments—their holdings, of course, of twenty-three per cent of the stock of General Motors which is controlled for all practical purposes. It includes the Mellon empire and their banks. And taken together makes a tremendous group of immense power who apparently have decided to make this struggle in steel, final and significant in American economic history."

Dropping to the third from the bottom, fourth paragraph.

"The struggle is on in the steel industry. Now it is obvious that the steel industry, financially interested in many coal mines, would be disinclined while this trouble is on to permit a contract to be negotiated in the mining
609 industry that would reaffirm the principles embodied in the welfare and pension plans in contract in extenso for its operation. They, of course, recognize that eventually they will have to make that form of contract in the coal industry. But they wish to postpone the day.

So, it is just as simple as Mr. Benjamin Fairless, president of the United States Steel, saying to Mr. George Hum-

phrey, head of M. A. Hanna, which owns thirty-eight per cent of the stock of Pittsburgh Consolidation Coal: 'Do not let George Love, as chairman of the Operators' Negotiating Committee at White Sulphur, make a contract that will embody a welfare clause!' It's just that simple. It's just that effective. And it operates just that way.

"So Mr. Love in his unique position of representing definitely and primarily these great combined interests which I have described in the coal industry, is in the position of being the actual as well as the titular leader and spokesman of the coal operators of the country due to circumstances and competitive relationships in the industry.

"For instance, no commercial coal operator as yet in the country, whether he is west of the Mississippi River or east of the Mississippi River, south of the Mason-Dixon Line—
if he is in the business of producing commercial coal—
610 would hazard his business future by undertaking to disagree with the leadership furnished the industry now by the United States Steel through Mr. George Love and Mr. Harry Moses, who is on the outside but is adviser and counselor of Mr. Love. No operator would dare hazard his commercial and business future.

"In the first place, he dare not make an agreement with any expectation of remaining in the business of producing coal unless he knows what his competitor will pay in the form of a wage structure. In the second place, if he wishes to sell his coal in the open market and sell some of it to these industries which I have described, he cannot offend them by undertaking to go contrary to their wishes on wage negotiation policies.

611 "In addition to that, he dare not commercially offend the financial influences exercised through the great banks wherein the interests described are dominant. I refer to banks like the Mellon Bank in Pittsburgh, a billion dollar concern. George Love is a director in that bank and sits in the holy of holies in discussion of these policies. I refer to banks like the Continental Illinois in Chicago, the great New York banks where the steel corporations, motor

industry and all of these allied industries have literally billions of dollars of deposits which can be shifted about at will to the detriment of the banker or to the detriment of the banker's customer who doesn't act in an orthodox manner from their standpoint.

"Therefore, there has been no progress in the coal negotiations. And, therefore, it is a reasonable expectation that there will be no progress until the roadblock which they have set up has been removed by the same forces which set it up.

"They have elected to fight this out and create this crisis and there is nothing that labor can do either in the coal industry or the steel industry than to await their pleasure."

The first full paragraph on page 76:

"Mr. Love is a hired man for the M. A. Hanna
612 interests. He runs the Pittsburgh Coal for them."

I might say, your Honor, Pittsburgh Coal is presently Consolidation Coal Company.

"He carries out their orders. He takes instructions from George Humphrey. George Humphrey is a partner in the steel industry with Ernie Weir of National Steel. He sits in the steel conferences. He prides himself on being primarily a steel man and not a coal man."

In the middle of page 77:

"It is impossible that the Southern Operators conceive that they will be successful in having the Mine Workers go to work in the mines again without a Welfare Fund. But they use it for the same reason—to create an impasse and a deadlock until their financial sponsors and their industrial customers advise them that it is no longer necessary to protect the steel industry by tying up the coal industry."

Mr. Combs: Just for the record, may it please the Court, while he is looking for that—the excerpts he read was a statement made by President Lewis at White Sulphur Springs, West Virginia, October of 1949.

His statement was extemporaneous. It contained
613 some nine and a half pages. That excerpt was from nine and a half pages.

Mr. Rowntree: We are at the bottom of page 81. We quote some of that language.

(The reading of the deposition was continued.)

"'So it is just as simple as Mr. Benjamin Fairless, President of the United States Steel, saying to Mr. George Humphrey, head of M. A. Hanna, which owns 38 per cent of the stock of Pittsburgh Consolidation Coal "do not let George Love, as Chairman of the Operators' negotiating committee at White Sulphur, make a contract that will embody a welfare clause." It is just that simple. It is just that effective and it operates just that way."

"Mr. Lewis, if these men could tie up the industry against the union, it would be just as easy for them to tie it up with the union?"

* * * * * * * * * * *

614 "A. I would say that it is purely an assumption. The question is predicated upon an assumption which has no bearing and it is not germane to the subject matter. I see no reason to quibble about words.

"Q. Now one of the things that occurred after the 1950 contract is reflected in the United Mine Workers Journal, September 1, 1950, page number 5. I show you a copy of it."

* * * *

"Q. Do you recall this development that is recited here in this Journal page?"

615 Mr. Rowntree: Top of page 83.

"A. Unquestionably at the time it occurred I must have had some knowledge of it but did not consider it too important, knowing a good deal about Mr. Denham's background and previous condition of servitude.

"I am frank to say that I had forgotten all about it. I had forgotten that this statement ever appeared in the Journal and had truly forgotten Mr. Denham.

"Q. But it does appear that the operators and the union were seeking a dismissal of a labor board case previously

brought by the operators? "A. It is possible, yes. I wouldn't know."

Mr. Rowntree: The Journal exhibited there states:

"The fantastic absurdity and mischief-making potentials of the NAM-Taft-Hartley Act were never more glaringly placed on view than in current proceedings before the National Labor Relations Board wherein the UMWA is being required to defend itself against unfounded charges of a dubious, technical nature at best and which the coal operators, who originally filed the charges in the heat of last winter's wage dispute, have since asked be withdrawn."

(The reading of the deposition was continued.)

"Q. Now with respect to the disposition of the
616 various issues that"—

Mr. Combs: Just before you pass on, if you don't mind, that is a quotation of one paragraph from the full page, two-column article on the United Mine Workers Journal in the issue counsel referred to, and it is styled by the editor "'Shylock' Denham Presses T-H Prosecution of UMWA in Spite of Operators-Union Plea." That is a two-page statement.

Mr. Rowntree: We are beginning to contrast the relationships after 1950 as compared before 1950.

* * * * * * * * * * *

617 "Q. Did the operators' representative, particularly Messrs. Moses and Fox, ever again raise any question in negotiations, with respect to this language? "A. They may have or they may not. I don't know. Because countless questions were raised during their tenure in office. That is their duty. It is a large industry that involves thousands of men and thousands of operators, and it is routine, and ordinarily these things don't come to the attention of the Chief Executive of the organization because he does have some other duties, and he delegates the administration of these things to other men.

618 "Q. Mr. Lewis, did you become personally advised of the passage of the 1951 amendment to the Taft-

Hartley Act which prohibited the union shop clauses and collective bargaining agreements where the union has not complied with the reporting provisions within the preceding twelve months?"

Mr. Combs: I made an objection to that, Your Honor, that it is strictly a legal question as to what the statute did and what it provided for, and I don't think the witness should answer a question like that.

The Court: That's correct, it is a legal matter, but did he answer the question, Mr. Rowntree?

Mr. Rowntree: Yes, sir, on page 91, the middle of the page.

(The reading of the deposition was continued.)

* * *

"A. I do not recall my reaction on the first news that it had been adopted by the Congress; but unquestionably, with regard to the usual procedure, I would wait until my lawyers had time to come in and tell me what it meant, and then I would advise them to look after our interests in connection with it.

Mr. Combs: That is just an illustration, Your Honor. I don't see how on earth this serves any purpose
619 whatsoever reading things like that.

Mr. Rowntree: If Your Honor please, we will proceed to show that they have not complied with the provisions of the reporting law, and that the companies raised no objection to the clause in spite of that. That would be the purport of the following pages, expressions of the union with respect to the filing compliance. I believe it will show clearly the attitude of the union with respect to that, and the provision of the law at that time required the filing of these reports to make an effective union shop clause.

The clause remained in the contract even after that law was inserted in 1951, and the clause went unchallenged by the major coal operators in contrast to the previous—the history of challenging these things. That is the purport of what we put in this morning.

Mr. Combs: Now, may it please the Court, I don't know what he is talking about, the requirements of the reporting requirements that the operators would have something to say about why doesn't the union do it.

Now it is stipulated here, there's been no claim whatsoever that the union elected to avail itself of the facilities of the Labor Board. The clause that we have here, the security clause, at that time admittedly was not an effective
620 union shop clause. There's no claim by the union that it was, the Courts have so held.

Now what counsel means by that, I don't know. I don't know why the operators didn't reply to that. The union's never made any claim and neither have the operators. Both parties had negotiated this clause with the view in mind of negotiating a perfectly valid, legal provision of the contract. The Courts so held.

The Court: Can't you stipulate what Mr. Combs just said as fact?

Mr. Rowntree: Yes, with the further stipulation that the clause remained in the contract in its amended form even after 1951, and that the operator representatives made no contest over it.

Mr. Combs: I see no reason for stipulating that. That is true, it is in the contract now, as of now. There has been —there may have been complaints on the operators' part, I don't know. I can't stipulate to that. I don't know if there has. I have no knowledge of it.

The Court: Does that satisfy you, Mr. Rowntree?

Mr. Rowntree: Except for this, Your Honor. A while ago counsel stated that the clause was in effect "except in those states which had right-to-work laws."
621 Mr. Combs: I didn't say that.

622 Mr. Rowntree: Well now, that is the thing that bothers me. It has bothered me for a long time. Is the clause in there or isn't it?

Our only contention now is that there was no protest by

the operators after 1950 over this clause, in contrast to their previous contest over it, repeated contest, hot contest.

The Court: Mr. Combs, as I understand, is willing to state insofar as he knows there were no protests on the part of the operators.

Mr. Rowntree: That is all I want.

The Court: All right. Let the record so show.

Mr. Combs: It is my assumption that when the operators signed the contract, they assumed it was a legal clause, and I know of no protest on the part of the operators on that clause.

Mr. Rowntree: That gets back to—

Mr. Combs: It is our further objection that, of course, the evidence and the stipulation we are talking about has no relevance to an anti-trust action.

* * * * * * * * * * *

626 (Thereupon, the jury retired from the courtroom and the following proceedings were had in the absence of the jury.)

Mr. Kramer: Your Honor, the plaintiffs now propose to go into some testimony with reference to non-compliance by the United Mine Workers of America of the Taft-Hartley Act, non-Communist oath, et cetera, which raises what we think is a serious question and we think the
627 evidence is incompetent. And may Mr. Rayson present our objections to you?

The Court: Yes, sir.

Mr. Rayson: Your Honor, it is a known fact, of course, that the United Mine Workers elected not to file certain things with the Department of Labor under the National Labor Relations Act as it existed in 1947. They did not file financial information with the Department of Labor. They did not file a non-Communist affidavit.

It is our position, particularly with reference to this last,

that this is highly prejudicial to the position of the United Mine Workers and that it ought not to be introduced into evidence.

The Court: Can't you avoid getting that before the jury by stipulation on the law features? Can't you keep that out from the jury by stipulating—that is not going to be controlling in this lawsuit.

Mr. Rayson: We think this, your Honor, it has absolutely no bearing on this case. It doesn't need to be in this record. It ought not to be in this record.

The Court: What is the point, Mr. Rowntree?

Mr. Rowntree: If your Honor please, we are showing the bearing that it has on conspiracy and restraint
628 of trade, proving the nature of the understanding and agreement that was made in 1950.

Now we have shown already the position of the operators before 1950, their haste in going into court with everything they could put their hands on. Now we come to a situation where there was an obvious remedy in an appropriate proceeding that they could take, which they would have taken under their attitude before 1950, and that is this. It is agreed that there could be no union shop in a labor contract with the union which was not in compliance with these reporting provisions.

As counsel has stated, it was a well known fact that this union had not complied, and yet we have a union shop provision in this contract.

Mr. Rayson: May it please the Court, in the first place, the non-compliance of the United Mine Workers dated from 1947, and, of course, as everybody knows, the reason that Mr. Lewis refused to sign the non-Communist affidavit was not because he was a Communist, but because he resented the fact that he and other people were being singled out to sign such affidavit in order to take advantage of the law.

The United Mine Workers' position on Communism has been a matter of public record since 1924. They op-

629 posed it long before it became popular to oppose it.

Mr. Rowntree: We can stipulate as to that for their purposes.

Mr. Rayson: But, your Honor, getting back to this other, the only possible connection it could have here, as Mr. Rowntree has pointed out, is with this so-called union shop provision. Now the 1947 contract, a contract executed before this alleged conspiracy, contained such a provision.

In 1950, as the proof is positive, such a provision was taken out. Now the history of this provision and this lawsuit has been one of absolute retreat from position to position, and we say now that the law is changed so much that he has no position left on this point, your Honor, and that the only discussion, the only purpose of any discussion of a union shop clause at this point, in face of controlling law, is to prejudice the jury.

The Court: Now, Mr. Rayson, as I understand Mr. Rowntree, he has one point in mind in offering this proof.

The point is that the big operators contested the union on the point up to 1950 or '49. After that period the big operators didn't contest the union with respect to

630 that point, so that he says that does have a bearing on whether or not there was an agreement between the big operators and the union, the purpose of which is to favor the big operators and to drive the little operators out of business.

I am not going to intentionally let Mr. Rowntree put in any evidence here that doesn't have a bearing on this issue of conspiracy, which might, as you say, prejudice the jury. I am not going to allow that under any circumstances, but I can see, if the point that he is making is supported by the evidence, where that might be a little circumstance, howsoever slight, which might have a bearing on this alleged agreement that he is undertaking to show.

That is the reason I am trying to get you men to stipulate, so I can keep out anything about Communism or anything in that regard from the jury, because I think you are exactly

right. It was well known—I say commonly known, that the reason Mr. Lewis didn't sign this was because he had a principle in mind and he didn't want to sacrifice that principle. The principle was that the Congress had no right to put that clause in, as I recall, under the Constitution, and that his the reason for not signing was not in regard to any labor problem, it was his belief that you were
631 depriving persons of liberty and freedom by forcing them to sign papers like that. Isn't that right? Isn't that his position?

Mr. Rayson: I don't know whether his principle went into constitutional objections to it. I frankly don't know. I know that he felt as a matter of principle that Congress should not have enacted such a statute to single out labor organizations for that purpose.

The Court: What the Court has said comes from a vague recollection of hearing something about it years ago. I don't have any definite recollection about it.

Mr. Rayson: We want to say this. The point of our objection is not aimed simply at the evidence as to the United Mine Workers' actions with regard to the Taft-Hartley Act reporting provisions in 1947 and afterwards. We say that is not competent evidence. We further say that this evidence about the union shop provision is not competent evidence.

If your Honor will recall, when this suit was first filed, and when Mr.—

The Court: I don't think it has anything on earth to do with the issues in this lawsuit, unless it has a bearing on the attitude of these big operators before 1950 and
632 the operators towards the union after that. It might shed light on whether or not there was or was not an agreement between these big operators and the union.

Mr. Rayson: Well, your Honor, this final point. The clause, I would say even Mr. Rowntree would agree that this clause is a legal clause. It was changed in 1950, at the

time he says the conspiracy started from an illegal clause to legal clause.

The Court: Mr. Rowntree, I am not going to let you go into these details about Communism and you might as well understand the Court right now.

Mr. Rowntree: We are willing to stipulate some general stipulation.

The Court: All right. If you will stipulate some general stipulation, I will keep all of this out of the record. I don't intend to let it go into these matters, except for what bearing it may have on the attitude toward certain propositions by the big operators before 1950 and their attitude after that.

Mr. Kramer, you can see that might have some bearing on this alleged unlawful combine which is charged in this cross action. But I don't want to bring in these collateral matters about labor problems that involve labor relations over which the National Labor Board has exclusive
632A jurisdiction. But at the same time, I don't want to deprive him of a right which he has of introducing proof to show the attitude of the big operators before 1950 towards the union and afterwards.

Mr. Combs: May it please the Court, without waiving our objection to the competency or the relevancy of the proof that he is offering, without waiving that, we stipulated at the time of the deposition. We are willing to stipulate now, as we did then.

Our stipulation at that time was this. Now this is without waiving our objection to the admissibility of this evidence at all. We have said repeatedly that we will stipulate that the United Mine Workers did not elect to conform to the reporting provisions of that act, meaning the Taft-Hartley act, as long as that section of the statute was in effect. They did not comply with it, and we will stipulate to that. It is a matter of record. It is a matter of history. There is no argument about it.

We will stipulate to that. Now that is the stipulation.

* * * * * * * * * * *

634 Mr. Rayson: Your Honor, this point, Mr. Rowntree has insisted that this is relevant in that it shows in 1950 the operators gave the union, by this clause, the right to dominate the men in the industry. Now that's been the repeatedly announced position.

Now that presumes first that the clause was illegal and second that it required all men to join the union at that time, or that as he finally said, after several of these decisions came out, that it unlawfully coerced men to join the union in violation of the Taft-Hartley Act.

Now decisions have established that it could do none of those things, that it could not achieve the purpose originally for which he said in the opening statement, in the pre-trial order, for which he says was its purpose. No, it could not have been its purpose. It could not have been its purpose in 1950 when it was changed from a union shop to something else, when it was changed from a provision then, perhaps, in violation of the law to one which did not
635 violate the law, so we don't see how on earth it can be argued at this point that this clause permitted the union to dominate the men.

And that really is the basis for our reasoning, for saying this evidence is not competent for any purpose in this case, and the jury could not be permitted to draw inferences of combination from that clause.

Mr. Rowntree: Your Honor, the Court has already ruled on that point against us. What we are putting this in for is a restricted purpose at this time.

The Court: Bearing on the attitude, isn't it?

Mr. Rowntree: Yes, sir, showing what kind of deal was made.

The Court: Mr. Kramer, can you stipulate that was a known fact?

Mr. Kramer: Your Honor, at the time we made this stipulation, and we are perfectly willing to make it now, we

said—however, in agreeing to this stipulation, we agree it is a fact, we object to its admissibility as an item of evidence. We keep that objection, but as a fact, we are willing to stipulate this as a fact.

We stipulate that the United Mine Workers did
636 not elect to conform to the reporting provisions of the Taft-Hartley Act as long as that section of the statute—that is the section with reference to the oath—was in the Act; that the United Mine Workers of America did not comply with it; that this is a matter of record, it is a matter of history.

• • • • • • • • • • •

The Court: A matter of public knowledge?

Mr. Kramer: Well, I guess matter of history is the same as matter of public knowledge. Yes, sir, we will say a matter of public knowledge. We are willing to state that.

• • • • • • • • • • •

641 The Court: The Court has tried to hold that you have a right to show anything that bears on a violation of the anti-trust law. But the Court has further held it cannot see how an unfair labor practice in and of itself, unless that unfair labor practice also violates the anti-trust law, has any relevancy to any issue in this case. That is what the Court—

Mr. Rowntree: May I clear up that point, possibly.

The Court: All right.

Mr. Rowntree: It may be an attempt.

We have contended all along, your Honor, that the
642 deal—that a phase of this deal that was made in 1950 was a reversal by the operators of their previous contesting of the union's right to dominate these men in the industry, because before that it was hurting these big operators. It was hurting them in the pocketbook, as Mr. Lewis says, before 1950 because he was dictating the working time of the men.

Now in 1950 these operators obtained the right to control

the working time of their own mines, but they reversed their position about the union shop clause, the welfare fund provisions, because the deal was that this National Bituminous Coal Wage Agreement was to be imposed upon the small mines of the country and the best way to do that was to secure domination of the men in the industry by the union just as was done in this case here.

And this reversal by the operators and going along with the idea of control of the union to the maximum extent over the men, was in line with this conspiracy to impose this contract down on small operators who would not have signed the contract except for these pressures that were put upon them, and because the employee in the small mine obviously is not going to compel his employer to sign a contract which is going to put him out of business and he will lose his
643 job and lose any rights he has to welfare fund benefits, and whatnot. They are going to lose their jobs.

The best way to put that contract in on the small operator to consumate this conspiracy again, is to have the union have all this domination over the men, all this power and control, that the big operators were previously contesting before 1950. That is our point.

The Court: All right.

Mr. Combs: May I make just one point on that.

The record shows by Supreme Court cases and by cases that are recorded and reported, the record shows that the operators contested the union shop clause in 1948 and 1949, those contracts, to the extent that it was taken to the Supreme Court of the United States.

They had an injunction that was secured by the National Labor Relations Board at the time the 1950 contract was signed restraining the union from even asking for a union shop. That is a reported case. And you talk about the operators reversing their position and giving up their contention about the union shop is just not—on the record is just
644 not so.

The operators insisted to the point that they went

to the Supreme Court of the United States, and the union lost, and to say in the face of that and the outstanding injunction that they suddenly gave up the right they fought for and was sustained—the record just doesn't show that.

There is one more thing I would like to say. They raise the question or use this argument of the Taft-Hartley Act, the violation of it. The question here is whether or not that you can use something that is legal and a person has a right to, like in the Hutchison case, that you can use a legal right, a person where he has a perfectly legal right to use in a legal manner, you can't use that in another act to send him to prison. That is what the Hutchison case is.

I say in response to counsel's argument that you can't use a legal right of a party under the law and go over here on another law and say it is an illegal right and send him to jail on that.

This is a civil case, of course, but we must remember that the anti-trust act has criminal penalties. We are talking about conspiracy here and I just don't think that the argument of counsel is correct.

645 He has a right to make it, and I don't think it accords with the facts or what we are talking about here, to say the operators reversed their position and suddenly gave up.

* * * * * * * * * *

651 The Court: Let the jury return, Mr. Marshal.

(Thereupon, the jury returned to the courtroom and the following proceedings were had in the presence of the jury.)

Mr. Rowntree: May it please the Court and ladies
652 and gentlemen of the jury, will counsel read the stipulation?

* * * * * * * * * *

Mr. Combs: I can read it.

This is the stipulation entered into by counsel.

Stipulate that the United Mine Workers did not elect to conform to the reporting provisions of the Taft-Hartley Act

as long as that section of the statute was in effect. This is a matter of record. It is a matter of history and a matter of public knowledge.

Of course, your Honor, that is without waiving our objection.

The Court: That is right.

Mr. Rowntree: Skip to page 100, the middle of the page.

(The reading of the deposition of John L. Lewis was continued.)

"Q. Now, with respect to the language of the 1951 contract on the Welfare Fund, we refer to the contract as set out at page 131, the 1953 minutes.

653 "There was some amendatory language, as I understand it, but still, in the middle of page 131, I see the language, 'All of the foregoing benefits applicable to the individual members of the United Mine Workers of America and their families and dependents and to employees of the operators other than those exempted from this agreement.'

"Also the next paragraph relating to the separate fund for pensions retains that language about 'for the members of the United Mine Workers of America or their families or dependents and such other persons that may be properly included as beneficiaries thereunder.' "

Mr. Rowntree: Both parties agree that the language of the contract speaks for itself.

Mr. Kramer: Yes, this is substantially correct. I don't think it is quite accurate, and we both agreed on taking deposition that the language of the contract speaks for itself rather than someone's conclusion thereof.

The Cour: All right.

Mr. Kramer: That is our position now.

(The reading of the deposition was continued.)

"Q. Mr. Lewis, I might state our contention. Our contention is that only union members have participated in the Welfare Fund after 1950 the same as before 1950.

"I point out the affidavit of Miss Josephine Roche. In paragraph Number 7 of the affidavit filed by Miss
654 Roche, sworn to June 7, 1960, she states:

" 'The sole requirement to receive pension benefits or any of the other benefits of the Fund or the retention of said benefits, is compliance with the eligibility requirements for each benefit and the continuing compliance with said eligibility requirements, none of which requires the applicant or beneficiary to be or retain his membership in the United Mine Workers of America or to perform any service for the United Mine Workers of America, any bituminous coal operator, the Trustees of this Fund, or any other person or entity.' "

Mr. Rowntree: Miss Roche is a trustee plaintiff in this case.

(The reading of the deposition was continued.)

"Do you agree with that statement of Miss Roche? "A. Yes.

"Q. I point—"

The Court: I didn't catch that. Would you read that again?

Mr. Rowntree: She states here that the only requirement for eligibility to receive pension benefits is compliance with the eligibility requirements for each benefit and the continuing compliance with said eligibility requirements, none of which requires the applicant or beneficiary to be
655 or retain his membership in the United Mine Workers of America.

That is her statement in response to our interrogatory. I asked this witness:

(The reading of the deposition was continued.)

"Do your agree with that statement of Miss Roche? "A. Yes.

* * * * * * * * * *

656 "Q. * * * We point out Resolution No. 20, found in United Mine Workers Journal for September 1, 1948, pages three and four."

Mr. Rowntree: And we wish to introduce this as exhibit 33, being United Mine Workers Journal, September 1, 1948, pages three and four.

(Exhibit No. 33 was marked for identification and filed.)

Mr. Kramer: Your Honor, we object to the introduction of this instrument. This instrument does not deal with the Welfare and Retirement Fund here involved. It is an entirely different fund. The Welfare and Retirement Fund involved here comes under the contract of 1950, and it is the Welfare and Retirement Fund of 1950. This deals with a fund that was previously in existence under a previous contract and has nothing to do with the current fund. We think it is irrelevant and immaterial, and we object to its introduction.

657 The same is true, your Honor, with reference to the rules and regulations that dealt with that. We are dealing with the 1950, with the averment of the plaintiffs that the conspiracy started in 1950, at some time subsequent to this resolution, subsequent to the fund that they are talking about in this offer of evidence. We think it is irrelevant and immaterial and it is confusing and should not be admitted.

Mr. Rowntree: If your Honor please, I don't know about this reference to two different funds. I don't know whether there is a different fund or not. It is hard to say whether the previous fund terminated or whether it did not. But anyway, the parties are pretty much the same, with Miss Roche a director of the fund in 1948 and Mr. Lewis was on the trustees in '48.

We asked for copies of the resolutions pertaining to pension benefits. This is the best we can get from what we can find.

658 The Court: Does this resolution deal with pension benefits?

Mr. Rowntree: Yes, sir.

The Court: Objection overruled.

Mr. Kramer: May I state this about counsel saying they

were not informed. The collective bargaining agreement of 1950, by its own provision—my copy doesn't seem to be here this morning—by its own provisions terminated the 1948 fund. It is entirely at an end. The provisions for handling the 1950 fund begin with a new fund. It is the provisions of the 1950 fund they say is the basis of conspiracy. It is not the 1948 fund. Counsel has simply forgotten reading those contracts, because the contract itself terminates it, and I can't see how what was done with the previous fund—

The Court: There may be a pattern involved, and if there was anything that occurred prior to 1950 that indicates a pattern and that the pattern continued through the alleged conspiracy for the period, it would be competent for whatever bearing it may have, if any, on the alleged conspiracy.

Mr. Kramer: All right, Your Honor. The objection we make is on behalf of both parties, the trustees and
659 the United Mine Workers of America, though the United Mine Workers may not be directly involved.

The Court: All right, overruled.

Mr. Rowntree: Now this is a 1948 resolution, and the jury should bear that in mind, as stated by counsel.

"Resolution 20." And I will read excerpts from it.

"Now, therefore, be it resolved, the following regulation," this is a resolution of the trustees of the fund—"Now, therefore, be it resolved, the following regulations shall govern the payment of pensions to the United Mine Workers of America and shall be subject to amendment, revocation and restriction at the discretion of the trustees.

"Eligibility. Any member of the United Mine Workers of America who is otherwise qualified and who retires from the bituminous coal industry on or after May 29, 1946, shall be eligible for pension.

"Proof of membership. The local union where applicant is last a member shall as to membership of applicant.

"Districts of the United Mine Workers of America
660 shall also certify to membership of the applicant.

"The International office of the United Mine Work-

ers of America shall have final authority to certify as to membership of applicant

"Service provision. Any member of the United Mine Workers of America who on or after May 29, 1946, has completed twenty years service in the coal industry and is otherwise qualified shall be eligible for a pension.

"Proof of service may be accomplished in any of the following ways:

"One. Certifications by a local union or by local unions, or by districts of the United Mine Workers of America that an applicant served in the coal industry, shall be deemed to be satisfactory proof of service for the period or periods covered by such certifications."

* * * * * * * * * * *

661 Mr. Rowntree: I will pass this exhibit to the jury.

Mr. Kramer: Which exhibit is that?

Mr. Rowntree: That is the last one.

Mr. Kramer: Of course, Your Honor, we have no objection to exhibits which have been introduced being passed, but we object to it being passed on the basis it was inadmissible in the first place.

* * * * * * * * * * *

(The reading of the deposition was continued.)

"Mr. Rowntree: Now, I would like to have filed as the next exhibit number the text of any resolution on pension eligibility, for pension benefits, or other welfare

662 benefits, that are fully set forth in the United Mine Workers Journal for any later period of time.

"If there is such a publication of the text of any later resolution, will counsel file that?"

Mr. Rowntree: Does counsel have such?

Mr. Kramer: No, sir, I do not, because they are dealing with the 1948 contract which we say had no bearing on this, and I have no such resolutions. We will have appropriate proof of the 1950 agreement which is the only one involved.

The Court: Now, Mr. Rowntree, you expect to connect these matters up that relate to the period prior to the for-

mation of the alleged conspiracy, and do you expect to show that the tenor of this resolution was followed through—

Mr. Rowntree: Yes, sir.

The Court: Into the alleged conspiracy period?

Mr. Rowntree: Yes, sir.

The Court: And that a pattern was started back prior to the period?

Mr. Rowntree: That's correct, yes, sir, and—

The Court: All right.

Mr. Rowntree: And we are starting that right now. We think the purport of this question clearly means copies of resolutions set forth in the United Mine Workers that
663 goes to the mass of the men in the industry. We wanted copies of later resolutions pertaining to the '50 contract or anything, and later amendments that are fully set forth in there so that the membership could see whether or not there was any change in these requirements. That is why we asked this question.

Mr. Kramer: Your Honor, it is our position that there was a change in policy just as there was submitted here, that 1950 contract contained a different language. At one time union membership was required, in '47 and the earlier contracts, but beginning in 1950, union membership is not required for benefits under the 1950 contract.

The Court: You mean union membership was required prior to 1950 to draw the welfare benefits?

Mr. Kramer: At one time it was, Your Honor, but it has not been required at any time since the beginning of this alleged conspiracy, and our proof, we say, Your Honor, will establish the fact that benefits are being paid and have been paid since 1950 to people, as was stated the other day on the witness stand, who were employed by signatories of the contract, whether or not those individuals were members of the union, and without contradiction, I say,
664 Your Honor, our proof will so establish.

The Court: All right.

Mr. Kramer: And I am talking about a 1950—

Mr. Rowntree: Now here, Your Honor, we can draw a sharp issue of fact.

Mr. Templeton: Your Honor, I would like to be cleared up whether or not it is admitted or stated that union membership was required for the 1948 contract.

The Court: He stated that prior to 1950 that union membership—

Mr. Templeton: He stated prior to 1950, but I understood the exhibit was on the '48—he said it was required in '47, but I didn't understand him to say it was required in '48.

The Court: I understood Mr. Kramer to say it was required before 1950, but not after 1950.

Mr. Kramer: Not up to 1950. I'm not sure. At one time was my language. I think Your Honor will recall. I do not say after 1948, I am not sure of that date, but it certainly was not after 1950, but at one time, it was required. We say that was immaterial because of the change of policy after the Courts passed on it. I don't believe that date was 1950, but I cannot state what it was, but it has not be required since 1950.

665 Mr. Rowntree: If Your Honor please, to clarify the issue of fact that's being drawn, we have not seen any resolution after this one being introduced here. We asked for it and haven't gotten it.

Mr. Kramer: May it please the Court, just a moment. The only request we made was under the contract of 1948. I don't think any request was ever made—if it was, I misinterpreted it—since the 1950 contract.

Mr. Rowntree: No. Do you insist?

Mr. Kramer: I think that was it.

* * * * * * * * * * *

Mr. Kramer: I may be mistaken with reference to the request, Your Honor, but there's been so much to this record, but we insist that prior to that time it was irrelevant anyway.

Mr. Rowntree: We are saying that as far as the outsiders are concerned, outside the immediate family of the Board of Trustees, there is a broad impression in the industry that the membership is required, that is a matter of actual practice.

(The reading of the deposition was continued.)

666 "Q. Now, Mr. Lewis, Mr. Val Mitch was General Counsel of the Trustees of the Welfare Fund? "A. Yes.

"Q. And he gave legal advice with respect to the law of the statute and the law of the contract and other types of legal advice to the trustees, I take it? "A. Yes."

* * *

Mr. Rowntree: We introduced at that point an affidavit of Mr. Mitch as general counsel of the trustees.

(The reading of the deposition was continued.)

"Q. Referring to his statement, in answer to a question in a case pending before the Court in Washington at page five, he was asked as to how he read the contract."

Mr. Rowntree: This with respect to the contract provisions on benefits, particularly of pensions. I read his answer.

"'I read it that "all of the foregoing benefits are to be made available to members of the Mine Workers who are employees of the operators signatory." I don't think it could be any other way, in my opinion.'

"Is that the nature of his advice to the trustees with respect to the meaning of this contract?

"Mr. Combs: At what time?

667 "Mr. Rowntree: I'm talking about the contract of 1950, particularly the provisions with respect to the benefits of the Welfare Fund."

* * * * * * * * *

"Mr. Kramer: Mr. Lewis, he is referring to a statement, allegedly a statement taken from Mr. Mitch, in another law suit, the Lachetti case."

Mr. Kramer: That is not an affidavit, Your Honor, in the

present lawsuit. It refers to the statement made in the Lachetti case, and filed in the interrogatory here, and he said yes.

Mr. Rowntree: In the form of an affidavit.

Mr. Kramer: That's correct, in another lawsuit.

(The reading of the deposition was continued.)

"The Witness: I take it that Mr. Mitch's reply was impromptu in the case, wherein specific facts and considerations were involved, and that Mr. Mitch's reply would naturally cover—although not expressly stated—the previous statement of policy read into this record 'and any other persons properly qualified.'

668 "Q. Now, Mr. Lewis, we said a while ago that we contended certain things were done in order to tie the Welfare Fund to union membership and to operations by the union.

"One thing we contended was that the Union sought to control the Trustees; and we have discussed the position of the operators in their statements with respect to your seeking to name trustees for the operators and for a neutral trustee.

"And we point out the statement of Mr. Love at page 125 of the 1952 Convention, made after the signing of the 1950 contract, where he says:"

Mr. Kramer: Just a minute. I object to this statement for the same reasons made on yesterday. It is a statement of a third party in an effort to prove conspiracy before proof of a conspiracy has been submitted—prima facie evidence of the conspiracy has been admitted aside from the statement of an alleged conspirator.

Mr. Love was not an officer or member of that association. He may have met with someone that was involved as another alleged conspirator.

The Court: Members of the jury, you will not consider the statements made by Mr. Love for any purpose unless you first find from the preponderance of the proof

669 in this case that there was a conspiracy to which the United Mine Workers and one or more of the large coal operators were parties and that the statements made by Mr. Love were made in furtherance of the alleged conspiracy.

With that explanation the objection is overruled.

(The reading of the deposition was continued.)

Mr. Rowntree: I quote:

"The union asked for a cooperative administration of the Welfare Fund."— "A. You are reading on page what, now?

"Q. 125. "A. The middle of the paragraph?

"Q. That's right.

" 'The union asked for a cooperative administration of the welfare fund and we are giving it to them. We will help every' "—

Mr. Rowntree: This is a short time after the signing of the 1950 contract.

(Continuing) " 'We will help' "—

Mr. Kramer: That statement is not in the quote.

Mr. Rowntree: That is right. It is in the exhibit though.

Mr. Kramer: Let's read the quote and then get
670 the explanation so we will know what we are reading because of the nature of the objection, which I continue, and I think in order for the objection to be effective I have to have the quote as it is.

(The reading of the deposition was continued.)

" 'We will help every way possible to make this huge fund a definite credit and benefit to the industry. However, the responsibility is squarely on the shoulders of the union and, if it fails, the public and ourselves will look directly to the union.' "

Mr. Kramer: That is a typographical error. It is "at the union" in the record.

Mr. Rowntree: At the union.

* * * * * * * * * * *

(The reading of the deposition was continued.)

"Do you know what he meant in that statement?"

* * * * * * * * * *

671 "The Witness: I assume that what was in Mr. Love's mind was purely an assumption, based however upon a considerable background of knowledge, Mr. Love and his interests. It was merely an evasion of responsibility on the part of the operators and an attempt to save face publicly."

* * * * * * * * * *

672 "Q. The 1950 contract is shown on page 130 of the 1952 Convention Minutes, at which page it names the Trustees of the Fund under the 1950 contract. I believe that you were named as a trustee.

* * *

"Q. We have gone over the position of the operators in those negotiations that Judge Dawson be named as Trustee for the operators, but Mr. Charles Owens was named in the contract for the operators. That's right, isn't it?

* * * *

"The Witness: Yes, he was named and seated.

"Q. Do you know if a problem came up in the signing of the 1950 contract as to who would advise Judge Dawson that he had been displaced on the Welfare Fund?

"Do you recall any problem arising with respect to somebody's communicating with Judge Dawson and advising him that he had been removed? "A. No, I do not; for the reason that he was never seated. He couldn't be
673 'removed' when he had never occupied the position.

"Q. And I believe Miss Josephine Roche was named as neutral trustee in the 1950 contract. That is right isn't it? "A. So the record says.

"Q. Miss Roche answered Interrogatory Number 32, the Interrogatory being:

" 'What is the connection of the Trustee Josephine Roche with the United Mine Workers of America, and what has been her connection with the union in the past?'

"Her answer is: 'Trustee Josephine Roche has no connection with the United Mine Workers of America, and has never had any connection with the United Mine Workers of America, except that as president of the Rocky Mountain Fuel Company of Colorado she executed various national bituminous coal wage agreements with the United Mine Workers of America on behalf of that company.'

"It is true, is it not, Mr. Lewis, that the United Mine Workers of America owned 222,720 shares of the stock of the Rocky Mountain Fuel Company at the time that Miss Roche was named as neutral Trustee? "A. It is true that
674 the United Mine Workers of America, and some of its subdivisions, owned some stock in the Rocky Mountain Fuel Company. As to the number of shares, I am not advised. And they were acquired subsequent to the closing down of that company and while it was in liquidation, and it is a non-operating, non-producing coal company.

"Q. Do you know when it closed? "A. And it was somewhere near the time when Miss Roche became a trustee but she was no longer an active operator representing the industry and the company was not operating, and that was considered to be no barrier, while in every other respect she qualified as the neutral Trustee representing the public interest.

"She was recognized as the best qualified person that was available for the public trusteeship. She had been Assistant Secretary of the Treasury. She had charge of the activities of the Public Health Service of the United States during that time. She had served on inter-parliamentary committees who wrote the Social Security Act; representing the Treasury Department on the inter-parliamentary committee that revised and rewrote from time to time what ultimately became the Social Security Act passed by Congress.

"She was a recognized authority on social work and public welfare.

675 "She was then Director and Administrator of the Fund.

"And both of the negotiating parties, which took in the operators and the mine workers, recognized her as the best qualified, most authoritative, and most capable of anyone we knew in directing the enormous work of the Welfare Fund.

"Therefore, she was unanimously agreed to in the joint negotiations, which took it out of controversy and out of the realm of uncertainty.

"Q. She had been serving as Administrator of the Welfare Fund? "A. She was Director and the Administrator in charge of all of the organizations. She set up the subdivisions of the Fund. She selected all the subordinate executives of the Fund. She had general charge of all the workings of the Fund and its obligations contractual-wise and public-wise.

"She was not in any sense a candidate of the United Mine Workers of America.

"Her profession had been, for some years, as president of a large operating coal company. In that capacity she was a member of the Colorado Operators Association—Coal Operators. She was a coal operator, bona fide, and so recognized. But she had retired from that interest
676 and her company had gone into receivership about that time. There may be a lapse of a month or two there, or some period of time, overriding those dates.

"But it was self-evident in the industry that the Rocky Mountain Fuel Company was not going back into production of coal.

"Q. While she was administrator of the Welfare Fund in the period before the 1950 contract, the Welfare Fund was operated to give benefits exclusively to Union members? "A. For what? Operated for what? Exclusively for what?"

Mr. Rowntree: The question was repeated.

"The Witness: That all depends again on these arrangements that were made and the sequence of the dates. I couldn't be responsible for that question.

"Q. And she had been your administrative assistant to you as Trustee, of the Welfare Fund? "A. No.

"Q. In that period? "A. No. She does not occupy that post. But she is a director and a Trustee of the Fund in her own right.

"Q. But she had been administrative assistant to you before she became director of the Fund? "A. When
677 she came in as a director for a brief time she occupied the position of administrative assistant to this Trustee, but, with the changes in the trusteeship of the Fund, she assumed a larger and larger range of duties and was increasingly relied upon by the trustees as the Law and the Prophets on all of the interior or inter-departmental matters of consequence on which the Trustees wanted information and advice.

"Q. It would be hard to find a person who was a better friend of the United Mine Workers of America than Miss Roche? "A. Again you ask an interrogatory based on your conclusion, and I wish to say to you that there are no personal equations of any character involved in Miss Roche's trusteeship or the feelings or private emotions of this witness. It is purely a business proposition of what is best for the United Mine Workers Welfare and Retirement Fund as the law exacts from a Trustee—that feeling; the laws governing charitable trusts and such agencies.

"And may I say this, sir: That a Senate Committee authorized by the United States Senate to investigate Welfare Funds, did investigate the United Mine Workers Welfare and Retirement Fund. The chairman of that committee was Senator Douglas of Illinois.

"Their agents had made available to them every
678 piece of paper in the Welfare Fund and their trusts. They spent considerable time in researching into the

records and the decisions and the findings and the awards and the usage of the money of the Welfare Fund.

"They found everything in order.

"Mr. Combs: Would you like to refer to the conclusions, Mr. Lewis?

"The Witness: At the hearing before Senator Douglas' Senate Committee, at which time this witness testified and Trustee Roche testified and Mr. Charles Owens was absent but wrote a letter of affirmation associating himself with the testimony of Miss Roche and myself, Senator Douglas had his chief investigatory agent give a resume' of their report to the Senate Committee, made public at this hearing, and read their Findings of Fact and Conclusions made to the Committee.

"I wish to read those Findings, on page 191 of the Welfare and Pension Plan investigation, under the chairmanship of Senator Douglas.

. . . . . .

680 "The Witness: Senator Paul H. Douglas, on April 6, 1956, transmitted to Honorable Lister Hill, Chairman of the Committee on Labor and Public Welfare, the report of his subcommittee on the investigation.

681 "The conclusion and appraisal of the program, contained on page 191 of this document—final report by the subcommittee on Welfare and Pension Funds to the Committee on Labor and Public Welfare of the United States Senate.

" 'Pursuant to Senate Resolution 40, as extended by S. Resolution 200 and S. Resolution 232, 84th Congress:

" 'This program'—that is, the United Mine Workers' program—'is honestly and well administered; in fact, the medical program is outstanding. The provision of pensions to retired miners, death benefits to survivors, and the comprehensive hospital and in hospital care to all miners and their families is of incalculable benefit to the beneficiaries.

" 'The Fund provides these benefits efficiently and at a low administrative cost. Less than three per cent of Fund contributions. The end result could probably not be achieved as well or at lower cost by any other set of arrangements.

" 'Insofar as can be judged within the time available for the survey, the pension plan is carefully administered, with pensions given to those who meet the eligibility requirements established by the Trustees, and withheld from
682 those who do not. The medical program, taken in all, can be characterized as not less than excellent. The program provides to beneficiaries all needed care in serious illness, virtually without exception or limitation, and gives them complete protection from the risk of heavy medical expense.

" 'Much effort is being made to assure that the care is of high level quality.

" 'The medical program is administered by an outstanding group of individuals. Its administrative cost is very reasonable. The decision of the Fund to build a chain of hospitals to provide service to beneficiaries appears to have been well taken, and the hospitals should do much to raise the level of care available to miners in these areas. The building of these hospitals is an indication of the imaginativeness, boldness and vigor, with which the medical program has been conceived and operated.

" 'It is believed that the medical program would benefit if it made public data on the hospitals utilization rates and costs, incidence of surgical operations; and average payments for selected operations and services.

" 'No appraisal by outsiders of the operation of the self-insured medical program is possible without such
683 data. However, these defects, if indeed they are defects—and they are matters upon which wide differences of opinion are possible—are of small consequence to the total picture, which is that of a far-flung, pioneering,

and well run program of immense value to its beneficiaries.'"

* * * * * * * * * *

684 The Witness: "And may this witness say that, as I sat here and heard that conclusion testified to by the experts of the Senate committee, I was filled with a pardonable pride to be associated with Trustees who were deserving of such praise. Entirely aside from all humane considerations and the incalculable value of these services to nearly a million potential beneficiaries, with an organization of the size and magnitude of the Welfare Fund, at the lowest administrative cost of any similar organization throughout the United States of America and within the confines of the civilized nations of the world.

"To Miss Roche the major part of the credit is due. Trustee and Director of the Fund. As a superlative executive with outstanding abilities and capabilities. Rich in mature experience. With a devotion to her task that exceeds all normal bounds. The credit is due.

"And may I say that to my personal knowledge, Miss Roche, in all those years, has not even taken a week's vacation from her duties.

"Greater service and devotion to a task is beyond my comprehension.

"She has earned the commendation of the industry.

"At no time since she was made a Trustee by joint
685 negotiation has there ever been a suggestion made by representatives of the coal companies or anyone else that she be supplanted; and no criticism of her work has been heard in those selfsame meetings.

"And with that certificate of character for Miss Roche and for the Trustees and for the staff and for the cooperating operators.

"I rest.

By Mr. Rowntree:

"Q. Mr. Lewis, this is a large Fund. Does it not collect

as much as a hundred and fifty million dollars a year? "A. Well, with every hesitation about quibbling with you on a matter of three million, I think it is one hundred and forty-seven million.

"Q. A hundred and forty-seven million. "A. Was a maximum at a time of the utmost production in that period of years on the part of the coal industry.

"Q. This money does come from the operating companies who signed the contract? "A. No.

"Q. Well, it comes from the possession of the men in the mines which produced the coal? "A. It comes from the public purse that buys the coal, and is a tax deductible item to the operators. There is no operators' money
686 in it.

"Q. And the benefits, from a Fund so large, are bound to be great to the beneficiaries? "A. Well, the first five thousand mothers who gave birth to babies after the hospital strings opened resulted in not one death in those maternity cases, which is a statistic unheard of and undreamed of in that area where maternity deaths in childbirth were the highest in this nation by a wide, wide margin.

"That is only one statistic. There are great numbers of them.

"Q. Well, I must say, Mr. Lewis, you have painted a very impressive picture of the work of the Fund. I want to say that we represent clients whose employees do not participate in the Fund and we are looking after the interests of such people as that in this case.

"And we get back to these questions that we have been discussing here.

"Is it not true that a large part of the saving of costs by the Welfare Fund is attributable to the fact that the Union itself is doing a lot of the administrative work in connection with the handling of applications for benefits? "A. Naturally the Union would cooperate and naturally that would effectuate some savings on the Fund.

687 "Naturally the Fund could not have accomplished the program, which has been enumerated, without that cooperation; because it would have required the building of a huge administrative organization in every state in the union, coal producing or otherwise, to safeguard the expenditures and prevent the looting of the Fund by selfish interests in the medical world.

"The Fund has had opposition in the realm of medicine, chiefly because it would not tolerate medical inefficiency and chiefly because it would not tolerate expensive charges for medical services, surgical operations, and hospital treatment.

"But by no means did the cooperation of the United Mine Workers of America account for the low administrative costs of this Fund.

"I might point out the fact that the Trustees of the Fund have utilized all possible revenues from the reserve fund by prudent investment, as becomes Trustees; and there have been years of operation of the Fund when, in truth and in fact, the beneficiaries were receiving one hundred per cent of the 40 cents per ton paid in by the signatories to the contract.

"So if virtue is a virtue and if it be true that you can aid a coal miner to the advantage of his employers and
688 the advantage of the public, in that manner and with that degree of efficiency, then I submit, aside from any moral considerations or any biblical or spiritual obligation, it is a good thing.

"And may I point out that increasingly the coal companies themselves are taking intense personal pride in their participation in this meritorious project. They stroke themselves with satisfaction at times and point out to their friends and neighbors 'see what I am going to abate human agony; to soothe the suffering; to eliminate the pain of illness on the part of human beings; to increase the life expectancy of the individual'; because it is mathematically true, on research and the record, that the pensioners are living

longer lives than the normal expectancy before the Fund was created.

"So there is no domination of the Welfare Fund by the United Mine Workers of America or its Trustees.

"I rest again.

"Q. Well, this question I asked just before that relates to our contention that among the things that were established in 1948 to tie the participation of benefits to Union membership and to tie the operation of the Fund to the Union including the processing of Welfare applications to the Union organization.

"We point out Interrogatory Number 20 addressed
689 to the Trustees, which was objected to. Interrogatory Number 20 was, 'File copy of application blanks commonly used by applicants for pensions and hospital and medical care benefits under the provisions of the Welfare and Retirement Fund.' "

* * * * * * * * * * *

Mr. Rowntree: We offer application for benefit forms as Collective Exhibit 34.

(Exhibit No. 34 was marked for identification and filed.)

Mr. Kramer: The original objection was withdrawn.

Mr. Rowntree: I will read extracts from the forms, your Honor. We can pass those to the jury.

(Exhibit passed to jury.)

Mr. Rowntree: At the top of a form headed "Application for Pension", under the caption "Welfare and Retirement Fund, United Mine Workers of America," a line saying, "All questions must be answered. Failure to do so will delay processing." The first question—

Mr. Kramer: Failure to do what?

Mr. Rowntree: "Will delay processing.

The first question: "District Number, blank. Local Union Number, blank."

690 I might state, your Honor, that this bears a date down at the bottom of November 20, 1957.

There is another sheet and headed at the top "employment Record", giving a number of blank spaces for periods of time worked, including certain information about each period of time, with a column local union number. On the back of the form "Application for Pension", is a place for certification.

"Certificate of Local Union. This is to certify that the above applicant is currently a member of Local Union Number, blank, and has been a member of this Local Union since the blank day of blank, year blank."

A place for the local union seal, a place for the signature of the local union officers, two officers.

Under that certificate is "Certificate of District. This is to certify that applicant is a member of District Number, blank, United Mine Workers of America." With a place for authorized district signatures.

691 Mr. Rowntree: Now one of these copies is for the local union office; one of the copies is for the district office. There is included in the exhibit, application form 85-HS which is for medical and hospital benefits. Up at the top, "Member's Social Security Number," a space for district number, local union number, blank, a space for member's signature, a statement at the bottom of the top space, "Not valid for a widow or her children sixty days after the death of the member."

In the body of the application itself, it has a space, check-off number. One copy of this form goes to the local union office. On the back of the form is "Local Union Certification. —This is to certify that we the undersigned officers of local union, blank, located at, blank, have examined the above application and have knowledge that the applicant has answered questions one, two, and three regarding employment correctly, and is a member in good standing. He has been a member of this local union since the, blank, day of, blank, year, blank." Space for president's signature, local union number, blank, and the vice-president and financial secre-

tary, a place for the local union's seal, a space headed as follows: "The following to be completed by district
692 official—Is the applicant's present employer a signatory to the National Bituminous Coal Wage Agreement of 1950, and to the National Bituminous Coal Wage Agreement of 1950. Yes, blank. No, blank."

"This is to certify that the above miner is a member in good standing of the United Mine Workers of America dated the, blank, day of, blank, 195, blank. Authorized district signature."

There is a form attached, "Request for changes on form 85-HS." Starts off at the top, "From local union, blank, district, blank." A space headed "Members identification." Next space starts off, "Information about the miner." First —it is labeled number two here, "Member died on, blank; number four, miner is no longer a member of UMWA; number five, member has married or remarried; number six, member transferred out of local union, blank; number seven, member transferred into local union, blank." At the bottom, "Local union seal, local union officer, and recording section a space for the district."

* * * * * * * * * * *

693 Mr. Rowntree: May it please the Court, ladies and gentlemen of the jury, may I point out the statement at page 254 of the minutes of 1952, part of the International officers report to the convention of 1952 under the heading, "UMWA Welfare and Retirement Fund," where it is stated:

"Determination of eligibility of an applicant is the sole responsibility and function of the Fund, with the one exception of certification of union membership which is strictly the province of the union."

(The reading of the deposition was continued.)

"A. As affecting, of course, Union members and relating only to Union members.

"Q. But the statement that the Union has exclusive

694 responsibility for certification of union membership.

"A. Certainly. Exclusive responsibility as affecting validity of membership.

"Q. That requirement and that function had significance with respect to the Welfare Fund applications? "A. Only insofar as there was available, through the United Mine Workers, supplemental proof of the validity and authenticity of the averments made by the applicant.

"There was no other way than to have some agency—to determine those things except to have some agency, namely the local union, which had general knowledge of the individual and perhaps intimate personal knowledge of him, the officer thereof. To aver to the soundness of the application. And the fact that he was a member or not a member would affect, of course, their interest in the case. Because if he was a non-member they would have no interest in him. They were not empowered to represent him or they were not empowered to pass upon his destiny as an applicant. Only the fund. All perfectly logical and all for business and sound procedural reasons.

"Q. The Welfare Fund application which we have exhibited—"

* * *

"—is captioned 'Welfare and Retirement Fund', and it does contain, in numerous places, spaces for certification of union membership by various union officers.

695 "What would the Welfare Fund be interested in union membership for? "A. Because that carried with it the fact that a Union officer would have more knowledge of that individual, and his record in the industry, than any other agency from which the fund could get information.

"I suppose counsel has contemplated that literally tens of thousands of applications for pensions and other benefits have been made by individuals who listed fraudulent averments in an attempt to qualify; especially individuals who had worked for a great many employments during their

alleged term of service in the industry.

"And we found, and that fact is emphasized in some areas, that the average individual—ill-disposed to preventing someone from getting a Fund benefit or taking the responsibility in the community of so doing—would easily agree that the facts of the petition were as stated; whereas, investigation through the Local Union, and from time to time with special representatives of the Fund, may have found that those averments were untrue.

"We have even found coal companies who wrote in certificates of employment contrary to the record and the facts, to assist individuals to get a pension who were not qualified to do so.

"And these were the agencies through which the
696 Fund worked because ninety-nine per cent or more of the applications were from members of the United Mine Workers of America.

"It is purely a modus operandi, a procedural technique designed to protect the other beneficiaries of the Fund by preserving the basic integrity of the Fund and not wasting the money.

"Q. You say, Mr. Lewis, that the integrity of the application is judged by the certification of the Union officers with respect to the indivduals' affiliation with the Union. Is that the substance of what you have said? "A. Not in toto, only in part. Because the Fund avails itself of any other sources of information that it can find that has knowledge on the subject.

"We interview coal companies and their agents.

"Some of these coal companies, where employment records were averred, are long defunct. Proof of the existence of those coal companies was ofttimes necessary.

"In certain instances awards have been made on the preliminary evidence available, and later research and prudent effort has turned up testimony to show that the basis of the application form was inaccurate, improper, and they have been cancelled in great numbers. All with due

respect to the interest of the Fund and without regard to whether it is pleasing to a coal company, a local
697 union, or members of the United Mine Workers of America.

* * * * * * * * * * *

"Q. Now the answer of the Trustees to Interrogatory Number 26— "A. It may interest you to know that this Trustee has not seen or read any of the responses to the Interrogatories as filed or the Interrogatories themselves.

"Q. All right, sir. "A. It has been done administratively by—

"Q. Miss Roche answered these, I believe. "A. —the administrative staff of the Fund.

"Q. Interrogatory Number 26:

'Describe how and through what officials and representatives of the International Union this literature is distributed."

talking about literature relating to the Fund.

"The answer of Miss Roche—

698 "A. Are you talking about the press releases or public statements made by the Fund or the annual reports or—

"Q. Literature with respect to requirements for qualifying as beneficiaries? "A. You mean application blanks?

"Q. Yes. Or instructions on— "A. They are made available to any interested party who wants to apply through the secretary of the local union or through direct correspondence.

"Q. Now, Mr. Lewis, I quote again this Interrogatory Number 26 addressed to the Trustees.

" 'Describe how and through what officers and representatives of the International Union this literature is distributed.'

"Miss Roche answered:

" 'As trustees, the plaintiffs are without sufficient knowledge and information to describe how and through what officers and representatives of the International Union

literature pertaining to the Fund is distributed, if such literature is actually distributed by said officers and representatives.'

"Do you agree with that statement: That you didn't know how this literature was distributed through
699 the Union? "A. I don't know to what degree it is distributed. I fancy—I take for granted that some was. Whether all or the requisite amount, I don't know and cannot be responsive."

Mr. Rowntree: We offer for the next exhibit UMW Journal May 15, 1950.

(Exhibit No. 35 was marked for identification and filed.)

Mr. Rowntree: I read excerpts from that exhibit, Your Honor.

Article contained on pages three and four of that edition of the Journal headed "Welfare Fund Restarts Miners' Pensions and Death Benefits Under Revised Rules."

The first paragraph. "Revised regulations covering payment of death benefits and pensions by the UMWA Bituminous Welfare and Retirement Fund which had been approved by the trustees were made effective coincident with a meeting May 2 of Fund and UMWA district officials, where the details were explained and administrative procedures discussed."

Paragraph beginning at the bottom of the page. "Booklets setting forth complete instructions to local unions and UMWA district officials in regard to administrative
700 details of arranging pension and death benefit payments were distributed at the meeting at Fund headquarters and the revised forms were mailed to local unions and district officials."

Three paragraphs down, "In addressing the meeting, Miss Josephine Roche, director, explained that the 1950 Fund is committed to live within its income, as did the previous Funds, and that a most careful study was therefore being given to all projected services to assure that

expenditures would not exceed the income and that maximum benefits reach the beneficiaries."

Back to the deposition.

(The reading of the deposition was continued.)

"Q. This speaks of revisions of pension requirements but it does not set forth the text of the resolution, the revised resolution, as I can see; but the first paragraph, you will notice, speaks of the meeting of the Fund and UMWA district officials where the details were explained and administrative procedures were discussed.

"So there were meetings between the Fund and Union officials pertaining to the administrative matters of the Welfare Fund; is that not correct? "A. Probably between the administrative staff of the Fund and the presidents of various districts, merely to answer questions
701 about the Welfare items in view of new agreements. I would so assume.

"I would not know—it was ten or eleven years ago—and I doubt that I was concerned with any of these details of policy. I have no knowledge of it.

"Q. The third full paragraph in the second column indicates that Miss Roche was present at the meeting; does it not? "A. Naturally Miss Roche would be there
702 because she was Director and chief administrative officer of the Fund.

"Q. And the paragraph starting at the bottom of the first column indicates that the literature or booklets with reference to administrative details were distributed? "A. Naturally. Because ninety-nine per cent or more of the applicants were members of the United Mine Workers and it is natural to conclude that the education of that element among the beneficiaries would be the most expeditious manner in which information could be transmitted. Because non-members of the organization get their community knowledge from general conversation and talk—local publications, and so forth—that intimately deal with the United Mine Workers and their affairs.

"But there is no significance in it whatsoever other than economical administration of the Fund."

Mr. Rowntree: We introduce as the next exhibit United Mine Workers Journal of July 1, 1950, pages 3 and 4.

(Exhibit No. 36 was marked for identification and filed.)

Mr. Rowntree: Reading excerpts from this article. An article headed: "Revised Hospital and Medical Services Approved by Welfare Fund as of July 1."

703 "Administrative procedures and revised regulations of the hospital and medical services of the UMWA Welfare and Retirement Fund to become effective July 1, 1950, were released by Miss Josephine Roche, director, after approval by the trustees. New instructions and forms were forwarded to the UMWA district offices and the local unions for distribution among the membership.

"Under the new hospital and medical care program, members of the UMWA, their wives and dependent children under 18, are eligible to receive hospitalization and medical care in the hospital for most illnesses."

Next; the last full paragraph in that column.

"The revised regulations provide that benefits are available to wives and dependent children under 18 only during the lifetime of the member, which means that a widow and her children are not eligible. Home and office care and drugs other than those used in the hospital are not provided for either the member or any eligible member of his family."

The paragraph starting at the bottom.

"The instructions sent to local unions set forth as the first requirement that every UMWA member must go to his local union and fill out form 85-HS and it is

704 advised that all members should fill out this form at once without waiting until they become ill. Three local union officers must sign and certify the form and affix the seal of the local union, and it is then sent to the district office for certification and processing."

Next paragraph:

"The form calls for the member's social security number and the signature of himself and wife, together with his district number, local union number, birth date, age, and data about his dependent children under 18. The local union and district certify that he is a member in good standing and when the member receives this properly certified form he, his wife and his dependent children under 18 are then eligible for benefits."

The next paragraph:

"Instructions on how to get hospital care are set forth and the members are advised that upon leaving the hospital patients will be asked to sign their bill which the Fund will pay. In the event a member is no longer in good standing he must return his form to his local union."

Next paragraph:

"Complete instructions were also forwarded to
705 the district offices telling them how to process the forms. In a covering letter to each district president, Miss Roche explained that the revised regulations represent the best consensus arrived at after the recent Washington conference of UMWA district and Fund representatives as to what services could be supplied with the funds available."

Mr. Kramer: Just a minute before the answer of Mr. Lewis is read.

I just want to point out, your Honor, that the statements read are from the exhibit all right, but Mr. Lewis is asked a question and answered it and only a portion of what he has now been reading into the record was read to Mr. Lewis in the taking of his deposition, so that there cannot be argued later there is a conflict between Mr. Lewis' testimony and what was read because his explanation only goes to the portion read to him and the last three paragraphs were not read to Mr. Lewis.

Is that correct?

Mr. Rowntree: I think that is correct.

Mr. Kramer: So I don't want any misunderstanding about it, any alleged inconsistency. I think the answer may be read.

Mr. Rowntree: Bottom of page 136.

706 Mr. Robertson: You haven't read the question yet.

Mr. Rowntree: Well, I just note there I limit it to certain paragraphs.

Mr. Kramer: This is an answer, really, to the paragraphs which were read to Mr. Lewis which were read here, and there are certain additional paragraphs read which were not read to Mr. Lewis when the deposition was taken.

(The reading of the deposition was continued.)

"A. All quite logical and a most logical administrative procedure to build up the files so that when the men became ill there would be no delay in the certification for hospital expenses. In no other way could the Fund operate.

"They had the addresses of the United Mine Workers' local unions. They knew of nobody else who would undertake to disseminate the information outside of the United Mine Workers and no other agency or individual whose services they could invoke to get the word to some individual who perhaps had let his membership in the United Mine Workers drop or who in other ways was eligible for benefits.

"Q. Why be so careful, Mr. Lewis, with regard to certifying a man's membership, with the seal of the union and all those things? "A. Because that gave validity to his record and that is the only reason. Someone who

707 had responsibility. Someone who is qualified to give the information. Someone who possessed the information.

"There was no one else in the community upon whom we could rely.

"Q. Would it not be just as effective for that purpose to simply certify that the man had been in the industry or had been employed the requisite number of years in the proper type of service? "A. No, that would be insufficient because

that would not carry with it the assumption of the knowledge of this man and his status in the community, and his membership in the union, his employment in the mines had been as it was, continuous or intermittent; it all having to do with his qualifications.

"Q. But the fact that he was a union member had nothing to do with the fact that he was qualified; is that not true? "A. The fact that he was a union member did not and does not now deprive him—give him any advantage in the award; or, if he is not a member, give him any disadvantage in the award.

"But the United Mine Workers was authorized to represent only its own members; and of necessity, inasmuch as they were the overwhelming number of people who
708 might become qualified for benefits in the Fund, they were obliged to render him and the Fund this assistance. They were the only responsible agency with which the Fund could entrust those duties.

"Q. Well, what about the non-union employees, Mr. Lewis? "A. Provision is made for the non-union members. Awards have been made for non-union members.

"Q. You say that non-union awards have been made? "A. Oh, yes.

"Q. Well, we call attention to Interrogatories Number 12, 40, and 18, addressed to the Trustees.

"Interrogatory Number 40:

"'Give the name and address of an individual who has received a pension from the Welfare and Retirement Fund voluntarily awarded without litigation and who was never a member of the United Mine Workers of America, and state the date such pension was awarded.'

"The response was:

"'Interrogatory Number 40 is objected to on the ground that"—

* * * * * * * * * * *

712 The Court: The objection is not evidence but the Court will let it be read so that you may understand

Mr. Lewis' answer.

Mr. Kramer: We will have to note an exception.

(The reading of the deposition was continued.)

"'. . . this interrogatory is oppressive, unreasonable, burdensome, vexatious, onerous, and imposes an undue burden upon plaintiffs for the reason that the records of the United Mine Workers of America Welfare and Retirement Fund of 1950 are not kept with relation to states, counties, or United Mine Workers of America districts, but alphabetically under the name of each beneficiary. In addition, the Fund does not keep records of union membership of each beneficiary and when such information is contained in any of the voluminous files of the Fund the accuracy of such information cannot be vouched for by the Trustees.'

"Do you agree with that response? "A. I have no knowledge of such statements as that.

"I am unable to comment intelligently on brief excerpts taken out of context in special cases that revolve around questions of fact and the validity of averments and
713 allegations made pursuant to the applications.

"So I couldn't answer intelligently anything with respect to that specific interrogatory."

(The reading of the deposition was continued.)

714 By Mr. Rowntree:

"Q. Taking up Interrogatory Number 18."

Mr. Kramer: I think, your Honor, I should point out what we did at that time in view of this. At the time we pointed out this, that the interrogatory directed to the trustees was whether the applicant had ever been a member of the United Mine Workers and not whether he was a member at the time when making application for benefits. In other words, they asked us whether the applicant had ever been a member. That is what we pointed out at the time and that is what the objection was.

The Court: Well, the jury is entitled to—

Mr. Kramer: The interrogatory said who was ever a member and had nothing to do with whether he was a mem-

ber at the time the application was made, which is the question in controversy. We pointed it out at the time and still insist on it.

(The reading of the deposition was continued.)

By Mr. Rowntree:

"Q. Taking up Interrogatory Number 18:

"'Were any of the recipients of the pensions awarded in 1956-1957 not members of the United Mine Workers of America and, if so, kindly name the same and give
715 their addresses.'"

Mr. Rowntree: There was a similar objection.

(The reading of the deposition was continued.)

"This interrogatory was objected to on the same identical grounds."

Mr. Kramer: I continue my objection as I made earlier, your Honor. What they are asking—the same objection was made. They are asking him to comment on those objections and we have the same objection.

The Court: I think Mr. Lewis is entitled to comment on it.

(The reading of the deposition was continued.)

"A. Well, I would so assume. I think that I would have been one of the chief objectors, myself, had I been present. I can hardly conceive of a more burdensome or oppressive interrogatory.

"Q. Well, now, in the one before that we asked for any member—any non-union participant. We were not asking for a great big long list; we just wanted one, Mr. Lewis.

"Don't you think that you could produce one name?

"A. The Fund is at a disadvantage in that it has no record of the non-union men. We don't know who they
716 are or where they are until they file an application out of the blue sky. So there has to be a complete overall investigation.

"The facilities open to the Trust are narrowed to the representatives of the United Mine Workers substantially, by reason of the contract and by reason that the United

Mine Workers are only authorized to represent their own membership.

"We have had men who had been out of the industry for twenty-five or thirty years that applied for pensions. We have had court cases on those.

"Q. We point out Interrogatory Number 12:

" 'Give the name and addresses of any non-union member employees in District 19 who have received benefits from the Welfare and Retirement Fund.'

"District 19 is the district that covers East Tennessee's coal mining area."

Mr. Kramer: Skip the comments on it.

Of course, we are continuing the same line of objection, your Honor.

The Court: Yes, sir.

(The reading of the deposition was continued.)

"The Witness: That, of course, would be my own opinion as a layman and as a Trustee, that your statement is correct. And I do not know enough about these interrogatories or the responses or the facts as affecting an individual
717 to be responsive; in the absence of knowledge on my part as a Trustee who did not handle the details of the Fund in dealing with matters of policy.

* * * * * * * * * * *

"Q. The third contention we made pertains to the means of tying the Welfare Fund to the Union; pertains to the International officers of the International Executive Committee passing upon the membership of applicants. This committee which was established in 1948, Mr. Lewis. The functioning of that committee did pertain to the applications under the Welfare Fund, did it not? "A. No. It pertained to all members or former members—"

Mr. Kramer: Just a moment. To keep this record
718 straight, I want to again object. Your Honor, notice first in 1948 period—prior to the period of the alleged conspiracy, and we think it is irrelevant and immaterial for

any issue in this case and is only confusing and may be prejudicial. Therefore, we object to it.

Mr. Rowntree: The subsequent questions carry on over into the 1950 and subsequent period.

The Court: All right.

(The reading of the deposition was continued.)

"A. No. It pertained to all members or former members who may have lapses in their membership or have employment in other industries, who may have left the industry and who desired, for reasons of their own, peculiar to themselves, to reestablish their membership.

"Q. We refer to the statement of Vice President Kennedy, in the 1952 Convention Minutes, pages 487 and 488.

" 'Mr. Chairman, being the Chairman of the Special Committee set up by the International Executive Board regarding the applications of thousands of individuals whose membership was in doubt and upon which we passed and have been passing for the past four years, I think I am somewhat competent to discuss this matter that is now before the Convention.

" 'In the first place, when the dollar dues for unemployed members and for those receiving pensions in par-
719 ticular was under consideration by this Convention, it was pointed out that one of the reasons back of this was a very important legal reason.'

"Now with respect to that statement we addressed Interrogatory Number 55 to the Union:

" 'File copy of Minutes of the International Executive Board relating to the establishment of the special committee referred to by Vice President Kennedy on page 487 of the copy of the Minutes filed.'

"Answer: 'Resolution of the International Executive Board relating to the matter inquired about in this interrogatory is attached hereto marked Exhibit E.' "

Mr. Rowntree: We filed that at this point.

Mr. Kramer: So there may be no misunderstanding, before these interrogatories we have been discussing have

been addressed to the trustees. Now he is talking about interrogatories addressed to the United Mine Workers.

Mr. Rowntree: That is correct.

Mr. Kramer: So there will not be any dispute about it later on.

The Court: Yes.

(The reading of the deposition was continued.)

By Mr. Rowntree:

"Q. This exhibit states:

720 " 'Miscellaneous membership in cases of original jurisdiction of Board.

" 'Extended discussion was had, during which there was mention of cooperation with Social Security and its effect upon the determination of these questions.

" 'Board Action: Agreement with President Lewis' suggested procedure that upon receipt of an application under the Original Jurisdiction Clause of the constitution, it would be transmitted to the district for preliminary findings and recommendations; the report would be returned; then, Welfare would obtain the Social Security record; and

" 'Acquiescence in President Lewis' suggestion of the probability of necessarily having to set up a permanent committee and his statement that it could be done administratively without a formal motion.'

"That did relate to applications for Welfare Fund benefits, did it not?

"A. Possibly, but not necessarily; because the organization had no knowledge of the motives of men in seeking restored membership and a member of the United Mine Workers, regardless of his intent or motives, was entitled to a finding as affecting his status in the organization. And a committee could make an investigation of each claimant's request and ascertain the facts through machinery provided;

whereas, the Board did not have that information
721 before it at the time an appeal was filed with the Board. The administrative procedure was long in effect and widely utilized.

"Q. Did this resolution here explain why the Welfare Fund forms contain so many blanks for certification by Union officers of membership? "A. No, not necessarily, at all.

"Q. Doesn't it explain the statement that we have previously referred to from page 254 of the 1952 Convention Minutes to the effect that the Union was solely responsible for the certification of Union membership? "A. No. It merely represents a somewhat ghastly and futile attempt of operating interest to create the illusion that the Union was attempting to do what you say.

"Q. Does not the effect of these various papers, including the resolution, including the Welfare Fund forms themselves, including the statements contained in the United Mine Workers Journal with respect to qualifications for participating in benefits, all indicate to the men in the industry that Union membership is a requirement? "A. No.

"Q. Is it not true that the functioning of this International Executive Board Committee with respect to passing on membership has continued all the way down at least through the 1956 Convention? "A. Oh, yes. The com-
722 mittee is in existence, but the number of applications has been greatly shrunken due to the conditions within the industry.

"Q. And the International Executive Board Committee was passing on applications for benefits with respect to the membership of the individual, in the 1952 Convention? "A. It had no relation whatsoever to the Welfare Fund but to the constitutional rights of the petitioner.

"Q. Well, I refer back again to the resolution, Exhibit Number 12. That resolution does pertain to applications for Welfare Fund benefits, does it not? "A. I do not recall what Exhibit 12 says.

"(After examining Exhibit 12)

"The particular petitioner whose case is under discussion at the time may or may not have had a question before the

Board, who had displayed that he wanted to come back in order to qualify for an award of some kind from the Trust; but, as Mr. Kennedy says in his testimony or his statement at the Convention, there were large numbers, perhaps thousands of such applications, and in the ordinary case there was no declaration of intent or purpose why he wanted his membership restored other than his desire to do so; because he had a right, as averred, to constitutional redress in the courts of the United Mine Workers."

723 Mr. Rowntree: We refer to the convention minutes, page 155, of '52. There a report is given in the report of the international officers to the convention under the heading "Special Membership Committee", setting forth the number of matters considered during the course of the time since the last convention, and similarly, there is a report at page 27—strike that.

Mr. Kramer: How much are you striking, beginning with the word "similarly"?

Mr. Rowntree: Similarly, yes.

The statement of Mr. Kennedy in commenting on that portion of the international officers' report. This is page 275 of the '52:

"A special Membership Committee was appointed by the International Executive Board and this committee has been functioning for four years. We have handled 11,075 cases, as indicated by this report, which shows the disposition of the cases as such as handled by the International Committee. I think this was a constructive step and that it provided the means whereby we could clear up these cases involving membership, which has become very valuable in the United Mine Workers."

There is a similar report at page —

724 Mr. Combs: Your Honor, may I interject here?

I believe it would be clear to the Court and the jury, if counsel doesn't mind, for me to read that whole paragraph.

The Court: All right.

Mr. Combs: This is a statement made by Mr. Kennedy and I think it will give some background.

Mr. Rowntree: All right.

Mr. Combs: "At the last International Convention, appreciating the fact that a great number of applicants should be heard with respect to doubtful member cases, where probably mistakes had been made by the member or by the Local Union Secretary or by the District or by the International Union, it was felt that some means should be provided to take care of these doubtful membership cases. The International Convention amended its Constitution to provide that the International Executive Board should have prior jurisdiction of these cases. A special Membership Committee was appointed by the International Executive Board and this committee has been functioning for four years. We have handled 11,075 cases, as indicated by this report, which shows the disposition of the cases as such as handled by the International Committee. I think this was a constructive step and that it provided the means whereby we could
725 clear up these cases involving membership, which has become very valuable in the United Mine Workers."

Mr. Rowntree: There is a similar report at page 136 of the 1956 convention.

(The reading of the deposition continued.)

"A. The witness would like to point out also that continuance of membership in the Union by a pensioner is not mandatory; and he need not, if he so elects, pay his dollar a month dues, as the constitution provides for pensioned members.

726 "Q. Now, Mr. Lewis, that was another one of the means that we contended was adopted to tie the Welfare Fund to the Union; that is, making pensioners retain their membership in the Union, which involves that constitutional amendment back in 1948. That business of requiring pensioners to retain their union membership con-

tinued on through 1952 and 1956 conventions, did it not? "A. I think it is in effect now.

"Q. Yes, sir. "A. In the constitution. But, again, I point out to you that the necessity of paying those dues does not impair his pension rights or his rights to any other benefits, hospitalization or what not.

"You will understand, of course, that all pensioners are entitled to free hospitalization privileges by the Fund. In fact, they constitute the largest block of expense, the largest portion of the expense. And special consideration was given to pensioners; because the convention had under consideration the increasing of the dues to all members, and this exception was made for the pensioners as a contribution to the pensioners who do not have to pay the regular monthly dues.

"The monthly dues to a working member is four dollars a month, and the pensioners' dues are only one dollar a month. The net profit to the pensioner is, in many
727 instances, greater than his income would be if he were a working miner. So that is the reason for the dollar dues.

"Q. It is true that the pensioner is required to pay the dollar and a quarter dues to the Union? "A. No. No, it is not true that he is required to pay. He is not 'required to pay.'

"If he wants to retain membership in the union it merely illustrates how much he will pay under that circumstance: namely, one dollar a month. A provision by the local unions on account of the extra payment to secretaries for clerical work and paper work, to enable the local union to be able to meet those expenditures. All for the benefit of these elderly pensioners, non-working pensioners.

"Q. Well, we have referred to pages 486 and 487 of the 1952 convention concerning a resolution moved for by a local union and a substitute resolution was presented by the committee on constitution set forth at the top of page 487:

"'Retired members, who are not employed outside of the coal mining industry, disabled members receiving aid, and those receiving State Workmen's Compensation payments, students attending school, also members temporarily unemployed through no fault of their own, shall pay
728 $1.25 per month, dues to be forwarded by the local union to the district secretary-treasurer.'

"Now Mr. Kenn y made a comment at page 487 and page 488 which w have previously referred to, and Mr. Kennedy there states:

"'In the first place, when the dollar dues for unemployed members and for those receiving pensions in particular was under consideration by this convention, it was pointed out that one of the reasons back of this was a very important legal reason. In other words, whether or not without any such consideration whatever, we could give membership to an individual without some consideration or to maintain the membership of an individual participating in pensions without consideration; and what I mean by 'without consideration' is that in the making of any contract between any parties whatsoever there must be some consideration to make that contract legal. That was the principal reason why this convention, in order to legalize beyond any question of doubt the membership of these individuals set this as a consideration.'

"A. Those are legal references. Mr. Kennedy is not a lawyer.

729 "Q. Is he not referring to a previous statement by you in the 1948 convention? "A. He may or may not have been. I do not know.

"Q. I think we have already mentioned that before; the statement you made in 1948 on this question of dues of retired members, where you stated that the Taft-Hartley Act required— "A. There was some legal discussion of points involved among the attorneys, and it was anticipated that if too many of the pensioners voided their membership in

the United Mine Workers that the operators, in all likelihood, would raise the question that they were not obligated to raise funds or pay a royalty for non-members of the United Mine Workers of America, on the ground that the United Mine Workers had no right, no legal right, to represent non-members.

"It does not in any respect run to the question which you press: namely, to limit this Fund and its benefits only to members of the United Mine Workers and to make that a pre-requisite of an award.

"If I were making the statement Mr. Kennedy made, I might have phrased it in different words, but Mr. Kennedy phrased it in words which readily came to him.

"Q. Mr. Lewis, we refer to pages 488 and 489 of the same minutes where you made this statement:

730 " 'Based upon present computations governing the life expectancy of individual members, $18,000 will be paid on the average under each pension award. Certainly we cannot continue to pay out that $18,000 over a long period of years without fully protecting the legal membership of that individual and causing him to maintain his constitutional membership in this organization. The basis of his monthly dues was previously fixed by a convention as being the minimum that would qualify, as Vice President Kennedy says, as a proper consideration in the premises. "A. Those statements were predicated upon the conditions existing at that time and are not necessarily the law and the prophets in 1961.

"Q. But this was 1952 after the signing of the 1950 contract? "A. Exactly so. Exactly so.

"But that whole question has been clarified since that time, and it is definite that a pensioner does not need necessarily, to take his pension, to obtain membership in the United Mine Workers of America; and it is not true that only members of the United Mine Workers are eligible for awards.

"Q. Well, have you made corrective statements at any

convention which would clear up this matter of mem-
731 bership? "A. I wouldn't know because I don't know what is in the convention records. I haven't read them as a matter of routine.

"Q. Well, these statements did make a profound impression on the membership, did they not? "A. I have no way of knowing.

"Q. I refer particularly to pages 490 and 491 of these same 1952 convention minutes. The statement of Delegate Morris:

"'It wouldn't be healthy for our delegation not to get up and speak on this issue at this convention. When it came time for resolutions to be drawn to be sent to our International secretary-treasurer, the old men asked the Resolutions Committee to cut the dues. We told them and quoted from the proceedings of our last constitutional convention to the effect that our great leader, John L. Lewis, settled a big argument that it was only due to the penitive measures of the Taft-Hartley Act that we had to charge something and the dollar was the least we could charge.'

"Do you know if any corrective statements have been made at any later convention to clear up that impres-
732 sion?"

Mr. Rowntree: The question was asked—

Mr. Robertson: There was an objection there.

* * * * * * * * * *

(The reading of the deposition was continued.)

* * *

"Q. May I ask what type of 'misunderstanding'? "A. The misunderstanding of Delegate Morris, that you lay great store by, apparently.

"Q. Well, has any effort been made to clarify that misunderstanding? "A. The convention clarified it.

"Q. Which convention now? "A. The convention that took all the action pertaining to this subject, the results of which confronted Delegate Morris and everybody else. Cer-

tainly in our conventions our dissenting opinions and analysis had variance with various speakers.

"Q. To return to the 1956 convention, the minutes at pages 499 and 500, where the increase in these dues of retired members from one dollar to $1.25 is again put in the form of a resolution, and presented by the Committee on Resolutions —"

Mr. Rowntree: Continuing over to page 159.

733 (The reading of the deposition was continued.)

* * *

"Q. The position was still maintained in the 1956 convention that there was a legal requirement that the men retain— "A. I suppose it is difficult for counsel to visualize the desire that is uppermost in the minds of many pensioners to retain membership in the United Mine Workers of America. And there are other reasons which have been analyzed. That question at that time was sufficiently obscure to justify the retention of membership in the union for the reasons that I have previously discussed.

"The dues to the organization were raised to four dollars per man per working member. There was a disinclination on the part of the majority of the delegates to require the pensioners, who were not employed in the industry, to pay that much dues to the organization. In one sense they regarded the action as a contribution of three dollars a month to a pensioner who, presumptively, had no other revenues besides his pension and Social Security. And the payment of three dollars was believed to be burdensome—of four dollars—was believed to be burdensome; so the convention took the action as recommended; which seems to me even now, after the elapse of the years, to have been a

734 justifiable, proper and virtuous action.

"And in the light of the occurrences since that action was taken, I affirm the soundness of the arrangement now as well as at that time.

"We have pensioners who do not pay dues to the organization. They elect not to. They may have removed to an

area in the country and a residence with their children, where the localities that they have settled in—California, Florida, and other states, are far removed from the United Mine Workers, and some of them elect not to keep up their membership. Others elect to do so. The option is theirs.

"The organization assists them within the area of its own functions. That is all there is to the question as far as this witness is concerned."

* * * * * * * * * * *

"Q. Isn't it true that all of these various things that we have talked about have resulted in such a tying up of the Welfare Fund to the union that the Welfare Fund is even thought of by union officers as being simply a Welfare Department of the union? "A. That is not true in any sense, according to the best judgment of this witness who has had long experience and intimate connection with the work of the Welfare Trust.

735

"Q. We refer to page 298 of the 1956 convention minutes: the statement of Mr. Kennedy speaking on the International officers' report, the United Mine Workers Welfare and Retirement Fund section of the report, speaking of the trustees.

" 'They are certainly in my judgment entitled to continuing commendation and approval for the great work done and being done by the Welfare Department of the United Mine Workers of America."

* * *

"The Witness: Well, I would consider the last sentence, where Mr. Kennedy refers to the 'great work being done by the Welfare Department of the United Mine Workers of America' as being merely a slip of the tongue; an inaccurate choice of words to which all public orators are given. One candidate for President called it 'campaign oratory.' I don't know what you would call it.

"But there is a confusion in the public mind—greatly aided by emanations from statements similar to your own in this conference—that the Welfare Fund is a department

one and indivisible with the United Mine Workers
736 of America.

"It is a natural assumption perhaps for some people little concerned with such matters, to assume that the United Mine Workers operate a Welfare Department.

"As a matter of fact, the Welfare Fund is not operated by the mine workers or by the coal operators, parties to the agreement. It is an independent agency, complete within itself, with which the United Mine Workers of America is cooperating because its members are the beneficiaries of the work of the Welfare Fund.

"As I have pointed out before, an increasing number of far-seeing coal operators in the country are publicly recognizing that fact, and the cooperation now received from the industry by men who fought its inception in the first instance and continued their animosity through the years—because they didn't like to admit error in judgment.

"So this statement by Mr. Kennedy, and this one title which he uses here, should be construed merely as a slip of the tongue in naming the agency.

"There are a good many agencies in the coal industry in the economic structure of the country, and it is rather difficult for one individual to retain the titles and
737 identities of the organizations with accuracy or definiteness. I have a hard time remembering some of the agencies in the coal industry.

"Like in identifying Mr. Moody sometime back, I had to stop and think what that ponderous title of his organization might be.

"By Mr. Rowntree:

"Q. Mr. Kennedy was in a position where he should not be confused on those things, was he not? "A. Mr. Kennedy is like all the rest of us. He is mortal.

"Q. Is he not presently the president of the United Mine Workers? "A. Yes. But he is a human being and he is mortal, and he is not always perfect in his illusions when it comes to proper names or titles.

"I think, like myself, he would probably stumble over a good many governmental agencies with which we have had to deal in the past two or three decades. I am quite sure that I stumble when I undertake to interpret the proper titles of these alphabetical agencies. And that is the case here, which I think has no importance, no bearing, no effect, and no influence on the subject at hand.

738 Mr. Rowntree: Page 165, Interrogatory No. 33 addressed to the Trustees:

(The reading of the deposition was continued.)

"'Are the Trustees of the United Mine Workers of America Retirement and Welfare Fund advised that there is a broadly held view in the bituminous coal industry, shared by both operators and miners, to the effect that only members of the United Mine Workers of America may participate in the benefits of the Fund?'

"Answer: 'No.'

"Do you agree with that answer, Mr. Lewis? "A. I do not understand your first reading of that. Would you let me read that?

"(After examining Interrogatory 33)

"The interrogatory in question is upon an assumption of knowledge of what are the views of the multitude of operators in the coal industry.

"Q. Also miners. "A. And the multitude of private citizens of the United States.

"'Are the Trustees of the United Mine Workers of America Retirement and Welfare Fund'—now there is a slip—reverting to Mr. Kennedy for a moment. Pardon me.

739 You incorrectly, in the interrogatory, expressed the title of this Fund. The title of the Fund is 'The United Mine Workers Welfare and Retirement'.

"Q. And we called it 'Retirement and Welfare'? "A. Yes. Which is incorrect and makes my point.

"'Are the Trustees of the United Mine Workers of America Retirement and Welfare Fund advised that there

is a broadly held view in the bituminous industry',—
"It is a question of fact as to whether they really know that or whether they just assume it.

"'—shared by both operators and miners, to the effect that only members of the United Mine Workers of America may participate in the benefits of that Fund?'

"Well, in the general atmosphere surrounding public knowledge of this Fund, who among the lay citizens can stop and interpret the exact relationship between the Fund and the mining industry?

"Obviously they know that the United Mine Workers of America, as such, were the protagonists of the Fund, that they are the ones who made the fight to press this plan upon the coal industry. That the Government of the United States agreed to it, as the employer of personnel in coal mines in this country.

740 "And the proper answer is as defined here: 'No.' To which I fully agree.

"Q. And, pursuant to that answer, I take it that the Trustees have done nothing to combat any such impression that might exist among the miners in the industry?"

* * * * * * * * * *

"A. Counsel, this witness does not agree with your premise. The interrogatory is based on a false concept and premise by you, when you are speaking of some other organization besides the United Mine Workers of America Welfare and Retirement Fund by your own typewritten wordage here. And if counsel can err in articulating these titles, then surely counsel would not deny to Mr. Kennedy the same privilege as a citizen in a casual, extemporaneous statement.

"Q. I certainly do not pretend to be immune from error.

"We have been talking about what happens with respect to the Union Shop clause and Welfare Fund provisions of the contract, particularly after 1950.

741 "I want to turn now to the disposition of another issue that existed in the 1950 negotiations; that is,

this stabilization of the industry question, relating to the fact that there was too much coal for the market.

"The operators did object to the setting of a three-day work week and various other working limitations during the period of the 1949-1950 negotiations? The operator representatives were objecting? "A. I failed to catch the point of the question.

"Q. In the 1949 and 1950 negotiations, there existed the setting of three-day work-weeks and other limitings of the number of working days by the union. "A. Yes. The three-day work-week was promulgated.

"Q. And the operators objected to that? "A. Yes, they objected.

"Let me amplify that a little:

"We were asked by the government representatives and by the operators to have the mines resume work while we continued negotiating, in order to alleviate what they said was the hazard that the public was enduring of running out of coal and to insure against it.

"Now the operators made a great point that the public was in danger. Through their public relations organizations they widely circulated that point of view and it received wide publicity in the nation.

742 "We consented to go back to work without a contract, while we negotiated; but, as the consenting party, we stipulated that it would be a three days a week operation, which would remove all vestiges of apprehension for coal throughout the country and take the headlines off the newspapers and abate the widespread publicity on the question of a theoretical shortage of coal.

"They then objected to the three-day week on the ground that it didn't let them work five days a week if they could work five days a week.

"The intent of the mine workers was to widen the opportunity for equal employment opportunity in the industry of all men who had been engaged in the strike and were

members of the union and to give them equal participation in the work available.

"We were well advised, of course, through our knowledge of the industry, that the industry could not expect to work more than an average of three days a week.

"So that is the Alpha and Omega of that question."

* * * * * * * * * *

743. (The reading of the deposition was continued.)

"'Did Mr. Moody ever talk to you about your proposal with respect to a limited work week, the control plan to stabilize the industry? "A. I do not recall that he ever talked to me personally on the question, but he made the welkin ring in the newspapers.

"Q. Did he ever talk to you and express the idea that he could not go along with a stabilization plan based upon a controlled number of days work because of the anti-trust laws? "A. I do not recall any personal conversation with Mr. Moody on that subject, but certainly I knew from the public press that he held those views when his organization met and he made this address—these remarks. And I considered it of little moment—his utterance.

"Q. Did the operators object to the limited work week because of economic reasons? Or what was the basis? "A. No. Their first concern—the position that they had occupied all through the negotiations was that they were mindful of the public weal and the public welfare.

"Their reaction when the three-day work-week was promulgated, was that we were interfering with their right to make profits as investors under our free enterprise system.

744 "They changed their position completely. In other words, they were smoked out of their hole.

"Q. They were really hurt in their pocketbook? "A. Their purse. We thought, 'Who steals my purse steals trash.'

"Q. Now the 1950 contract, as signed, contained no provision with respect to a limited work-week? "A. As I have

previously testified that came about on a request to put the mines back in operation to abate a theoretical hazard, a shortage of coal for the industry and for household use in the nation. That is the only time that came up prior to the promulgation of the three days arrangement.

"But we were asked to do the country a favor—which was likewise a favor to the operators—by working without an agreement. So we named that as one of the considerations under which we would work. And the wails and lamentations were of course then heard from every high hill because it touched on a vital spot: Their left hip pocket.

"Q. Now, we refer to page 125 of the Convention Minutes of 1952, a statement of Mr. George Love, where Mr. Love states:"

Mr. Kramer: Of course, your Honor, we continue our objection to the statement of an alleged conspirator,
745 and I guess it isn't necessary to repeat my grounds.

The Court: Same ruling.

(The reading of the deposition was continued.)

" 'This two and one-half year contract gives the industry its first real opportunity for stability in the last decade.'

"A. Where are you starting out reading?

"Q. Well, this is the second sentence again. I was trying to save space. "A. The second sentence of which paragraph?

"Q. The statement of George H. Love. "A. Yes, but there are two and a half paragraphs.

"Q. Well, the first paragraph. "A. Starting in the middle of the first paragraph?

"Q. The second sentence: 'This two and one-half years contract gives the industry its first real opportunity for stability in the last decade. Both the unions and the operators made concessions. The operators definitely established the right to control their production and their mining facilities.'"

"There Mr. Love states that the contract attained the stability in the industry and yet says that the operators retained the right to govern the working time of the men.

So my question is: How did this contract attain
746 stability in the industry? "A. By the elimination of the hippodromes that were held from time to time by the industry in the attempt to negotiate a new wage scale.

"They were, in effect, Roman mobs; and all the spotlights of modern means of communication were turned on them and all the mechanisms of our modern communication systems were utilized by the press and the radio and television to sensationalize their reports on the progress of the negotiations in this large and important industry.

"Stabilization—the word used here by Mr. Love—the word 'stabilization', and as used by me on numerous public occasions, ran to the question of stabilization of production facilities and the elimination, if possible, of the long cessations of production; the three ring circuses of the wage conferences, with contending operators in the various subdivisions of their operators' organizations pulling this way and that, and being interviewed, a la Mr. Moody and Mr. Love.

"Mr. Moody's ill-conceived utterances, as repeated by you, on a number of occasions were his desire to outdo Mr. George Love who was president of another association of operators as the greatest spokesman for the mining industry. But he had the overwhelming disadvantage of not being familiar with the industry and of having had
747 little experience in it; because from York, Pennsylvania, in that manufacturing concern that he represented before he came down as president of the association, there was no coal industry for him to study. So he wanted to be known as an expert with the rank of George Love, naturally, for political reasons in the association to give him more strength, because he had some critics in the Southern Coal Association.

"So Mr. Love refers to 'stability'. He hopes that there will be improved methods, as I translate his utterance to myself—improved methods, of negotiating on a more intel-

ligent basis, with less cumbersome machinery, with less stoppage of production. And I used the word 'stability' all my life in the industry with references to our obligations in that stabilization.

"There have been many changes in the negotiations in the industry. The last changes, since 1950, have occurred without the convening of large conferences; without public apprehension of a shutdown. Because they have been privately carried on between authorized representatives of the industry and the union, without fanfare and without publicity. And they have been successful so far, which does not imply that they will be successful tomorrow nor at the termination of the present agreement, which can be terminated upon sixty days notice by either party to the contract, the basic contract."

* * * * * * * * * * *

749 "Q. Mr. Lewis, hasn't this word 'stabilization' been heretofore related to the problem of excessive coal for the market? "A. At last the cat is out of the bag. By that question. The answer is no, because the United Mine Workers have nothing to do with the operation of the mines; the direction of working forces; nor the marketing of the coal after it leaves the pithead.

"They have never sought to influence or to guide the question of price; the question of preparation; the quality of preparation—to refine the coal to a low sulphur or a high BTU qualification. And in our use of the word 'stability' and Mr. Love's, insofar as it relates to any of our joint interests, the word 'stability' refers to that area which concerns the United Mine Workers of America and the coal operators.

750 "As a matter of fact, in the basic agreement of the organization which has been therefor forty years or maybe fifty, there is a clause which reads as follows, substantially:

" 'The management of the mines and the direction of

the working force, are vested in the coal operators and the United Mine Workers of America will not abridge this right.'

That has been the bible on that subject.

"We do not desire to assume the responsibility of management. We don't feel we are qualified, and we think the results would be adverse to the interests of the members of the United Mine Workers of America.

"The coal, when it leaves the mines, free on board the coal cars or the barges on which it is loaded, or the trucks, finishes the responsibility of the United Mine Workers.

"Q. Now, Mr. Lewis, refer again to this statement on page 297 of the 1948 Convention Minutes:

"'So next year in 1949 or at any other time when evil days come upon this industry, you will find the United Mine Workers of America moving in, and if there are only three days work in this industry we will all have the three days work. These things are of the utmost importance.'

751 "And also the statement previously referred to on pages 66 and 67 of the 1952 Convention Minutes:

"'There comes up at this conference, we think, the question of some regulation of the working time, some stabilization in the industry. The mine workers have gazed at some degree with admitted apprehension at the tendency in the industry to reduce their prices in the face of increased competition. Frankly, we think the industry has been too hasty.'

"A. That is an opinion on the matter of public policy which the operators were utilizing to plead pauperism as a reason why they could not concede any new advantages to the mine workers in the new agreements.

"And the first statement you read, from the 1948 Convention: My statement to the Convention that when needs must we would act to stabilize the industry related entirely to the shortening of the work week, and the fact that we would not idly sit by and see whole areas—north, south, east, or west—pauperized by the fact that their working time had been destroyed by the policy of the operators.

"In other words, it was the genesis of the three-day week, or four-day week, or five-day week. The industry now is limited to a five-day week on production, by joint agreement.

752 Or emergency work can be done by the payment of overtime on Saturday and Sunday if needs must, if it is an emergency. But coal can be produced only five days a week under the contracts of the Union with the industry.

"Q. It is a problem arising from an excessive amount of coal for the market? "A. It is a problem of how much the market requires in relation to the production capacity of the industry.

"It is widely advocated. It has been talked of in a number of industries now. Increasingly it will be discussed if this economic situation does not improve.

"Q. Now this 'stabilization' that Mr. Love speaks of there, was it not discussed between you and the operators that the problem of an excessive amount of coal for the market would be solved by forcing the smaller and weaker companies and their employees out of the industry, leaving the market to the big companies or producers who were represented by Mr. Love and the other representatives at these negotiations? "A. No. No, that was never discussed.

"Q. Was it not discussed that the National Bituminous Coal Wage Agreement would be used to accomplish the driving out of the smaller companies from the industry? "A. No.

"Q. Now, Mr. Lewis, I believe that you have already commented upon the difference in the kind of collective

753 bargaining you had in the industry after 1950 as compared to the preceding period.

"Would you compare the type of bargaining as to the smoothness of the bargaining as compared to the previous period that you experienced in the past 1950 period? "A. In 1950 the contract had been made between the parties for a duration period that was indefinite, governed by a clause—

the expiration date was governed by a clause in the contract mutually agreed to, providing for the termination by either party to the agreement on a formal sixty day notice.

"The 1950 agreement continued for a period and representatives of the United Mine Workers inquired privately from representatives of the operators whether they would like the Mine Workers to give sixty day notice; or would prefer, privately talked about, the extension of the agreement and under what terms.

"The operators communicated with each other on that question in their own meetings and in their own manner, and replied that they would be glad to sit down with informal representatives on both sides and try to work out a revised form of the agreement which could be adopted and remain in force, without the necessity of a sixty day notice being filed; it being understood that both parties reserved
754 the right to utilize the sixty day notice and terminate the agreement in the event that these more or less non-public discussions turned out to be futile. That is all there is to it.

"That has been done in succession several times since 1950. The agreement has been improved for the mine workers. The public has not been disturbed by the threat of a strike in sixty days; because the mere filing of a notice by either party to the agreement would create public concern or synthetic public concern created by those who might be interested in so doing.

"It has been found mutually advantageous. There is no agreement to continue following this procedure. It is subject to change by mutual agreement at any time, or without mutual agreement.

"To me it seems to be constructive. It rendered unnecessary the creation of formal negotiating committees representative of all producing districts in the United States and the consequent confusion that inevitably follows those things. The newspaper notoriety. Whatever effect it may

have upon the storage policy of utility and other power consumers of coal who, fearful that a possible strike might continue for some duration—long period of duration, in consequence rush into the market and buy excess quantities of coal for storage purposes; and the reaction from that would come later in lack of working time for the industry.

755 "That, in substance, about expresses the arrangement."

Mr. Rowntree: With respect to the bargaining after 1950, we make reference to 1956, page 97 and 98.

Mr. Kramer: Are you talking about the '56 minutes?

Mr. Rowntree: Yes. Quoting at the bottom of the page:

"Following this chaotic period of labor-management relations in the industry, the Bituminous Coal Operators' Association was formed on July 22, 1950, for the purpose of promoting 'Stable, just and harmonious industrial relations' on a national basis.

"This Association, representing for collective bargaining purposes approximately half of this tonnage of bituminous coal mined, is comprised of the following regional associations:

"Central Pennsylvania Coal Producers' Association

"Illinois Coal Operators Association

"Indiana Coal Producers Association

"Northern Panhandle of West Virginia Coal Operators' Association

"Northern West Virginia Coal Association

756 "Ohio Coal Association

"Virginia Coal Operators' Association

"Western Pennsylvania Coal Operators' Association

"In addition the membership includes a number of individual companies. Among these are some of the largest commercial coal companies and major steel companies which operate coal mines."

The 1952 minutes, page 156—

Mr. Combs: May I point out to your Honor what counsel

has just read? It is part of the message of the President of the United States to the Congress of the United States, reporting on the wage negotiations, and he read from one paragraph—two paragraphs of a long statement made to the Congress.

757 The Court: Yes, sir.

Mr. Kramer: Now you are reading from what?

Mr. Rowntree: The 1952 minutes, page 150.

• • • • • • • • • •

Mr. Rowntree: "Washington Conference of 1951.

"One of the outstanding accomplishments of our distinguished President, John L. Lewis, was his successful negotiation of the 1951-52 Agreement without publicity or fanfare, which became effective February 1, 1951, five months before the expiration of the then existing Agreement.

"Mr. Lewis had many conferences with Mr. Harry M. Moses, who represented the industry. Finally, in Mr. Lewis' handwriting, the suggestions below were given to Mr. Moses, who made a copy of them and handed the copy to Mr. Lewis, retaining those in Mr. Lewis' handwriting. These suggestions resulted in the consummation of the National Bituminous Coal Wage Agreement of 1950, as amended January 18, 1951 —"

That is all I care to read there. Do you want to read the rest of it?

Mr. Combs: No, I just want to point out though for the benefit of the Court and the jury that this was taken from the officers' report, a very lengthy report, to the con-

758 vention that was held at that time in Cincinnati, Ohio, and I might also point out for the information of the Court and the jury that these convention proceedings were public and the newspaper representatives attended all sessions of these meetings.

• • • • • • • • • •

Mr. Rowntree: All right.

During the course of the 1952 convention, at page 525, under "Supplemental Scale Committee Report."

"Inasmuch as certain contractual developments occurred after the Officers' report had been printed, we respectfully submit herewith a supplemental report covering recent wage negotiations to bring the delegates up to date:"

Skipping a paragraph.

759 "A National Bituminous Coal Wage Agreement was successfully consummated. This contract contains the following provisions:"

* * * * * * * * * * *

Mr. Rowntree: Page 533, under the statement of Vice-President Kennedy.

"I might say that in the negotiation of the recent Bituminous Wage Agreement, in fact in the last two Bituminous Wage Agreements, the negotiators representing the respective parties were made up of one man from the Bituminous Coal Operators' Association in the person of Harry Moses; and the other negotiator was President Lewis, of this organization."

* * * * * * * * * * *

760 Mr. Rowntree: The 1956 convention, page 123, there is set forth—

* * * * * * * * * * *

Mr. Rowntree: There is set forth there a call of the National Policy Committee of the Union sent out by the president, John L. Lewis, dated August 17, 1955, and on the same date a telegram to the members of the International Executive Board from the president of the union calling a meeting, and then there follows a circular letter of August 26, 1955, to the officers and members of the United Mine Workers from the International Officers stating:

"We have negotiated a new contract denominated 'National Bituminous Coal Wage Agreement of 1950 as Amended Effective September 1, 1955.'"

And on page 302 of the same minutes of 1956, there is a

statement by Vice-President Thomas Kennedy—I guess I better read it, Your Honor.

761 "In my talk," starting with the second paragraph.

"In my talk to the Convention yesterday, in analyzing the report of the officers, I referred to the new techniques that have been engaged in for the past few years with respect to the negotiation and the consummation of new agreements. Harry Moses, as President of the Bituminous Coal Operators' Association, and your President engaged in these conferences and negotiations in the making of the last several agreements—a two-man negotiating team—and as I indicated yesterday we profited immeasurably as a result of this technique in negotiation and in the consummation of agreements.

"Unfortunately, not too long ago Harry Moses passed to the Great Beyond. Harry Moses was a fine character. He was born in the mining districts. His people came from the mining districts. He worked in the mines himself, and in his heart he had the philosophy and the dreams of the mine workers of this country. Therefore, in the making of agreements he and President Lewis predicated their discussions on what would be good for the men in the industry and what would be good for the industry itself, as well as for our country.

762 "As I said, Harry Moses passed on to his reward, and a new man was eventually elected to succeed Harry Moses in that very important position.

"That man happened to be a Mr. Edward J. Fox, the President of the Philadelphia and Reading Coal and Iron Company in the Anthracite Region. He is a good mining man. We have dealt with him in the Anthracite over the years. He is honest and forthright in all of his work and in all of his undertakings, Mr. Fox assumed his position on September 1. Previous to his assumption of office the Steel Workers negotiated a new agreement for a period of three years, with certain increases broken down and applied partially in each of the tree. There were some questions as to

the actual amount of the increase secured in that contract. It probably runs about 29 cents an hour over the three-year period, or thereabouts. But, regardless of the amount, in our judgment the Steel Workers did a good job in pulling a contract out of the fire, as a result of their strike.

"There is a very close identity of interest between the United Mine Workers of America and the Steel Workers, because in reality they constitute more or less a joint industry because of the captive mines operated by the steel companies, the employees of which are members of
763 the United Mine Workers of America, and we congratulate the Steel Workers for the successful ending of their negotiations in the making of this new agreement.

"Well, it would naturally follow that the people at the head of the steel companies who also control the captive mine industry, when they fixed the money that could be applied to the captive mine ludustry in the making of our new agreement. Consequently, in the early part of August we sounded out, through Mr. Fox, whether or not the coal operators, represented by his organization, were willing to follow the same course and the same pattern in the making of a contract as was followed by Harry Moses and his Executive Committee. We got word back that they did want to follow that course; that sixty days' notice was not necessary for the reopening of the contract which expired September 1. Therefore, negotiations were engaged in similar to the negotiations we have had in the past.

"A number of meetings were held and finally matters reached a point about a week ago last Monday where we thought that there should be an enlarged conference, such as they have had previously under Mr. Moses, when the final word would be spoken by the respective parties. That conference was held in Washington a week ago last
764 Friday. Both sides laid down their bases of suggested agreement and understanding.

"The operators recessed and Mr. Fox returned and accepted the proposals as made to the Joint Conference the previous Friday."

765 Mr. Rowntree: We offer United Mine Workers Journal of April 1—I don't think we need to go into that. I think the last statement covered the point.

(The reading of the deposition was continued.)

"Q. Mr. Fox was a man who carried on these informal negotiations after Mr. Moses died? "A. He is the president of the Bituminous Coal Operators Association with offices in Washington; and in the capacity we understand the coal operators expect him to dispose of all the routine business incident to the operation of the joint agreement with the United Mine Workers of America and all other parties who are affected.

"So naturally the negotiations began with Mr. Fox."

Mr. Rowntree: To page 185.

(The reading of the deposition was continued.)

"Q. Mr. Lewis, the successive amendments to the National Bituminous Coal Wage Agreement from 1950 on increased the wage each time, did they not? "A. I think so. That was the intent of the effort."

Mr. Rowntree: We refer to page 30 of the 1952 Minutes under the heading "Bituminous Wage Scale Conferences and Agreements—1949-1952", concerning the 1950 contract, starting in the middle of the bottom paragraph:—

766 this is addressed to the membership at the convention, I suppose.

"Thanks to your cooperation, your committee was successful in negotiating a 70-cents-per-day increase in wages, 10 cents per ton in royalty for the Welfare and Retirement Fund * * "

That is the '52 contract.

We have as the next exhibit the United Mine Workers Journal of December 15, 1950, page 3.

(Exhibit No. 37 was marked for identification and filed.)

Mr. Rowntree: I will just read the summary on the left-hand bottom of that page.

"Following is a contract-by-contract listing of major gains made by UMWA negotiators since 1950, the year the Bituminous Coal Operators' Association was formed:

"1951—Signed January 26, this agreement raised wages $1.60 a day to $16.35. It also added the stabilizing feature of the 'open-end' termination arrangement which meant that the contract was firm for a year, could then be terminated only by 60-days' notice from either party.

"1952—Effective October 1, the 1952 agreement raised basic daily wages $1.90 a day to $18.25, increased
767 operator payments to the UMWA Welfare and Retirement Fund from 30 cents a ton to the present level of 40 cents a ton.

"1955—Effective September 1, the 1955 agreement boosted wages in two steps $2 a day to $20.25 a day. Vacation period was lengthened to 12 days and payment therefore raised from $100 to $140. Punitive pay for Saturday and Sunday work as such was added.

"1956—Signed October 4, the 1956 agreement provided for a second two-step, $2-a-day wage boost, which brought basic wages to $22.25 a day. Vacation pay was hiked $40 to $180 a year, and, for the year 1956 only, a Christmas vacation of three days with a payment of $40 for that time off was provided.

"1958—Effective December 1, the contract calls for a third two-step $2-a-day wage increase bringing basic wages as of April 1, 1959, to $24.25 daily. Vacation pay was raised $20 to a total of $200 for a 14-day period. The Protective Wage Clause, designed to prevent handling of non-Union coal by commercial operators, was added to the agreement."

Skip to the last question on page 186.

(The reading of the deposition was continued.)

"Q. Mr. Lewis, as the principal representative of
768 the union in dealing with these coal companies you were familiar with each of these large coal companies

and knew them rather thoroughly as far as their financial side and their production side was concerned; is that right? "A. In a general way, I have testified that we have a substantial knowledge of the form, structure, reserves, markets, and financial position of each of the important coal companies in the country, acquired during our tenure of office.

"Q. Is it not true that these increases—these successive increases in the wage rate—was designed to meet the increased ability of these large coal companies to pay these successive wage increases? "A. The mine workers had no relation to those elements of consideration. The mine worker was merely interested in getting a compensatory rate for his services in an ultrahazardous industry, affected with much unemployment; and that was the sole consideration of the United Mine Workers.

"We did not intend to have the operators do anything except what they judged themselves was essential to do in the operation of their mines or in the marketing of their coal.

"Q. Now we refer to page 128 of the 1956 Minutes.

* * *

769 "Q. I am addressing this question particularly to that paragraph in the middle of the page, Mr. Lewis, where you make a statement following Mr. Moses' statement after the signing of the 1955 contract, and particularly that language where you say, with reference to the contract:

" 'It is based upon the economics of a modernized industry. It is tailored to fit the future requirements of constantly progressive industrial techniques. It is in line with the established policy of the mine workers to share with the public and investors in a constantly increasing man-day productivity. Man-day productivity has increased approximately forty per cent since 1950.'

"Now, Mr. Lewis, are you saying in effect there that the contract was tailored to fit the ability of the mechanized companies to pay more wages because of their increased productivity per man per day by reason of their modern-

ization of their plants? "A. No. I would like to read into the record—

"Q. All right, sir. "A. —the complete paragraph.

"Q. Yes, sir. "A. This witness speaking:—I think
770 this was made at a public press conference.

"Q. It looks like a press conference. "A. When the agreement was signed.

"Q. That's right. "A. And the press and radio came in and Mr. Moses and I made separate statements in behalf of our respective interests.

" 'Mr. Lewis: Thank you, Mr. Moses. I have a brief statement, gentlemen.

" 'This agreement is sane and in the public interest. It preserves the era of pacific relations effective since 1956.'

Mr. Rowntree: That should be 1950.

Mr. Combs: 1956 is what the stenographer had. I assume he referes to 1950.

Mr. Kramer: Let's correct it then. I suggest you start again, Mr. Robertson.

(The reading of the deposition continued.)

" 'This agreement is sane and in the public interest. It preserves the era of pacific relations effective since 1950. It will not oppress the coal consumers nor yet expose the brittle bones of the operators to the icy blasts of the coming winter.

" 'It is devoid of Marxian babble; contained no
771 wind or water.

" 'It is based upon the economics of a modernized industry. It is tailored to fit the future requirements of constantly progressive industrial techniques. It is in line with the established policy of the mine workers to share with the public and investors in a constantly increasing man-day productivity. Man-day productivity has increased approximately forty per cent since 1950.'

" 'Production per man-day is 9.773 tons on a national average.

" 'This productivity is in amazing contrast with British

and Continental productivity which is less than 1¼ tons per man per day.

"'The agreement is a constructive instrument with edible virtues.

"'Mine workers require strong meat and eating money will produce more coal than philosophic discourse.

'You all have copies, haven't you?'

End of paragraph.

"Q. Now, Mr. Lewis, turn to page 308 in the same 1956 book, page 308.

"At this point I believe you are speaking to the 1956 Convention.

"Commencing in the middle of the page there:

772 "'This contract encompasses all that the industry is able to pay at this time. There isn't anymore. If there was we would get it. So there isn't anymore. It is all there wrapped up. If you look at it long enough you will find it is good. Your officers know something about this industry. We know the status, the financial standing, and the market possibilities, and the operating costs, and can project them far to the future of any major coal company in this country. So we are equipped with the facts when we talk with them.'

"So, with respect to the major coal companies, Mr. Lewis, you were familiar with their ability to pay these progressive increases in wage? "A. We were dealing with the preponderance of tonnage in the industry and making a contract with the industry through the only established articulate leadership that they had until that time created; namely, the negotiating representatives of the operating end of the industry who sat in joint conference and who participated in the task of negotiating agreements; who sat for endless days in negotiating conferences over each and all of the questions at issue.

"The industry as a whole had increased its productivity —and those are national averages, the figures which I

quote there. All in the public interest; all consistent
773 with the traditions and practices of our economy since industrialized America has come into being; and we were representing only the interests of the members of the United Mine Workers of America, and were not responsible or concerned in any official way—and certainly not in any personal or private way—with what the operators of the industry, as such, would do as affecting those questions over which the United Mine Workers of America had no jurisdiction.

"To suggest that the wage increases negotiated during the period since 1950 in any way were designed to favor certain companies whom you wrap up under the subject of 'large companies' is absurd, completely wrong, and constitutes an insult to the integrity of the members and officers of the United Mine Workers of America.

"You are charging me, by implication and by inference, with being particeps criminia to a conspiracy to aid special interests in the coal industry; under conditions which, if proven, would make this witness guilty of a crime, together with his associates.

"Officially in behalf of the Union and personally, speaking for this witness alone, I deeply resent the aspersions and the implied suggestions that I would participate in an unlawful conspiracy after a half century of service in various positions for the United Mine Workers of America.

774 "The charge, the insinuations, and the inferences, are deeply resented by this witness.

"Q. Well, Mr. Lewis, I'm sorry you feel that way about it, but I do want to go on with some other statements which you made at the 1956 convention.

"On page 310, paragraph commencing at the top of the page —"

* * *

By Mr. Rowntree:

"Q. 'These great combines now being formed in the industry are able to save enormous sums of money in the

production of coal, in the buying of supplies, on the part of managerial ability and administration in the reduction of the idle day time, because of their ability to make contracts with the great power consuming and manufacturing industries of the county, and deliver them on schedule, enabling them to plot their production with the maximum number of days of operation per year and cutting out the unnecessary idle day drag that mounts the cost of production.'

"Now isn't it true, Mr. Lewis, that these things, together with the mechanization of the mines, contributed to the saving of money in the operation of these large coal companies to a degree beyond the ability of the small coal producers such as exists in East Tennessee to match?

775 "A. Counsel, the statement you have just read, which I made, is in line with the accepted technique in the whole of the American economy.

"The United Mine Workers are not responsible for the entry into the industry of any American citizen who thinks he wants to become a miner, a producer of coal.

"He may well be equipped to come into the industry and assume that task or he may be inefficiently equipped.

"He may be without any knowledge of the industry. He may be without adequate funds. He may be without any knowledge of where he can market his tonnage which he intends to produce.

"He may have substantial credit in the banks and be capable of buying the best that the market will afford in manpower, in managerial ability, in equipment, in advertising, and all the marketing arrangements. Or he may be the reverse: Utterly without all of those things.

He may be a farmer with ten acres or forty acres of land underlain with some coal veins. He may decide to open a mine there with the brother-in-law's assistance and produce their own requirements of coal on his own land, under his own conditions.

"He may enlarge that and sell to his neighbors.

776 "He can scarcely be considered a formidable competitor in the open market with better equipped, better managed concerns, with ample credit for the production of coal.

"In the same maner that a chain store may erect a mammoth retail establishment across the street from a corner groceryman who has been on that corner selling groceries to his patrons for a half century; but the chain store, through all the reasons and elements that are contained in the matter of purveying groceries, ultimately will take much of his trade.

"The United Mine Workers of America are not responsible for anybody who fails to succeed in the business world or in the mining industry.

"An average of 400 to 500 concerns go into bankruptcy each week in the United States of America. Sometimes 300 or 350; sometimes 650; sometimes 425; but a fair average, in my estimation, would be 400 to 500.

"Who is responsible?

"To some degree, certain business enterprise coming into conflict with what might be called the genius of our modern society.

"We are living in a time, in a period, that is fascinating, because never before in any country in all history has the genius of mankind flowered as it has in our own
777 country in our own time.

"It runs to the question of why, for instance, we are sitting here today on the tenth floor of a modern hotel in Tampa, Florida, instead of patronizing a third rate hotel eleven blocks down the street somewhere from where this edifice sits.

"Why? Because we are able to pay. Because this hotel has been erected and it takes away trade from inferior hotels, by choice of the patron.

"That is the old theory, in effect—if you want to get down to the bread and butter elements in this thing—why people

buy their commodities in the cheapest markets, and the enterprise that produces the cheapest commodity achieves an advantage in the cost of production by the volume of purchases.

"So it is with these pallid, underfed, ill-nourished operators of small coal mines who cannot keep up with the economic procession nor live under the rules of competition as it now exists in this free enterprise nation.

"The United Mine Workers of America disclaims any responsibility for those units of the industry, those lesser producers whom you seem to believe should be kept alive at the expense of the body politic and the body social; and that the rule of industry should be that only the inferior producers of this country should be patronized, on an equal basis with the larger enterprises and more efficient
778 enterprises.

"It is the public policy of the United States, in buying the essential items necessary to properly operate and protect this government to which we all adhere, to enter the open market and buy from the modern enterprises that furnish them their goods at the lowest price on the market.

"There can be no conspiracy in the United Mine Workers of America, by the United Mine Workers of America, for bargaining with the coal industry in the only way that it is possible to bargain with the industry after seventy years of experience: namely, to deal with those representatives of the industry elected by the coal industry to so represent them in their dealings with the United Mine Workers of America."

Mr. Rowntree: We introduced at that time the United Mine Workers Journal for May 15, 1952, page six.

(The reading of the deposition was continued.)

By Mr. Rowntree:

"Q. I want to quote particularly the sentence starting five lines down:

" 'We've got many units of our industry that aren't modern, with low productivity—' "

Mr. Rowntree: This is a statement by Mr. Lewis.

779 (The reading of the deposition was continued.)

"'We've got many units of our industry that aren't modern, with low productivity and obsolete machinery, not well financed, no marketing outlets, mining a poor grade of coal, and with inefficient management. They're just a drag on the industry. The constant tendency in this country is going to be for the concentration of production into fewer units, with the best possible equipment, under the most modern plans that our engineers can devise with less idle-day loss; because the more continuous operation is geared to standard, qualified, marketing outlets and practices. That's the tendency.'

"And continuing with the next sentence:

"'More and more of the obsolete units will fall by the board and go out of production.'

"That, in substance, I take it, is what you have been saying in the answer you gave before? "A. This statement which you have just read is merely an analysis of what is practiced and constitutes a shibboleth of the American economy and its varied industrial units.

"Obviously the statement is factually true in each and every particular. That will be the trend. That has

780 been the trend in the years that have eventuated since 1952.

"The prediction in this statement as to the future is obviously well premised and has been justified by the records made on the scroll of time since that date.

"The United Mine Workers are not responsible for the individual units who fail to keep up with the competitive marking pace of American industry.

"These units are like the soldiers on the forced march. A certain percentage are compelled to fall out and rest by the wayside, while their more stalwart comrades carry on, burdened though they may be.

781 "I know of no other way in which the American economy can operate. I do not know anyone who generally known and generally understood and commonly

knows any other way that the American economy could operate and preserve the principles of free enterprise, investment for profits, reward for genius—call it 'capitalism' if you will.

"The difference between our American concept of freedom and liberty, free enterprise, reward for genius, individual participation in a trade, vocation, occupation, enterprise—freedom of employment, the right to organize, the right to pay taxes for the privilege—those concepts, those standards, those principles, are what are causing world-wide conflict in the years in which we now live, between those forms of government who adhere to the socialistic or Marxian concept of the operation of a state—who believe that the individual citizen is naught but the servant of the State—that he has no right to participate in the rewards of his own genius or his own labors and should be content with the substandard conditions that affect him as an individual; all because of his fealty or his presumed fealty to the oriental philosophy of Communism.

"This is America in which we live. The competitive theory is predicated upon the assumption that the strong shall be the vanguard of American enterprise, and
782 the weak, of necessity, now as in all periods of history, will naturally trail the strong until they fail and fall.

"The United Mine Workers of America and its negotiating representatives with the operators of the industry nation-wide are not responsible for those things. They are parties in an association with all others.

The same is true in our profession; in all elements of our modern society.

In the American Bar Association. The average annual earnings of an attorney-at-law in the United States is amazingly low. Amazingly low. Because, where we have hundreds and perhaps thousands of attorneys who make fabulous incomes annually and are able to command those

rewards by their genius or their skill, or their towering eminence in their profession; in contrast are the county seat lawyers in the backward counties of the United States, covering vast areas. The reward for genius expressed in the legal profession, as I ought to know. The same principle, sir.

"It is idle to inferentially accuse the United Mine Workers of being responsible for this condition in the legal profession or in the mining industry.

"I might go on with further anaolgies and take up other vocations and other industries and other professions. And an analysis would bring us to one and the same con-
783 clusion, because the same traits of human character exist among all men under our flag.

"Q. Mr. Lewis, do you think that the inevitable outcome of this American industrial complex is that fewer and fewer units of production will come about and that the smaller businessmen and their employees will inevitably be gobbled up by these large combines, as you call them? "A. I do not adapt your language."

Mr. Robertson: Adopt, I guess.

* * * * * * * * * *

(The reading of the deposition was continued.)

"I simply say that to any student of American industry there is an evident strong tide running in favor of increased productivity on the part of the individual employed that is emphasized, that is cultivated, that has flowered to a great degree in many of our modern industries.

"It is already here and will continue because the American people have adopted that policy and they find it productive and good. That it is raising their standard of living in the United States. It is increasing the annual income.

"In 1933 and 1934 the gross national product, so-called, of the United States, fell to about forty or forty-four
784 billion dollars for all the people of the United States.

"The President but yesterday avers that at the present time it is more than five hundred billion dollars practically five hundred and five billion.

"The mere increase in population is insufficient to justify that sort of an advance without the requisite fact, the prime reason, that the income of the people is advancing, that their purchasing power is increasing, that they live better, that they live longer, they enjoy more vacations. Old age and insecurity and evil days are guarded to a greater degree than ever before in the history of our country. All being matters of prime concern to the head and to the members of every household in the United States.

"There is no reason to think that is going to change soon. It can't change under the compulsion of this overwhelming sentiment of the American people, and the investors of America are looking constantly for greater and greater rewards for their investments.

"Q. Mr. Lewis, is there no place for the so-called small business getting started with low capital? Or does the businessman have to be a big combine with tremendous financial resources in order to get into the business
785 world? "A. That question is one that cannot be solved or answered competently by this witness nor by anyone else that this witness knows.

"The future of every man, of every enterprise, rests with the man or the enterprise. Only he can determine what he will do under the circumstances that exist.

"I could make no prophecy on that."

* * * * * * * * * * *

"Q. Mr. Lewis, the contract, the National Bituminous Coal Wage Agreement, contained terms which were included in each and every contract executed by the Union with any and all coal operators throughout the country; is that not right? "A. That, sir, is the policy.

"Q. Do you not think that the statements we have read from show a concern by the union that these large combines have the ability to pay these increased wages? "A. Obviously they have the ability or they wouldn't pay it and they

couldn't pay it. That is part of the distribution of
786 wealth.

"Q. And do you not think that these statements reflect the attitude of the union that the union does not care whether these smaller units can pay these increased wages?

* * * * * * * * * * * *

"The Witness: The question of whether or not the union cares—the union being a composite of hundreds of thousands of members—and the industry being one that notoriously is over-developed, with a production capacity far in excess of economic requirements—the union, like all other elements, is bound by the conditions that exist, and cannot guarantee and in fact cannot afford to undertake to become the sponsor and the protector of thousands of inefficient and ill-operated, uneconomic mining units.

"I point out again on the record that the number of units engaged in mining in the United States,—consisting of large companies, small companies, partnerships, and individuals and syndicates—has been progressively reduced over the last twenty-five years from a total number approxi-
787 mating twelve thousand or more to a total number now extant of eight thousand mines.

"I again observe that the United Mine Workers of America are not responsible for this failure or withdrawal of nearly five thousand units in the industry from the business of mining coal.

"The United Mine Workers of America are victims of that situation just as are the investors in these uneconomic mines.

"The technological advances made by the industry, which affects vitally the production of coal and the ability of the investor to stay in the business, has augmented unemployment in the mining industry and has driven from their jobs or made idle hundreds and hundreds of thousands of coal miners.

"I point out that in World War I nearly 750,000 bituminous coal miners produced five hundred million tons in the

peak year of production for war needs in World War I.

"I observe that in World War II, with 300,000 less men employed in the industry, the peak production year produced six hundred and twenty-five million tons.

"There is the story of the American mining industry.

"By Mr. Rowntree:

788 "Q. Could you bring that figure up to date, Mr. Lewis, as to what number of units are producing what tonnage up to the present time? Or do you have those figures in mind right now? "A. The American mining industry made that contribution and that rate of progress has continued in the years since World War II ended.

"In fact, the tempo and the pace has increased; and with a manpower of something over two hundred thousand men in the coal industry at the present time, the industry is capable of producing in excess of five hundred million tons per annum now.

"In World War I the production per man per day averaged about three tons; so it put 750,000 men to supply the needs of our nation during wartime and the requirements of our allies in that struggle.

"The average production now in 1960 is twelve tons per man on a national weighted average; in contrast to the productivity per man per day in World War I of three tons.

"Those are the facts. That is the trend.

"Q. Mr. Lewis, this uniform contract throughout the United States, did the union conduct intensive drives to make that contract applicable to all mining units throughout the country? "A. I have testified before that one

789 of the objects of the United Mine Workers of America —designed to improve their lot, to increase their wages, shorten their hours, promote safety, abate occupational disease, the incidence and ravages of occupational disease—caused the founders of the union when the union was first founded—first conceived and first founded and first came into being—that was one of the objects to make this

program successful: The organization of all miners in the union, based upon the slogan 'United we stand and divided we fall'.

"In other words, they recognized the unhappy lot of an individual employee in trying to bargain with a mammoth operation or a lesser corporation.

"'In union there is strength.' That is the only way in which the operators could be induced to collectively bargain for those items of concern to the working miner.

"In addition, the union stands for the principle that equal service must be predicated on equal pay.

"So there has been no departure from the uniform contract on the part of the United Mine Workers except when needs must and forces beyond our control have deprived the union of any power or influence in the question.

790 "Every device — economic, social, political, and legal — has been used continuously, during all the years since this union was organized, not only to prevent the accomplishment of the objectives but to establish conditions whereby the union could not exist and where men who dared to join the union were inconvenienced and persecuted without stint and became victims to denial of their citizenship rights and social advantages, in contrast to their fellow citizens who enjoyed immunity from such oppression.

"Q. With respect to the organizing activities of the union we make reference at this point to page 267 and 279 of the 1952 convention minutes."

Mr. Rowntree: "Organizing Activities." The portion of the report of the International officers, from the minutes.

* * * * * * * * * * *

Mr. Rowntree: I'll read portions of this.

"In October, 1950, an International Organizing Committee was set up by the International Executive Board to promote an intensified and integrated organizing campaign in the non-union areas of the Bituminous coal industry."

Skip to the second paragraph.

791 "Under the direction of this committee, and your International Officers, considerable progress has been made in both the strip and underground fields of the east. Progress is also being made in the Anthracite bootleg operations.

"Some of the non-union operators have appealed to the courts for injunctive relief against the United Mine Workers of America. Although several of these injunctions have temporarily impeded our campaign in certain areas, they have not appreciably affected our drive, and we anticipate success despite these legal bulwarks."

The last paragraph.

"Your International Officers have considered the organizing campaign of foremost importance and will continue to extend every effort and attention required to assure all men employed in the bituminous coal industry the privilege of membership in the United Mine Workers of America."

Mr. Combs: May I point out to the Court and to the jury that the excerpts he was reading was from the report of the officers to the convention on the organizing activities between conventions, and I might point out also that the last paragraph that he read is under the caption of "Or-
792 ganizing Activities in Alaska."

* * * * * * * * * * *

793 Mr. Rowntree: The statement on page 279, the same Minutes, comment upon the report of Vice-president Kennedy.

"We have been conducting organizing campaigns in unorganized sections of our industry, especially in regard to strip pit operations and the operations of the smaller mines. We have had very little difficulty in organizing large units, but we have extreme difficulty in organizing strippings where the workers are taken from farms and small towns adjacent to the stripping operations. But we are making progress and we shall continue to do so until the banner of

this organization flies over every mine and every strip pit in the United States and Canada."

Page 284 of the 1956 Minutes:

794 "Subsequent to the last International Convention, the Organizing Committee which was formed by the International Union in 1950, has continued to function concentrating its activities on the non-union areas of the bituminous anthracite industry.

"Notwithstanding the liberal use of the injunction by the courts against your union, the Organizing Committee and your International Officers were able to overcome such obstacles and have conducted a decisively successful campaign. In addition to organizing scores of small mines throughout the industry, this campaign has culminated in all of the major non-union operators signing the joint agreement.

"We are particularly pleased to report that in Kentucky, the West Kentucky Coal Company, the Nashville Coal Company, the Homestead Coal Company, the Colonial Coal Company and the DeKoven Coal Company have all been organized."

It speaks about in Oklahoma and Kansas. Down at the bottom of that page.

"With few exceptions, consisting primarily of very small operations, the coal industry today enjoys an unprecedented degree of organization. Although considerable progress has been made we will continue to concentrate our organizational campaign in the bituminous area of Penn-

795 sylvania as well as in the bootleg mines in the anthracite region of Pennsylvania, and in Northern West Virginia, Virginia and Tennessee.

"Your International Officers will not relax their activities but will continue exerting every effort to extend to all employees of the coal industry the opportunity to enjoy the benefits of membership in the United Mine Workers of America."

(The reading of the deposition was continued.)

"Mr. Lewis, the union has been aided in its organizing drives by finances, the use of its own finances, and by the big coal operators also; is that not true? And I make particular reference now to page 545 of the 1956 which refers to the acquisition of the West Kentucky Coal Company by Mr. Cyrus Easton."

Page 545:

"When Mr. Eaton's interests bought the West Kentucky Coal Company, which was operating non-union for more than 50 years, his first official act was to have that corporation sign the industry agreement with the United Mine Workers of America."

Mr. Combs: May I point out, this statement read by counsel, is a statement made by President Lewis just before he introduced Secretary of Labor Mitchell to
796 the convention at Cincinnati. It constituted part of the introduction of Mr. Eaton.

Mr. Rowntree: This was part of the introduction of Mr. Eaton who spoke at the convention.

Mr. Combs: Yes.

Mr. Rowntree: We file the Journal of May 15, 1959, page 21.

Mr. Kramer: This, your Honor, is an issue of this magazine, or this paper, this journal, of May 15, 1959. The alleged conspiracy ends December 31, 1958.

The Court: Well, that, what he is about to read now, since it comes after December 31, 1958, according to Mr. Kramer, has no bearing on the question of alleged damages in this case because that is beyond the alleged damage period. But if it has any bearing on the matters that are involved during the period that is involved in this lawsuit, then the jury may consider it for whatever it is worth, if anything.

Mr. Kramer: Well, in view of your Honor's statement, counsel admits it is in May, 1959, which is subsequent to the period?

Mr. Rowntree: Yes, sir. The company in question here

was purchased in 1958. The conversion to the union
797 operation was right after that.

Mr. Kramer: But the article from which you read was published in May 1959.

Mr. Rowntree: That is right. That is the date of the publication.

(Exhibit No. 38 was marked for identification and filed.)

Mr. Rowntree: The article is headed, "Elk River Coal & Lumber Co. Signs Contract". At the bottom of the right-hand column.

"What had been the largest non-union coal mining operation in West Virginia has now been brought under the terms of the UMW bituminous coal wage agreement of 1958. The Elk River Coal & Lumber Co. at Widen, Clay County, W. Va., signed the agreement on April 7. The mine is under the jurisdiction of District 17.

"General Manager Harold L. Beattie of the company said, 'The last count we took showed that 246 out of the 278 men eligible had joined the UMWA.' The UMWA conducted a quiet campaign to sign up the workers at the company. The company was purchased last year by the Pittston Co., a holding concern with operating coal subsidiaries in various coal mining states. The company formerly was
owned by J. G. Bradley who had resisted efforts of
798 the UMWA to organize his employees for 50 years."

We make reference to the testimony with respect to the acquisition of the St. Ellen and Millstadt mines by Peabody Coal Company. That is a matter which will subsequently come up in the proof.

Mr. Kramer: Wait just a minute, please. Now. Pass to what you had in mind, please.

(The reading of the deposition was continued.)

"Q. Those matters have been of help to the union, the United Mine Workers, in furthering its organizational drives, have they not?"

Mr. Rowntree: By "those matters" I mean specifically the West Kentucky Coal Company matter, the Elk River

Coal and Lumber Company matter, the St. Ellen and Millstadt mine situation. Those are matters which come up in this record and I asked whether these acquisitions were of great benefit in furthering the organizational drive of the United Mine Workers.

"The Witness: These incidents to which you allude were rather small incidents, advantageous to the degree that they were advantageous. Not alone on these companies but in all other companies in the industry it is always
799 advantageous to the union to increase its membership, to augment its strength.

"With respect to Peabody Coal Company, the acquisition of those mines in question was merely incidental to the carrying out of the basic coal agreement, that when a company became a party signatory to the industry contract he was of necessity including all the mines owned by that company wherever situated.

"Peabody Coal Company had a contract with the United Mine Workers of America for all its mines. As it expanded the number of mines under its control, naturally there was an obligation on the part of the company not to oppose collective bargaining in those mines then operated by that company. Purely incidental.

"Q. Is it not true, Mr. Lewis, that the existence of the Welfare Fund has been of great aid in the organizing drives of the union? "A. Merely as one of the incidents related to the benefits of collective bargaining to the individual. It is just one of the advantages of belonging to the union in the United States coal industry.

"Q. I make reference to the letter of Mr. Hugh White, District President of UMW District Number 12, of July 1, 1957, to the employees of the Millstadt Mine, in
800 which he states:"

Mr. Kramer: We object to the statement by someone not claimed to be a conspirator, not a party to this litigation, and it is a pure hearsay statement—what I shall refer to as a hearsay statement as far as this lawsuit is

concerned, by some far off individual not in anywise related to the conspiracy as alleged or related to the operators and talking about something else.

Mr. Rowntree: Talking about a District president of the United Mine Workers, your Honor.

Mr. Kramer: Yes, but what is—that is true.

The Court: Overruled.

Mr. Rowntree: Talking about his use of language in respect to the Welfare and Retirement Fund.

The Court: Go ahead.

Mr. Rowntree: A letter to the employees of the Millstadt Mine, in which he states:

"'After becoming a member of the United Mine Workers of America and working under the National Bituminous Coal Wage Agreement of 1950, as amended October 1, 1956, they will be eligible to receive all benefits from our Welfare and Retirement Fund.'

"And he lists those benefits.

801 "Has it been the practice of the Union, in its organizing campaigns, to represent to the employees that if the become a Union member they may participate in the Welfare Fund benefits? "A. I doubt there is a miner in the United States who doesn't know, in his own right, that the members of the United Mine Workers are eligible to such benefits and they are covered by a collective bargaining agreement.

"It is also true that when men become members of the United Mine Workers they like to have the knowledge and they inquire what are the benefits that the United Mine Workers of America provide through the Welfare Fund by reason of adherence to the agreement.

"Mr. White's letter obviously was incidental and merely furnishing information to those members, as was his right and as was his duty, to furnish members of the United Mine Workers with precise information on things of concern to them.

"Q. Do you not think it was his duty to further point out—if, in accordance with your previous testimony, membership was not a requisite to those benefits—that they did not have to join the Union in order to obtain those benefits?

"A. That had no bearing upon the case in point.

"The case in point is that the United Mine Work-
802 ers are qualified to represent them after they become members, not before.

"Q. I was addressing that question to the language in that letter:

"'After becoming a member of the United Mine Workers of America.'? "A. Mr. White is a coal miner. His educational opportunities in Alabama as a youth were limited and circumscribed by the debased economic conditions in the mining industry of Alabama. There are certain inadequacies in his education.

"Like myself, for instance, he is not a university graduate. He is not skilled in the preparation of documents that will have a bearing upon the statute of the United States or the decrees of our several courts bearing on conditions and affairs in the mining industry. He wrote the best letter he could.

"He did not express himself in the language and with the words that I would probably have used in writing that letter, or that you would use in preparing a paper in behalf of a client.

"What Mr. White said in no way alters or impacts upon the policy of the United Mine Workers of America and in no way affects the privileges due to a member, because his privileges cannot be in any way taken from him by
803 Mr. White with a letter or by any other act.

"So Mr. White's letter and his choice of words is not necessarily binding upon the United Mine Workers of America—is not binding—strike 'necessarily'.

"It is merely an administrative act on his part, of no consequence; intending only to satisfy a question or questioners seeking information."

Mr. Combs: May it please the Court, may I point out that the quote from the letter is only part of the contents of the letter and the letter was written in July of 1957 in connection with a local organizing drive in the State of Illinois.

Mr. Rowntree: If your Honor please, I would like to read from United Mine Workers Journal, February 15, 1956, page 10.

The Court: Members of the jury a letter or statement of a representative of a local union made without authority from the officials of the UMW would not be binding upon the UMW, unless it was later ratified by the officials of the UMW.

Mr. Rowntree: If your Honor please, this was a district president, district of the United Mine Workers, president of the district that wrote that letter, not a local president.

Mr. Kramer: The same rule, your Honor, we
804 insist is applicable.

The Court: Unless a local district president had authority from the officials of the international union, that is the UMW, or unless such statement was later ratified by the officials of the UMW, the Court holds that that wouldn't be binding upon the UMW to the extent certainly to show the conspiracy upon the part of the UMW.

* * * * * * * * * *

The Court: All right. The Court is referring to isolated statements allegedly made by these district organizers, but the jury will look to the whole picture and all the evidence to determine whether or not such statements were authorized by the officials of the UMW, whether or not they were ratified or acquiesced in or approved by the UMW:

* * * * * * * * * *

Mr. Rowntree: If it please the Court and ladies and gentlemen of the jury, I read from United Mine Workers Journal, February 15, 1956, page 10, article entitled
805 "District 28 Pensioners Rally at Wise, Va., Courthouse."

Mr. Kramer: May it please the Court, we are going to object to the introduction of this statement taken from the United Mine Workers Journal, unless there is a showing of some construction, authorization or connection between United Mine Workers of America or the trustees for what these pensioners did.

This is an article that they desire to introduce which makes a recital of what certain people drawing pensions from this fund of the trustees may have done. The fact that they did it as individuals or did it as a group, unless they were authorized to do it, instructed to do it, or their conduct was in some manner ratified, is not evidence of any act on the part of the party defendants in this cross action and we object to it for that reason.

The Court: What do you say, Mr. Rowntree?

Mr. Rowntree: Well, starting off, this first one, I think the connection is obvious in the second paragraph.

Mr. Kramer: No. Someone was present that made a speech. It doesn't say that he ratified or did anything about it, as I read that.

Mr. Rowntree: It is the president of the United
806 Mine Workers' District 30.

* * * * * * * * * * *

Mr. Rowntree: This is the pensioners.

The Court: Sir?

Mr. Rowntree: These are pensioners under the Welfare Fund.

The Court: Oh, I see. Overruled.

It is your position that they used these pensioners to picket and engage in other union activity and that was a part of the conspiracy?

Mr. Rowntree: That is correct.
807 The Court: Overruled.

Mr. Kramer: It is our position unless there is a showing that they did just what your Honor has now said that they—I suppose you are referring to the union—that

the union used these, the fact that the people drew a pension and they voluntarily did this, that or something else—

The Court: Unless it is connected up with the union, gentlemen of the jury, you won't consider it for any purpose, but if the union either acquiesced in these activities, or sponsored the activities, or incited the activities, or ratified the activities, then you may look to it for whatever it may be worth, if anything, as bearing on the alleged conspiracy.

* * * * * * * * * *

808 Mr. Rowntree: "The Miners' Pension Committee of District 28 combined a regular meeting in their organizing campaign with a 'sneak preview' of the Wise, Va., Memorial Hospital to form a rally on February 5 that attracted a crowd of 3,000 persons. Five hundred crowded into the Wise Courthouse, while the remainder spilled into the street to listen over loudspeakers.

"Samuel Caddy, president of UMWA District 30 (Eastern Kentucky), was the principal speaker. He praised the organizing drive being waged by pensioned UMWA members under the guidance of District 28 President Carson Hibbitts and Secretary-Treasurer E. L. Scroggs."

An article May 1, 1956, in the United Mine Workers Journal, page 12:

809 "District 28 Pensioners Continue Their Drive to Organize the Unorganized."

Mr. Kramer: We want to continue the same objection, your Honor.

The Court: Same ruling.

Mr. Rowntree: "The Organized Pensioners' Committee of District 28 is still campaigning valiantly and successfully to enroll Virginia's non-union coal miners into the UMWA."

The last paragraph:

"The public information campaign being waged by the militant, battle-scarred oldsters has proved of inestimable value in the concered District 28 organizing drive being

led by President Carson Hibbitts and Secretary-Treasurer E. L. Scroggs."

Article January 1, 1956, United Mine Workers Journal, page 7:

"Pensioners Continue Fight Against Power Co.'s 'Scab' Coal Business.

"The pensioned coal miners of Northern West Virginia on December 17 took a further step in dramatizing their fight to persuade Monongahela Power Co., to buy union mined coal.

"More than 100 of the UMWA's peppery oldsters braved freezing temperatures to hand out leaflets in four 810 cities — Morgantown, Fairmont, Shinnston and Clarksburg—outlining the facts in dispute. These men, all recipients of $100-a-month pensions from the UMWA Welfare and Retirement Fund, belong to the Miners' Pension Committee of District 31. They represent, among others, UMWA local unions located at Bethlehem Mines, Dawson, Kingmont, Rivesville, Clarksburg, Barrackville, Ida May, Grant Town, Fairmont and Morgantown."

United Mine Workers Journal, March 1, 1957, page 14, a picture with the legend underneath:

"Picketing for the UMWA. These pensioned members of the UMWA, Local Union 602, have been doing their part for the organization in picketing non-union operations in District 2 in Central Pennsylvania."

Mr. Kramer: Your Honor, so I don't need to interrupt, may the record show my continuing objection to this line of testimony?

The Court: Yes, sir.

Mr. Kramer: For the reasons heretofore given?

The Court: Yes, sir.

Mr. Rowntree: An article from the United Mine Workers Journal, August 1, 1957, page 5:

"UMWA Pensioners Renew Fight Against Monongahela Power Co.

811 "Approximately 300 UMWA pensioners, members of the Miners Pension Committee, joined forces on July 20 to picket offices of the Monongahela Power Co. in five northern West Virginia cities in protest against the non-union coal buying policies of the big power company. The company is a subsidiary of the West Penn Electric Co. with headquarters in New York City."

United Mine Workers Journal, January 15, 1958, page 6:

"District 28 Organizes Banner Fuel.

"This mining camp—near the town of St. Paul, Va.—was on December 29 the scene of a happy non-holiday celebration when more than 1,000 members of UMWA District 28 gathered to rejoice over the fact that the Crane's Nest Mine of the Banner Fuel Corp. was going to sign a Union contract.

"Banner Fuel reneged on its UMWA contract more than two years ago. Since then, the District 28 pensioners of the UMWA Welfare and Retirement Fund have been spearheading a strike to bring the miners there back into the Union. A picket line was kept going for more than two years. Most of the pickets were the 'old men' of Southwest Virginia who showed up every day, rain or shine, hot or freezing.

"Eleven of these veterans worked their 'full shift'
812 on that picket line nearly every day of those two years and were especially mentioned by International Auditor Archie V. Woods at the Bondtown rally."

Mr. Rowntree: Middle of page 218.

813 (The reading of the deposition was continued.)

"Q. Mr. Lewis, as a Trustee on the Welfare Fund did you know that these organized pensioners were carrying on these organizational drives on behalf of the union?

* * *

"The Witness: As Trustee for the United Mine Workers of America Welfare and Retirement Fund, I had no knowledge of it whatsoever. No reports. It was never discussed, as a Trustee.

"Through other sources I knew generally of instances where pensioners had taken an interest in a local contest.

"By Mr. Rowntree:

"Q. Was any effort made by the Trustees of the United Mine Workers of America Welfare and Retirement Fund to sever these pensioners from union activities? "A. Certainly not. They had no jurisdiction in the premises.

• • •

"Q. Is it part of the program—"

Mr. Kramer: Wait just a moment.

Mr. Combs: I would like for you to read the rest of that answer.

814 Mr. Rowntree: All right.

(The reading of the deposition was continued.)

"Mr. Combs: And I might point out for the record that I think it would have been a violation of the law if they had.

"The Witness: Certainly. As I previously pointed out when they were discussed by the trustees.

"By Mr. Rowntree:

"Q. Is it part of the program of the union, in requiring these retired pensioners to retain their union membership, that they are obligated to carry on these organizing efforts? "A. Your choice of words is inaccurate on which you predicate the question. The pensioners are not required to remain members of the United Mine Workers of America.

"Q. I am referring now back to this lengthy discussion we had before about the constitutional amendment with respect to the dues of retired members. The constitution was amended, was it not, to assess dues— "A. Obviously; it has been so testified here. But I point out again that your question is not qualified because it is based on the statement that they were required to remain members. They are not required to remain members, as previously testified. They are free agents and can do as they will without impair-

815 ment of their pension rights. Pensioners are free agents."

• • • • • • • • • • •

"Q. Do you know what proportion of the bituminous coal production is produced by companies operating under the National Bituminous Coal Wage Agreement, say, as of the beginning of 1958? "A. Yes.

Mr. Kramer: Just a moment. May we have a moment just for a conference?

The Court: Yes.

Mr. Combs: I might point out to counsel that he read in '58, and it should be '59.

Mr. Rowntree: I skipped down to that, "Well, say, as of December 31, 1958."

Mr. Kramer: All right, Your Honor.

Mr. Rowntree: The answer was, "Yes."

(The reading of the deposition was continued.)

"Q. And what is that proportion? "A. Eighty-two per cent is produced under the contract. Eighteen per
816 cent for the non-signatory production. • • •

Bituminous coal only.

"Q. A lot of these small companies went broke after they signed the National Bituminous Coal Wage Agreement, did they not? "A. I wouldn't know what happened to them. I only know that a great many units, continuously through the years, have retired from the business of producing coal.

"Q. You were talking a while ago about the bankruptcy rate in the United States. A lot of these companies were coal companies, were they not? "A. Some of them were coal companies, perhaps; I have no knowledge of it. But certainly they constituted no substantial number in contrast with the national figure."

Mr. Rowntree: There was exhibited here, Your Honor a list of the companies sued by the Trustees of the Welfare Fund in the various states including Tennessee, and we will mark that as the next exhibit.

(Exhibit 39, marked for identification.)

Mr. Kramer: What is now offered in evidence, may it please the Court is a statement or a compilation with reference to suits that were pending by the Trustees for the col-

lection of welfare amounts owing as royalties to this
817 Welfare Fund, owing to the Trustees as royalties, and Your Honor, it is of course a legal duty under the law for the Trustees to collect this Welfare Fund in amounts owing so that we say that no inference of any kind, whatsoever, with reference to a conspiracy can be drawn from the fact that one or more actions may have been filed in one or more Courts by the Trustees to collect the amounts which they aver is due and owing to the Welfare Fund. Therefore, it is incompetent and irrelevant for any purpose in this lawsuit. I would be glad to have the marshal hand to Your Honor the paper that he has in his hand so Your Honor can see what I am talking about.

The Court: Mr. Rowntree, what do you say?

* * * * * * * * * *

Mr. Rowntree: Our contention, Your Honor, is that there was a conspiracy to impose this contract on the small mines, on the mines that could not afford to pay that the purpose was to put the mines out of business, that it was part of this program of stabilization, that it was part of the understanding between the major coal companies and the union, and the Trustees, that this would be accomplished by using this National Bituminous Coal Wage Agreement as part of
818 that program, and this is the ultimate result of the imposition of the contract on coal companies where it is shown from the proof that many of them could not pay and that was part of the program.

Mr. Kramer: May it please Your Honor, if I may answer, this doesn't show whether they could pay or couldn't pay. It simply shows that certain numbers of actions were instituted and which the law would require under the terms of the contract and by saying they were performing a duty imposed upon them by law, somebody can conclude or guess a conspiracy, we think, Your Honor, is far beyond the range of competent evidence, and we object most certainly to the introduction of this instrument.

The Court: Are you introducing it as evidence against the Trustees or against the United Mine Workers?

Mr. Rowntree: The Trustees particularly, Your Honor.

The Court: Well, if it is a legal duty, and I assume it is, for the Trustees to institute these suits, then how could that prejudice them?

Mr. Rowntree: If the proof can be—support a reasonable assumption—reasonable conclusion that the Trustees were considered by the union, or that they engaged in a conspiracy for the purpose of putting small companies out of
819 business, this shows the ultimate, final stage.

The Court: Well, I will let it go into the record, but whether it has any probative force, I'll let the jury be the judge. This standing alone, standing alone, institutions of suit which the Trustees, as the Court understands, are required under the law—do you agree with that?

Mr. Rowntree: Yes, sir.

The Court: That is the law, a Congressional Act. Then that alone could not be construed as a participation in a conspiracy by the Trustees.

Mr. Rowntree: Not that standing alone, certainly.

The Court: No, this standing alone, this exhibit standing alone should not prejudice either the rights of the UMW or of the Trustees for the reason that it is conceded by all of the interested parties to this lawsuit that the Trustees were required to institute—or to collect these royalties which accrude under the Colective Bargaining Agreements; and if they weren't paid and past due, then it would be the legal duty of the Trustees to institute such suits, but the Court will not let it go into the record as an exhibit as a part
820 of the overall picture for whatever it may be worth, if anything, have a bearing on the controlling issue in this lawsuit, namely whether th[illegible] was or was not a conspiracy.

All right.

(Exhibit 39 admitted into evidence.)

Mr. Combs: May it please the Court.

The Court: Yes, sir.

Mr. Combs: I would like to refer back to the deposition, Mr. Lewis' answer on page 221. I think the reporter made a mistake there, and I think we ought to agree in the record in order for it to make sense.

The Court: Yes, sir.

Mr. Rowntree: What page?

Mr. Combs: 221. Mr. Lewis' answer with reference to the percentage of coal by the signatory operators was eighty-two per cent, and then the reporter has it that eighteen per cent for the nation-wide production. I think that should read eighteen per cent for the non-signatory production.

Mr. Rowntree: I agree.

The Court: All right, correct the record accordingly.

* * * * * * * * * *

821 (The reading of the deposition was continued.)

* * *

"Q. Mr. Lewis, is it your position that the policies of the United Mine Workers of America have been dictated from the basis of the best interests of the man in the union?

* * *

"The Witness: May I inquire is that an assault on my integrity?

"By Mr. Rowntree:

"Q. No, sir, I just wanted to ascertain whether that is the basic premise from which the union sets its policies: The best interests of the men in the union. "A. As the servant of the union I have made reports of my stewardship to the constitutional conventions of the United Mine Workers and had them approved, through all the years of my incumbency in the office of president.

"The United Mine Workers of America have always regarded me as their spokesman and agent and their
822 servant and have given approval in all circumstances where my acts were in concert with the best interests of the United Mine Workers of America and the union as such.

"My public record on those questions through the years would seemingly justify my own averments.

"Q. Mr. Lewis, you have received notice, have you not, that many of the men in the union are suffering and are opposed to some of the policies of the union?"

Mr. Rowntree: There is no answer.

We there make reference on the question of notice to the 1956 convention minutes, pages 312 and 313.

Mr. Combs: If you will pardon me, I objected to the answer to that question, because it wasn't specific, and it wasn't answered. I want the record to show that.

Mr. Rowntree: These are statements upon the question of the adoption of the 1956 amendment to the contract on the floor.

823 Mr. Kramer: Your Honor, the statement he is about to read, if I am correct, and, I think, knowing this record as I do, it is, is a statement, and I state frankly to the Court, of some one delegate, one of two-thousand, in opposition. I don't think that has any relevancy because it is very seldom, even in a Baptist convention or a Methodist convention, you can't get some fellow to get up and object. I don't think it has anything to do with the action taken by a constitutional convention, and we object to it.

* * * * * * * * * * *

The Court: The Court will let the jury hear them for whatever worth, if any, they may have on the over-all picture.

Mr. Rowntree: "Delegate Demchak, Local No. 3648, District 2: I would like to discuss this new agreement and I would like to discuss it from the point of view of men who are not working full time and also men who are not working at all at the present time. As far as the wages in this agreement are concerned, that will be acceptable to me, but

824 there are other things besides wages. I am thinking particularly of the unemployed miners that we have.

"Prior to the mechanization of the coal mine where I worked we had 1100 workers. With the introduction of

machinery that cut us down to 800, and now there are 400 working. There are 200 on the panel. Others have gone elsewhere to seek employment. There are 200 who expected us to come out here and try to get an agreement calling for a shorter work day so some of these men could be re-employed."

Delegate Brown, page 314, third paragraph.

"But I do think, Mr. Chairman and delegates, that from now on in the future, I believe that we have got pretty near to the top notch in wages and I think that the next negotiation which one year don't take very long to roll around, I thing that according to the hazards in the mining industry and the fumes and the noxious gases that we should now try to start negotiating and shorten our hours per day."

Delegate Croyle:

"I suppose I am a little bit like the donkey charging at a windmill, but I do want to express my resentment against this contract, which fails to recognize the economic time of day in the coal industry. Just awhile ago Mr. Lewis
825 said the United Mine Workers can't be destroyed by the Democratic Party, the Republican Party, or the Communist Party. Yet he would bring the machinery into the mines without shortening the working day and they won't have to destroy us. There won't be any of us left.

"I was on the third shift the night the report came out about this rumored contract. I will say one thing, I never saw one man in our mine satisfied with the increase in pay without reduction in the working hours. I feel that it has been over 50 years since we established the eight-hour day, and I think if we are ever going to have a reduction in the working time, it is about time for us to start talking about it."

Delegate Whitlatch:

"I want to assure you, Mr. Chairman and all of the International Officers, districts and delegates, that I am not going to and never have criticized the action of the Internation-

al Union nor the District but I do want to say that I have always respected and upheld them to the highest because I think it is the greatest organization on earth. But I do have some comments I would like to make, as a scale committeeman, being in close contact with the various local
826 unions and with the individual mine worker at home in our own mine. There are two things that need to be justified within our contract other than wages. Now, who doesn't want more money? I am not going to be one who would say that I didn't want this raise or that the men back home didn't want the raise. But I think that we do reach the point in wages whereby simetimes maybe it begins to hurt and maybe we could negotiate it in some other way, some other form or manner that it might mean more to the mine workers. Now, what I meant by that, I know the operators could afford this raise or we wouldn't have gotten it. Now, if we could have gotten it and shorter hours, it would have meant that there would have been more employment. Some people say step into the other field of employment. I have got 26 years in the mines myself and at my mine maybe when I get back home there will be another piece of machinery in there which will cause me to be put on the pan because our seniority clause reads 'job classification.' Therefore, my seniority in all those years doesn't mean anything because the other man on the job has got a year or two more. And there will be men that were hired there in the last two months that will stay.

827 "I think those are inequities and I think they need to be justified. As President Lewis says, there isn't much more there because if there had been, he would have gotten it. I believe that. But there will be more, and we want it to be more, because if we sit idle and don't mechanize in the coal industry and every other industry within the United States, we will be sopped in by some other country. We've got to mechanize, we've got to go forward, and the production is going to increase. Don't fool yourselves, it is going to increase. The production per man is going to

increase. We know that it is going to. So, I think now since this contract has been drawn up and all but accepted, I don't know much else to do but to accept it. But I think that these things should be given a thought. I have a stack of resolutions that high and it is a demand of the mine workers.

"Now, I think the understanding before ever there is another raise in which there will be a raise production and there will still be more money. I think it ought to be given to the mine workers in some other manner or form other than wages. And I know that is what I have met with, the demand of the men back home.

"Now, just for a second, if they will permit me,
828 the coal mole is a machine that is taking place in the mine that I work for and the company that I work for. And a crew of eight to ten men got approximately 30 cars of coal. They put in a coal mole and with five men they produce about 60 or 70 cars of coal. So, you have cut the crew in half and you have doubled the production. And those things are going to continue to happen and the bad feature about it, if there isn't something done, the man that reaches the age of 40 to 45 to 50, along in there, is generally the man let out and you show me some place he can go and tell them he is a United Mine Worker and 45 or 50 years old and he can get a job other than in the coal industry. And there is a panel at nearly every mine in our District, so you can't do that. So, I want to say this, and I want to extend my appreciation to the International Officers and the Districts for the great work that they have done. But I do hope that in the future we take these things under consideration because if we don't, there is no question about it, there is not going to be too many of us left, and the $30 or $40 a day that you may get is not going to do your neighbor across the street any good if he don't have a job."

The statement of Delegate Matula, bottom of page
829 318.

"As a representative of my Local we are mostly interested in hours." * * *

"According to Mr. Kennedy when he was commenting on the contract, he stated he thought the increases in wages were the best for the economic condition. I wonder whether that is so, whether a shorter week would be better. We work in the mines in my district, jump on a belt line and ride maybe a thousand or two thousand feet, put a respirator on and go up to the face and work. When we grab a drink of water or a bite to eat, there is a man standing behind us with a stop watch. We work a machine and try to keep up with that machine. I wonder which wears out first, the man or the machine.

"In our mine a shorter work day would be of much greater benefit to us than a wage increase."

Delegate Mentz:

"I believe in all the phases in the contract excepting our seniority clause, the hours and the wages on this basis: Our Local instructed us to seek a six-hour day at the same pay where the companies can put a four-hour shift on per day and employ more men in their mines and give us all these benefits, all these miners that have been laid off. In
830 1933 we had in the neighborhood of 500,000 bituminous coal miners in the United Mine Workers. Due to the abondonment of mines and modernizing machinery in the mines, we have decreased to approximately 250,000.

"By applying a six-hour day at the same basic pay, the company that I work for has three mines within a five-mile radius. They employ in the neighborhood of 300 and some men at the 1077 Local No. 2 Mine. They are putting out their quota per month through the No. 1 and No. 3 mines. Those men are idle and walking the streets, not only in that mine, but in other mines throughout the bituminous area. That is why we are advocating a six-hour day.

"The money is all right we agree with that. But we are looking after the welfare of all the individuals who were laid off due to the mechanization of mines. I am financial secretary of 2262. We have been informed by the company that they are anticipating a layoff, the same as they did at

the last convention, when I was here and I was notified they laid off 162 men. I was advised to stay. Other representatives went back and took care of the lay-off for me.

831 "We are interested in each and every individual."

Now, skipping.

"Now, 500,000 coal miners, reduced to 250,000 is a lot of men. You want to remember this: Many thousands of you men—I hope you are never laid off—but, if you don't have your 20 years within your 30 years, you will never get another job in the coal mines as it applies in District 6 down there where I am working because they will not hire you after you are 45. Men from . . ."

Skip to Delegate Lapsley:

"We are perfectly satisfied with the contract. I think the contract is fine. I want to compliment the Executive Board members and you, Mr. President, for making this contract. The question is about the seniority. The more money you get out of the companies, the more men they are cutting off. We want to know if there is some way we can protect our older men from being cut off and put on the street as soon as we get a raise.

"Now, on our further contract, as we get a raise then the company cuts these men off. This company we work for has practically six mines. The old men who have made this wage possible for the younger men today are being shifted around and put on the sidelines. They are cut off with

832 no place for them to go. We men who are working are enjoying the fruits of this contract and that is fine, and we think no more about it. But we want to know about the older men who are being cut off and who have made this wage possible for us.

"The men who have made the wage possible are enjoying it today, but they are being laid off. Those are the men we want to look out for. We don't worry about the men who are working, because they have a job, but the men who are being shifted around by the company and are being cut off, those are the men we need to help."

Delegate Sufritz:

"Mr. Chairman, it seems to be pretty obvious from the discussions going on here that what a lot of men are concerned with are the conditions; the conditions of work. The wages I have heard no one criticize. They are all very much in favor of them and so am I. But, what is mostly of concern to them is the conditions under which they have to work."

The third paragraph:

"And in the form of mechanization it reaches a new depth and new pressures are being put on the men. That is what they feel. That is what they protest against, that is
833 what they try to have corrected. They sent us here to see if we couldn't do something to correct these things which they feel are wrong."

Delegate Dugan:

"Now, we have heard talk about classification, and I think that we should continue to talk about classification and life expectancy . . ."

Down to the middle of the paragraph.

"But now we have a more hazardous and a more dangerous and a more health deteriorating situation than the banker and the school teacher and a lot of other businessmen. We have the coal dust to contend with. We were told, I know when I started in the mine, that they were loading on an average of 3 tons of coal a day. Today they are loading 11 tons. But at that time the cutting was done at night, the shooting was done at night, there was less dust at that time than there is now with these machines.

"These fellows at the faces are wearing masks and they are not getting the air. The heat is great from these machines and it is deteriorating their health more than it does the banker or the school teacher or the other business people."

Mr. Combs: May I point out, your Honor, that the ex-
834 cerpts read by counsel are some seven or eight delegates' speeches that were made at the convention.

They were part of the speeches that he read. A convention that was composed of 2,000 delegates.

The Court: Yes, sir.

Mr. Rowntree: That is true. All 2,000 did not speak, however.

Mr. Kramer: No, but they are speeches. There are a lot more members of the delegation there in favor of it. Simply one of these debates which we say does not show any conspiracy whatsoever.

Mr. Rowntree: Talking about notice there to the International officers.

Mr. Kramer: Some people said it is good; some people said it was bad, and the majority ruled.

The Court: Mr. Rowntree, what is the purpose of this testimony?

Mr. Rowntree: The notice to the International officers with respect to conditions in the field.

The Court: All right.

Mr. Rowntree: At the bottom of page 230.

(The reading of the deposition was continued.)

"Q. Do you recall, Mr. Lewis, that there was quite a bit of discussion in the 1956 Convention on the presentation of the 1956 contract with respect to the continuance of the policy of the Union to seek constantly increasing
835 wage rates and its resulting effect on the unemployment situation?"

Mr. Rowntree: Well, skip to page 231, middle of the page.

(The reading of the deposition was continued.)

"Q. Do you recall discussions on the floor of the 1956 convention with respect to the effect of this policy of constantly increasing the wage and the effect of that policy on the unemployment of miners, and also discussion of conditions in the intensely mechanized mines? "A. I recall that there was general discussion in the convention on all of these matters; things pertaining to the contract. And, as a constitutional convention charged with making policy—and the action of the convention is a binding thing upon this officer,

this former officer—the details of those discussions are not in my mind now, and I would have to read the whole record to have any understanding of what point you are getting at in connection with that.

"The convention decided. I like all others present, accepted the convention's decree, and considered it as my instructions.

"Those questions are decided, passed by, and forgotten, except as they bind policy or affect current efforts.

836 "Q. And is it not true, Mr. Lewis, that after that 1956 convention the union executed the 1958 contract with another wage increase and without any change in the working time of the men and without any change in the seniority rules? "A. That is entirely possible. It had no bearing, however, on the discussion of the convention.

"Q. Mr. Lewis, was the ability of the International Policy Committee, the International Executive Board, and the International Officers to secure approval of their acts by the various conventions the result of the intense central control of the union by the International Executive Board and officers? "A. Certainly not. Certainly not.

"The convention of the United Mine Workers is probably the most democratic—if I may use that term—parliamentary body of magnitude in existence in the United States.

"Every major item—the officers' reports, the constitution, and the resolutions, of which there are usually hundreds—must come on the floor for disposal and cannot be killed in committee. The sponsor of the resolution cannot be deprived of the right to speak on it whether the committee concurs, non-concurs, amends, or substitutes. If he elects to speak he can be heard.

837 "There is no 'central control' outside of that strength that came through administration, as in the case of all of our national affairs, through meritorious service in that office.

"My influence in the organization was solely derived from approval by the membership of my previous efforts and

previous accomplishments in their interest. That is far—under our American concept—from any connection with the exercise of so-called organized influence.

"The average coal miner has an emphatic personality. In a broad sense of the word, it is primarily a requisite of that vocation.

"He is a man of courage. He is not deterred in his convictions by opposition. He is surrounded by the hazards of the industry. It is second nature with him to perform what ordinarily are called heroic acts in the face of danger to his comrades and associates. And every day, in any mind of magnitude, he risks his life and his limbs and the well-being of his family in his continuing his work as a mine worker.

"So the idea that any member of the United Mine Workers is afraid of any officer of the organization, from the top down, is completely and genuinely absurd and farcical.

838 "The United Mine Workers are not ruled by fear of another's actions in command of their organization. There is no such creation. No dictatorship exists. The elective process governs.

"Q. Now, Mr. Lewis, I make reference to the answer of the union to Interrogatory Number 21 of Set Number 1 pertaining to the appointment of the International Executive Board members; the answer indicating that, in 1955 and 1956, as many as twenty-one of the thirty Board members were appointed and approved by the International executive Board.

"Is that your recollection? "A. Those designations, elections by the International Executive Board generally came after the ability of the industry—the ability of the district—to operate and to finance the payment of its officers.

"The district's membership perhaps had dwindled to a point where the district could not pay its own way and was not capable of rendering the service.

"The districts, by the way, are merely service stations

for the membership; instituted so that representatives of the organization will have closer contact in the immediate area where the mine worker lives and is employed.

"In the handling of disputes and the constitutional questions that arise affecting the membership of individual members. And it is absurd to believe,—from every administrative standpoint it is absurd to believe that the district could be represented with a full corps of elective officers when its membership perhaps does not represent but a small proportion of the total number of mine workers in that area.

839

"So all those things were done with the approval of the International Convention over a period of twenty-two years; and for twenty-two years, at each convention, the matter has come up and the convention has ruled after full and exhaustive debate ofttimes.

"Q. We make reference to some of those debates— "A. Invariably, when it was possible, the men designated as Board members ex-officio were men previously elected to that office by the membership and merely continued their service at the expense of the International Union from whom they derived their pay.

"There never has been any question raised, so far as I know, about the personality of any of the individuals thus designated.

"The speeches of Mr. Demchak, to whom you allude—'Alas, poor Yorick, I knew him well'—I knew him well and know him well; and he has retired now from active mining and is enjoying the superb delights of having a pension plus his social security, plus anything else that he was able to save during his working years; and he is one of the most satisfied, happy men that I know at the moment.

840

"He no longer is making speeches.

"Mr. Demchak, of course, had advanced political views. He believed that any agent or servant of the government—this is my concept of his belief from listening to him—or

of any institutions operating under the American flag, and who had to deal with public welfare or represented great numbers of people as members, should be elected to office by what he called the rank and file. And he rode that horse all of his working, active life, and he wanted perfection in democracy, as he called it, while the average listener to his discourses wanted some bread and butter in the meantime and they would disagree with him.

"And I think in the discourse to which you alluded, when you named Mr. Demchak as one of the participants, after that debate concluded my recollection is that there were eight votes in the convention in favor of Demchak and something over two thousand against; and the convention ruled and the officers were bound by the ruling of the convention.

841 Mr. Rowntree: At this point, your Honor, we made reference to a number of pages concerning debates over district autonomy in the United Mine Workers' convention. I think your Honor is very familiar with those things.

Can we have a stipulation that the question of autonomy in the districts of United Mine Workers of America was raised at each convention from 1948 through the convention of 1956 and after considerable debating the resolution of the committee opposing autonomy was each time voted down, was voted in favor of and thus autonomy was not given to the districts? Autonomy being the right to elect their own officers.

Mr. Combs: Of course, your Honor, what he is talking about is a bit difficult to follow as to just what he wants. There are some districts, as Mr. Lewis testified, who have autonomy, partial autonomy. Some of them don't have any of their officers elected.

There have been debates in each of the conventions on the part of the delegates. The policy that Mr. Lewis has testified to and is in existence is overwhelmingly adopted at each of these conventions.

Now if that will satisfy counsel, it is pretty much accurate facts. Now to get down to particular stipu-
842 lations, I couldn't get any further.

Mr. Rowntree: That is all right.

* * * * * * * * * * *

By Mr. Rowntree:

"Q. Mr. Lewis, do you know a gentleman by the name of R. U. Black in District 19? "A. In where?

"Q. District 19. "A. R. U. Black?

"Q. R. U. Black. "A. The name means nothing to me at the moment. Could you be a little more definite?

"Q. Let me see. His name appears some seven times on the list of delegates from District 19 at the 1948 Convention. Pages 398 through 402.

"For instance, he was a delegate from Local Union 6130, Middlesboro; Local Union 6936, Balkan, Kentucky; Local Union 8803, Capito; Local Union 8852, Ferndale, Kentucky; 8961, Middlesboro, Kentucky; 8970, Balkan; and 9038, at Hutch. In each instance having one vote at the Convention for each one of those Local Unions.

* * * * * * * * * * *

843 "Q. Was there a practice of having a single individual having a number of votes representing several local unions at these conventions? "A. Under the constitution each delegate is entitled to represent a membership up to 500; having, on a roll call basis one vote for each 100 of the members. So some delegates represented 100 or less. If there were only ten men in the local union he got one vote. If he had 101 members in his local union he would be entitled to two votes. And so on up to a limit of five.

844 "And a local union was privileged to have two delegates present if they elected to bear the expense of sending two delegates, if they had 101 votes or more, up to 199, they would be entitled to three delegates, if—five votes, one delegate."

Mr. Kramer: That word "votes" is evidently an error of the reporter, because it is members, not votes.

Mr. Rowntree: That's right.

. . . . . .

"So when they list—the Credential Committee, in preparing the Credential Committee's report to the Convention as to the seating of delegates and the qualifying of them, they would list the number of votes on roll call to which each member was entitled—each delegate was entitled.

. . . . . .

846 "Q. Mr. Lewis, the 1952 contract, you recall, had a provision in it, talking about the clause in the 1952 contract;

'As a part of the consideration for this agreement the operators signatory hereto agree that this agreement covers the operation of all of the coal lands owned or held under lease by them or any of them or by any subsidiary or affiliate at the date of this agreement or acquired during the term which may hereafter (during the term of this agreement) be put into production. The said operators agree that they will not lease out any coal lands as a subterfuge for the purpose of avoiding the application of this agreement.'

"Now when a non-union coal operating company, such as Osborn Mining Company, sought to go on lands owned by a signatory operator, he would be barred by the terms —be barred from the land by the terms of that clause that I have just quoted? "A. I wouldn't think so. I

847 cannot give a legal definition but it is my understanding and belief that he was not barred.

"Q. Did you not have conferences with signatory operators, such as with the president of Black Star Coal Company, with respect to who could take leases on the coal lands of that operator and who could not? "A. The signatory operator holding such lands binds himself in the contract, through his negotiating representatives, to certain stipulations.

"It is reasonable to assume that any lease which he

would effect would protect him by an iteration of the clause to which you refer.

"It merely narrows the terms of negotiation between him and an application for a lease.

"Q. Do you recall conferences you had with Mr. Hill of Black Star Coal Company? "A. No. It is one of innumerable conferences, I suppose, which I have had through the years which I do not always remember day by day.

"Q. Mr. Lewis, these largest coal companies in the country have acquired tremendous reserves of coal lands; is that not right? "A. I am at a loss to understand what you mean by the term 'the largest coal companies'.

848 "Q. I am speaking of Peabody Coal Company, Consolidation Coal Company, the Pittston Company, Pittsburgh Midway Coal Company. "A. May I ask if those companies thus named are the only companies that you would include in that category in the industry?

"Q. I would include West Kentucky Coal Company, and Nashville Coal Company. Yes, those are the ones I am talking about."

* * * * * * * * * * *

"The Witness: I assume that every coal company in the business acquired such reserves to the degree that they are capable of acquiring them—purchasing them, leasing them, paying taxes thereon or royalties.

"As to the amount owned by the several companies I have no knowledge.

"I suppose that it might be assumed that the well-financed companies, with great resources, could go further in acquiring reserves than a lesser company, less well-financed, smaller in volume of production and with less capable management.

849 "The changes in the industry have been very great. Thirty years ago reserve coal lands could be acquired, to justify the sinking and development of mines, at an average price of two dollars per ton year.

"Today, due to the increase in the cost of the operation of coal mines,—running to power, supplies, machinery of all characters, wages, taxes, —we must not forget that these corporations pay a 52 per cent corporate tax and that they only enjoy the disposition of 48 per cent of the money they make—which constitutes a burden of tax which I think should be reduced, in order to permit the economy to expand in a requisite manner to meet the obligations of our increasing population. What that ownership is in the various companies, I don't know and have no interest in it. But if the company is contemplating the erection of a plant capable of producing, say, two thousand tons or three thousand tons a day or more, depending on whether or not they utilize multiple shifts in the operation, their original investment is greater, to protect the life of that company; to insure that the revenues from the company on the investment thus fixed would be adequate to amortize that company and liquidate the credit which has been entailed through
850 the erection of the plant.

"So of necessity we find all companies now undertaking to expand their production and faced with the problem of acquiring enough acres to justify the investment in the operating plant, the producing plant, and its various auxiliaries.

"So mine workers have no knowledge of the specific plans of companies small or large as to the amount of their reserves, or have nothing to do with justification of their investment in those reserves. It is part of management's obligation.

"By Mr. Rowntree:

"Q. Mr. Lewis, has the union expended some of its funds for the purpose of tying up coal lands under the union contract? "A. Any investment that the United Mine Workers may have made has all been in the interest of the United Mine Workers of America and pursuant to declared and legal objectives.

"Q. The 1958 contract, Mr. Lewis, brought in the Protective Wage Clause, did it not? "A. If that was the date, yes."

* * *

"Q. Did not, in general terms, this clause prohibit the signatory operator to buy or deal in coal produced
851 by another operator who was not paying a scale of wages commensurate with the union contract scale? "A. It had nothing to do with the union. It was a question of substandard mines. And the operators stipulated that they would cease their buying of coal to be sold in the open market in competition with their own production, from substandard mines; mines that did not contain a standard of safety in accordance with the law made and provided, the State and Federal laws, mines where substandard wages were paid.

"Q. What would be substandard? "A. Mines that were substandard because of their whole structure and their inefficiency.

852 "Q. What would be a sub-standard wage? "A. Any wage below the agreed wage or the going wage of the industry, as defined by Congress through the Walsh-Healey Act.

"Q. Wasn't that tied pretty closely to the union scale as contained in the National Bituminous Coal Wage Agreement? "A. If the facts bore out with verisimilitude the various problems there. Then and only then.

"Congress passed the bill, a minimum wage bill, and created a division of the Department of Labor to enforce it; and mines that pay less than the standard fixed by Congress, through the Labor Department Walsh-Healey administration, are in violation of the law, of course.

"Q. I want to take up the Walsh-Healey a little bit later; but on this protective wage clause in the 1958 contract some of the operators did not want to sign that contract, did they? "A. As to that I can only say that whatever the sentiment was among the operators that the negotiating representatives executed the contract with that arrangement con-

tained therein. As to the bickerings among the operators I couldn't testify as to those from my own knowledge.

"Q. Some of the operators, under the previous
853 contracts, were buying non-union coal, were they not?

"A. Not non-union. Substandard coal.

"Q. Well. "A. I wouldn't classify it as 'non-union'. Any substandard mine.

"Q. Some of the operators were buying substandard coal? "A. It is so averred. It is public knowledge that that was the case.

* * * * * * * * * * *

"Q. Now, some of these large coal companies had control of the biggest markets in the country— "A. Before you get to that, may I ask you to define 'large'?

"Q. Talking about Consolidated Coal Company. "A. No. No. Give me a rule-of-thumb there. At what point does a company cease being 'small' in your estimation and become 'large'? Would it relate to production?

"Q. I was trying to use a phrase similar to the
854 expression you have used. "A. It isn't a 'phrase'— if I may be permitted to interject. It is a generality.

"Q. At one time you used the name 'large combines' and I would say any of the ten largest coal companies in the United States. "A. The production of what tonnage makes a company 'large' in your estimation? Give me a rule-of-thumb by which I can be responsive to your interrogatory.

"Q. A company that produces coal on the scale of West Kentucky Coal Company. "A. Generalities, again.

"Every company produces so much coal per annum. They have a rated capacity of so much. They may not attain that rating in their output. They produce what they can market—market and sell.

"At what point does a company cease being 'small' and become 'large'? How many tons?

"Q. Mr. Lewis, you have stated that the tendency in the industry is to concentrate into fewer and fewer units of production and that the tendency to concentrate into these

large combines is what the industry is bound to come to. "A. I disagree with that word 'bound', sir, in interpreting my position.

855 "I have pointed out the trend. I have pointed out and been specific about the progress in tons and in percentage during the years, the last twenty-five years.

"I have pointed out that the velocity of that change or the tempo of it has been increased in recent years.

"It is dormant now because of the depression and declining industry and the low level of industrial activity in that contract. So that corporations that in the nature of things one would assume would grow in their output and in their general dimensions are withholding affirmative action on the expansion question until they find out whether their cash reserves and equivalent will be sufficient to tide them through a depression the length of which they cannot now determine.

"I have been most explicit about those things. I do not want to deal in generalities that fit only the company that you may have in mind, and not be advised of what companies you have in mind with the exception of naming a half dozen coal companies that come easily to the end of your tongue.

"The witness is asking for fair play on this proposition.

"Q. Are not these companies that I have named the ones that are following this tendency? "A. They are

856 among those.

"Q. Let me finish my question, Mr. Lewis.

"Of buying other companies and forming themselves into these large combines. And I make specific reference to the acquisition by Consolidated Coal Company of Pocahontas Fuel Company. The acquisition by Peabody Coal Company of a number of other coal companies. The acquisition by the Pittston Company of the Clintsfield Company. The acquisition by West Kentucky Coal Company of the Nashville Coal Company.

"Now these companies are the ones, are they not, that are following this tendency of binding up large combines to

take over the production of coal in this country; are they not? "A. They are among those who are doing that."

* * *

"The Witness: This witness did not use the word 'combines' because this witness believes that combines, in the sense of ordinary usage of the term, do not exist in the coal industry.

"By Mr. Rowntree:

"Q. I am talking now about the speech, Mr. Lewis, at the 1958 Convention, page 310, the first full paragraph on that page:

" 'These great combines now being formed in the
857 industry'.

"Mr. Combs: He went all through that.

"Q. And I ask you are not these companies that I have named, these 'large combines' that you are referring to there or these are the kind of combines that you are talking about? "A. This witness used the word 'combine' in that address in relation to the mergers in the country, the consolidations of coal companies; and in other sections of various public addresses in this record, and elsewhere, this witness has pointed out the advantages to the public interest in these mergers and has defined specifically the advantages which would affect the modern process of mining coal for public use.

* * * * * * * * * *

858 "Q. Is it not true, Mr. Lewis, that the union has conducted campaigns against some of the large consumers of coal to drive them into buying coal from signatory operators under the union contract? "A. Can you be more specific —

"Q. Yes, sir. "A. — in identification?

"Q. I refer to pages 376 through 378 and also page 380 of the 1956 Convention Minutes."

Mr. Rowntree: This is upon the question of the resolution in aid of petitioner's committee. Page 376 is where that resolution starts.

Mr. Kramer: We have a copy.

Mr. Rowntree: This resolution is with respect to
859 accommodation of the Pensioner's Committee which was sponsoring the effort to get West Penn Electric Company to buy union coal for its Monongahela Power Plant, and with respect to this matter President Lewis states at page 380:

"The mining industry in Western Pennsylvania, Northern West Virginia and Eastern Ohio are among the principal customers of this great power combination. The coal operators find themselves without influence in this situation, although they would like to sell their coal to this company at a price that could yield them a return on their investment because they fear that this giant concern would withdraw its patronage from any coal company that objected to their policy of buying non-union coal that pauperizes the community where their power plants are located.

"We have had conferences with this company before. They are arrogant in their power;"—and so forth.

Down to the last full paragraph.

"I want to assure the West Penn Power Company that the day when they continue to follow that policy is rapidly passing, and that within a very short length of time the
860 West Penn Power Company and its directors, with investments in many business institutions of the American economy, will be required to pay for coal at their coal barge plants, or at any other plant they have a price which will enable men to live."

* * * * * * * * * *

861 "The Witness: The answer to your question, as phrased by you, is no. We have not attempted at any time to drive these consumers into using coal produced under the wage agreement.

"If you change the word 'drive' to 'induce', then I would say we have tried to induce the patronage by these companies, in the coal that they consume in their varied operations, of mines where coal is produced under American

standards and in accordance with the American concept; namely, paying the going wage rate, the recognized rate in the mining industry.

"It is true that we have sought to induce them to do so.

"It gets you right down to TVA, a governmental agency, whom we have tried to induce to purchase coal mined under the standards of the American taxpayer whose money they use in the operation of this vast edifice.

* * * * * * * * * * *

862 "Q. Is it not true that the United Mine Workers of America have acquired stock in Tampa Electric Company, Kansas City Power and Light Company, Cleveland Illuminating Company? "A. I think you have a record given by competent agents of the Union.

"Q. And also Union Electric. Yes, we happen to have a record. "A. Well, you have the answer.

"Q. Yes. Now, turning to Tennessee Valley Authority. This is a United States Government operation; that's right, isn't it? "A. It is. And the average citizen so assumes and so do I. If you want verification, why—

"Q. And the Walsh-Healey provisions are applicable to it as such a governmental operation?"

Mr. Rowntree: I think that is generally assumed, too.

* * * * * * * * * * *

863 Mr. Rowntree: No, sir.

We want to introduce this exhibit.

Mr. Kramer: That is what I thought, and that is the reason we want to raise the question.

These are important and rather far-reaching. We would like to be heard out of the presence of the jury. It is 4:20 and we could hear it this afternoon, if your Honor cares to, unless—

864 The Court: All right. Let the jury be excused until tomorrow morning at nine o'clock.

(Thereupon, the jury retired from the courtroom and the following proceedings were had in the absence of the jury.)

The Court: Gentlemen, I think I have the point which you have in mind. For that reason, I want you to be very brief. I am familiar with the case that involved the railroad.

Mr. Kramer: The recent Supreme Court decision.

The Court: Yes, sir, the railroad and the trucking companies. What is the style of that?

Mr. Kramer: The Noer case, N-o-e-r.

The Court: I am familiar with that case. Just state very briefly what you want me to know.

* * * * * * * * * * *

Mr. Rayson: Your Honor, quite briefly, it is this. United Mine Workers contend that it had a right to go to the Secretary of Labor and to present its case for the establishment of a minimum wage under the law. It had a right to present evidence on the question.

865 The Secretary of Labor found that the minimum wage, the prevailing wage in the coal industry was thus and so.

Mr. Rowntree is going to undertake to introduce an exhibit which will show that that wage was considerably higher than other minimum wages established by the Secretary of Labor.

It seems to me that that point is very prejudicial. But apart from that, we think it is incompetent as evidence to submit to the jury to permit it to draw an inference on any point.

The Court: Well, now, what you said about the union's right to petition the Secretary of Labor is correct. The parties petitioned the government and that is what was held, either implicitly or specifically in the Noer case. If that is all there is to the matter, then you are right. And the Court agrees with you and is in full accord with you. I understand there is more to this.

Mr. Rowntree: Yes, sir. We fully set out our position in our brief, your Honor.

The Court: Briefly, it is your contention what? I have read your brief.

Mr. Rowntree: That when the effort is to take over a market, a government market, we get an entirely dif-
866 ferent question.

The Court: Then you have that $10,000 spot shipment.

Mr. Rowntree: That is right.

The Court: Gentlemen, I am going to let them go into that for whatever bearing it may have on the overall picture.

It is my opinion that the opinion in the Noer case doesn't preclude going into that question under this theory of the case.

Then when he asks the question, if you want to, renew your objection to that specific question and I will give it consideration and pass on it. But I do hold as a matter of law, under his theory, that he has a right to go into that question, and the Court will overrule your objection, which is general at this time, but allow you to renew it when the specific questions are asked.

Mr. Kramer: May I say just one word before you adjourned?

We further insist, as a part of this objection, that the fact that the wage set under Walsh-Healey may be higher than wages set for other industries or for whole industries elsewhere cannot be used as evidence of conspiracy.
867 The fact, aside from your Honor's previous ruling from that, the fact, that he determined that a higher rate, and even at the insistence that they are going to say of the union, and the fact that the Secretary of Labor, upon proof presented, found that a higher wage for the sale of coal to TVA, coal was produced and had to pay a higher wage than was necessary to pay for others, cannot be used for evidence of a conspiracy, because it was the determinations of a governmental agency.

I want your Honor to have the benefit of our insistence. They are insisting that the wage paid was higher.

The Court: Mr. Rowntree, unless you have more than that, the Court will hold that there is nothing wrong in that,

petition to a public official, and it is not a violation of law, and it will end right there.

As I understand from your brief, there is more to it than what the gentlemen have indicated.

Mr. Rowntree: Yes.

* * * * * * * * * * *

874 (The reading of the deposition was continued.)

"Q. Mr. Lewis, some of the large coal companies—particularly Consolidation Coal Company and Pocahontas Fuel Company—participated in proceedings with the union whereby the Secretary of Labor made a first determination of a minimum wage in the bituminous coal industry; is that not right?"

Mr. Kramer: We are continuing our objection, your Honor, for the same reasons heretofore stated.

The Court: Same ruling.

"A. That is correct."

The Court: Members of the jury, the coal companies had a right, a legal right, to petition the Secretary of Labor to fix the wages at certain figures under what is known as the Walsh-Healey Act, and the fact that these coal companies did that shall not be construed by the jury as wrong or as prejudicial to their rights.

The Supreme Court of the United States, in a recent case known as the Noerr decision, held that political activities engaged in jointly by two or more parties do not violate the anti-trust laws; that under our government two or more parties have a right to combine and work together in political activities and by so doing they do not violate any law of our government. And keep that in mind as

875 you hear this—keep that rule in mind as you hear this testimony.

Mr. Kramer: Your Honor, your Honor said "coal companies" had the right to petition. The same right your Honor has now explained to the jury is applicable to the trustees or by any other person or citizen or organization.

The Court: That is correct. I say, two or more citizens

or two or more companies may engage in political activities by petitioning their legislators or the executive branch of our government to do certain things and such petitions, or such activities, political activities, upon the part of persons, firms or corporation, are not violations of the law.

Mr. Rowntree: If your Honor please, might we have an instruction along with that that there may be a violation of the anti-trust law where a purpose is to monopolize a specific government market or to restrain the trade of others selling—

The Court: It is a violation. What makes anything along that line a violation of law is for two or more persons, firms or corporations, to join together or to conspire to fix prices or to monopolize an industry or to attempt to monopolize an industry, and unless they do conspire
876 together, agree together, to do those things there could be no violation of law. But if they do those things, namely, conspire to monopolize a certain market in interstate commerce or to attempt to monopolize a certain market in interstate commerce or to restrain trade in interstate commerce, then that is a violation of law.

It is the unlawful agreement that makes it a violation of law, or the conspiracy by two or more parties to do those things that makes it a violation of law.

All right.

Mr. Rowntree: We refer at this point to page 546 of the 1956 Minutes of—before doing that, I omitted the United Mine Workers Journal of February 15, 1955, pages 4 and 10. I think we had better introduce that one as an exhibit.

We offer that paper as the next exhibit. I believe the whole exhibit will include pages 4, 10, 11 and 12.

(Exhibit No. 42 was marked for identification and filed.)

I read an extract from that, your Honor. An article headed, "Lewis Calls for Halt to U. S. Purchase of 'Dog-Hole' Coal; Asks Minimum Wage."

877 "The UMWA and major soft coal producers,"—

Mr. Kramer: Just a minute. Your Honor, this is subject to our objection for the reasons heretofore given.

The Court: Yes, sir.

Mr. Kramer: It is again with reference to application to the government of determination of the prevailing wage.

The Court: Yes, sir.

Mr. Rowntree: —"quarterbacked by President John L. Lewis of the International Union, have called on Secretary of Labor James P. Mitchell to promulgate a prevailing minimum wage for the bituminous coal industry to prevent 'dog-hole' non-union operators from doing a 'push-cart' business with government agencies at cut-rate prices that undermine the economic stability of America's basic fuel industry.

"In addition to the International Union, the petitioners asking for the wage declaration under provisions of the Walsh-Healey Public Contracts Act are the Pittsburgh Consolidation Coal Co.,"—

Again, I would like to say that that company has changed its name to Consolidation Coal Company.

—"largest commercial producer of soft coal in
878 the nation, and the Pocahontas Fuel Co., Inc., one of the largest of the Southern companies."

The Pocahontas Fuel Co., Inc., was later merged into Consolidation Coal Company.

"Public hearings on the matter got under way February 1 in the Auditorium of the National Museum of National History in Washington. Conducting the hearings for the Secretary of Labor is Hearing Examiner Clifford Grant.

"Appearing on behalf of the UMWA in addition to President Lewis, are Secretary-Treasurer John Owens, and W. A. (Tony) Boyle, special assistant to President Lewis and president of District 27. Other witnesses who appeared in support of the petition were George A. Lamb, manager of business surveys for the Pittsburgh Consolidation Coal Co., and Hugh R. Hawthorne, general counsel and director of the Pocahontas Fuel Co., Inc.

"The UMWA's legal representative was"—and there they give the name of counsel.

On page 10, in the middle of the third full paragraph—

Mr. Combs: May I inquire of counsel to read the
879 whole paragraph.

. . . . . .

Mr. Rowntree: We will go on through that paragraph and the three following paragraphs, and that is all we will read.

" 'The petitioners feel, in requesting this affirmative action by the Secretary of Labor, endowed with authority under the statute, that they are in harmony with the declared intent of the law as uttered by the Congress and that they are in harmony with the conclusive findings of the Supreme Court of the United States as to what the act was intended to do and the effective administration of its provisions. One governmental agency, to wit, the Tennessee Valley Authority, has been a tremendous offender against the declared purposes of the Act and in the purchasing of the coal requirements for that great enterprise has consistently violated the spirit of the act in all their business transactions.

" 'The board of directors of TVA could say legalistically that there has been no legal promulgation of a prevailing minimum wage under the provisions of the statute
880 in the bituminous coal industry. However, there has been no estoppel against the Tennessee Valley Authority putting into practice the standards set forth in the act as affirmed by Congress and interpreted by the Supreme Court without the necessity of awaiting a promulgation of a minimum wage by the Secretary of Labor.

" 'The TVA, which purchased something more than eight million tons of coal in fiscal 1954, has done so at starvation prices. They have used the vast influence of their heavy purchases to beat down small isolated producing units to a starvation wage, ignoring safety standards and health conditions, taxes, compensation obligations, etc., and after having established such standards, based on starvation, they have asked the stable investment of the

industry, operating modern mines under standard conditions with collective bargaining in the American way, to meet the intolerable and unjustifiable prices in order that TVA, a government agency, presumably bound by the law as well as every other natural citizen and artifical citizen, might make a better showing on its financial records in competition with free enterprise industries producing electrical power in the United States.

"'That agency has ignored every humane con-
881 sideration, every standard of ethics, and the provisions of every paragraph of the Walsh-Healey statute in carrying out its push-cart policy of providing itself with coal. They seek to turn the economic structure of the United States back to the push-cart days.'"

Mr. Combs: May it please the Court, I would like to comment on the paragraphs that counsel read. From the Journal he read from an article that was written by Justin McCarthy and Rex Lauck. They were writing the article. On the same page, on the left-hand corner of the same Journal is Lewis' statement to the secretary, which is the official statement. What counsel was reading was a narrative on the part of the editor and the assistant editor of the Journal. Just for explanation, your Honor.

Mr. Rowntree: Is he not quoting Mr. Lewis?

Mr. Combs: No, he is not quoting Mr. Lewis, unless it shows he is quoting Mr. Lewis.

Mr. Combs: That is what I mean. If there are quotation marks, which counsel has not stated that there were, it would be explanatory itself. I would not know.

882 Mr. Rowntree: If counsel will look at the exhibit.

Mr. Combs: As a matter of fact, your Honor, I don't want to slow counsel up in that. As a matter of fact, the very sentence he read was not a quotation. It is an article by the editors of the Journal. Now there do appear to be quotes in the second part of the part that he read, the second part that he read is in quotes, and we will stipulate that. The second three paragraphs that he read are in

quotes, purporting to quote from Mr. Lewis' statement to the hearing officer.

• • • • • • • • • • •

883 (The reading of the deposition was continued.)

"Mr. Lewis, do you recall that the Secretary of Labor made a speech at the 1956 Convention of the Union? "A. I recall that he was there and addressed the Convention, yes.

"Q. Do you recall that you introduced him? "A. Yes."

Mr. Rowntree: We read from the introduction and portions of the speech on pages 546 and 549 of the 1956 convention minutes.

The Court: Who did you say made the speech?

Mr. Rowntree: James P. Mitchell, Secretary of Labor, introduced by President Lewis.

Mr. Kramer: Of course, your Honor, it is the same type, not the same thing, that we have been objecting to of the statement of somebody else. However, this goes further, your Honor, because the statement we heretofore objected to in the main, maybe not all of it, I recall, were representatives of alleged conspirators. Here they are seeking to introduce from the Journal the statement of a person not a party to the litigation at all, a governmental official, the Secretary of Labor. From the minutes, not the Journal. I said the Journal. I mean from the minutes of the international convention.

884 They are seeking to introduce from the minutes of the international convention a speech made by a governmental official, the Secretary of Labor.

We do not think under any rule of evidence this could be admitted, an outside party, not alleged to be a conspirator. Therefore, it goes beyond the rule.

Here is a public official that happens to be at the convention, makes an address, and they seek to put in what this official of the government may have said. The fact that he made it at the convention makes no difference.

The Court: I assume that you want to put that talk of

the Secretary of Labor in for limited purposes. If so, what are such purposes?

Mr. Rowntree: The purpose, your Honor, is to put in a statement made at an official convocation of the cross defendant in the presence of the international officers of the cross defendant, contained in the minutes of the cross defendant, a statement of one who says that he worked with the cross defendant to accomplish certain things for certain purposes.

Mr. Kramer: May I answer, your Honor?

The fact that a person who is not a party to an alleged conspiracy may have said certain things or done
885 certain actions which are not a part of the conspiracy as claimed, would not be claimed. The rule never, that I know of, as far as I know, never goes beyond the introduction of hearsay testimony, except to the extent, and that is what this is, except to the extent that one is alleged to be a conspirator. Now to the extent that one is averred to be a co-conspirator, though not named in the suit pending, has made statements under certain conditions, those statements are admissible, but here is a third party or fourth party, whatever he may be, wholly outside of any claimed conspiracy at all.

They don't claim the Secretary of Labor was part of the conspiracy. It might just as well have been somebody else, and it is pure hearsay testimony, your Honor, and the rule with reference to statements of conspirators is only a variation or exception to the hearsay rule, as your Honor well realizes.

They are seeking to go beyond that exception to the hearsay rule and say that some outside person—suppose the mayor of Knoxville had been at that convention and made a speech, or the mayor of Cincinnati, where ever this convention was held, and in a welcoming address made some statement. Certainly counsel can't claim that was competent.

886 Here is the Secretary of Labor, a governmental

official, outside the bounds of the conspiracy, and how it is possible to get this within the exception of the hearsay rule, I fail to see, and we object to it most seriously, your Honor.

887 The fact that he says that he did something for a purpose, he's not a conspirator.

Mr. Rowntree: He did it.

The Court: What is the other fact that you propose to show by this alleged statement, Mr. Rowntree?

Mr. Rowntree: They show here why he, together with the union, working with the union, put in the minimum wage under Walsh-Healey, in the bituminous coal industry. It shows a restraint of trade purpose, and we have not attempted to allege or charge every person that can conceivably be a conspirator in this case.

Any person who is a conspirator, regardless of whether he is in the lawsuit or not, can make a statement in the presence of the defendant, and that is to be judged on its own merits as to whether he is a conspirator.

We don't want to have to charge him with being a conspirator, but the very statement here would indicate that this is admissible, I believe.

Mr. Rayson: May it please the Court, the Secretary of Labor was stating his connection with the enforcement of a law, the Walsh-Healey Act, the law which is unquestionably a constitutional enactment, constitutionally ap-

888 plied in this case. He is talking about an action which he took which was lawful in a general sense, and which was found to be lawful in litigation that went to the Court of Appeals, which he took.

He may have expressed action which he lawfully took, but would not, it seems to us, be competent for any purpose in this case.

. . . . . .

Mr. Rayson: My remarks are not as to the admissibility under the technical rules of evidence. I am talking about

its probity value. It has none, because here is a governmental official talking about an act which he had the right to do and the duties—

• • • • • • • • • • •

Mr. Rayson: Of course, the Secretary of Labor was not speaking in the technical terms of the statute, but in the terms of the spirit of the statute which he lawfully undertook to enforce.

The Court: Is there any dispute about what the Secretary did and what the coal operators did with re-
889 spect to these?

Mr. Kramer: No, may it please the Court, the coal operators and the United Mine Workers of America, under the provisions of the Taft-Hartley—Walsh-Healey Act, pardon me—appeared before the Secretary of Labor, or his representatives, as has been said here, and asked for a determination by him of the prevailing wage for the miner of coal in the various areas in the United States in which coal is mined, and as a result of that joint appearance before the Secretary of Labor and his representative, he came up with the findings which have been passed to the jury.

Now that is all there is to it. He did that. We appeared—the United Mine Workers, not the Trustees—United Mine Workers; representatives of certain coal companies appeared and under the spirit of the Noerr case, we had the right. They can't claim fraudulent misrepresentation under the facts placed before him and under the authority vested in him by the statute, the Walsh-Healey Act, he comes up with an answer, and now they say because we did that, we were conspiring, entering into a conspiracy.

There's no dispute that those are the facts. That is exactly what happened. Now they are seeking to
890 to say that the Secretary of Labor—

The Court: Do I understand from what you are saying that following the appearance of the UMW and some of the coal operators before the Secretary of Labor, the

Secretary of Labor fixed the minimum prices which the TVA was to pay for coal? Is that it?

* * * * * * * * * * *

Mr. Kramer: I don't mean price. It had nothing to do with the price of coal except incidentally, but he fixed the amount of wages as a minimum which any person selling coal to the—

The Court: Fixed the wages instead of the prices.

* * * * * * * * * * *

That they would be paid by any operator if he sold coal to the TVA or any other governmental agency?

Mr. Kramer: Correct, Your Honor.

The Court: Then if that is what was done, Mr. Rowntree, why do you want to talk about it any more?

* * * * * * * * * * *

891 The Court: Members of the jury, what the Secretary of Labor said in this speech would not be binding upon the UMW unless the UMW ratified and confirmed and acquiesced in what the Secretary of Labor said.

892 Now the Secretary of Labor couldn't say anything that would prejudice the rights of the UMW on an occasion of this kind unless the UMW authorized him to say it, or unless the UMW approved what he said, or ratified what he said, or acquiesced in what he said.

Now with those explanations and those restrictions, the Court will permit him to read what was said.

Mr. Rowntree: On page 546, President Lewis, in speaking about the office of the Secretary of Labor:

"Since that time there have been a number of occupants of that high office, and your union and its representatives from time to time through the years have had occasion to deal with the Department of Labor on many of the important considerations that affect the mining industry and the welfare of this Union and its members. None of them have been more considerate of this union and its policies. None of them have interfered less, and none of them have been more cooperative with this organization, within the limi-

tations of his office and the statutes that regulate the actions of that particular department of Government than the present occupant, the Honorable James P. Mitchell."

893 The Secretary starts at the bottom of page 447:

"I have had occasion, as Mr. Lewis has indicated, to work with your organization in the Department of Labor on many fronts. I would like to tell you about some of the things that we have endeavored to do, as Mr. Lewis so aptly expresses it, within the limitations of our authority and responsibility and I would like to tell you also about some of the things that we would like to see done. As you know, ab the things that we would like to see done. As you know, about a year ago the Secretary of Labor, for the first time in history, found a minimum wage in the coal industry which controlled the wages that were to be paid to workers who worked on government contracts. We purposely sought that determination in order to exclude from government bidding those non-union mines which are a detriment to the industry. And I think by and large we have succeeded, except for certain areas of government purchasing which still have to be, shall I say, investigated.

"Twenty-five per cent, at the moment, of the TVA purchases are made under contracts less than $10,000, which excepts such purchases from the determination of

894 the Walsh-Healey Act.

"I have set in motion a study of the TVA purchasing policy to see if there is any evasion of the Walsh-Healey determination on the part of TVA. I don't know whether there is or not. But, if there is, you can be sure that we will correct it."

The paragraph in the middle of 549, the third sentence:

"I believe it is my duty and my function to see to it that the laws which the Department of Labor is charged with administering are administered rigidly, inflexibly and without favor to anyone. We have administered those laws on that basis in the past three and a half years, resulting in the collection of back wages for workers of some seven and a

half million dollars from violators of either the Fair Labor Standards Act or the Walsh-Healey Act. I propose to continue this enforcement policy, because I believe it is in the interest not only of the worker but is in the interest of the fair employer to prevent the chiseling, non-union employer from competing in the market place with fair employers who hire union labor."

Mr. Lewis states at the end of this speech:

"I am sure that the Chair voices the sentiments in the mind of every delegate in expressing our appreciation of the address by the distinguished Secretary of Labor. His personal assurance of his intention to fairly treat the men of the coal industry is bulwarked and borne out by his attitude in the entire period of three and a half years of his incumbency of that office."

Mr. Combs: May it please the Court, without waiving our objections to the introduction of this evidence, I think that probably if I read a few excerpts at this time with the Court's permission, this might be more clear.

The Court: All right.

Mr. Combs: In the first place, the Secretary was addressing the convention. It was an open, public convention that was attended by all the newspapers and any person of the public could attend these meetings.

Mr. Lewis introduced Mr. Mitchell, as stated here, by counsel, but counsel only read part of the introduction, and it is short. I would like to read the part of the introduction that Mr. Lewis made that counsel did not read.

It starts out:

Starting out with President Lewis:

"The United Mine Workers, over a period of many years, was one of the organizations that petitioned the Congress to create a new Cabinet position, a department to be known as the Department of Labor. Congress finally enacted that legislation, and the first Secretary of Labor in the history of the United States, a member of the Cabinet, was the Honorable William B. Wilson, former Secretary-

Treasurer of the International Union, United Mine Workers of America, a Member of Congress, one of the founders and officers of this Union who served with distinction in that capacity during the Administration of President Woodrow Wilson."

And the next paragraph counsel read. Mr. Lewis continuing:

"He is here this afternoon"—speaking of Mitchell—"to deliver an address to our Convention. He is a man of honor and integrity, high character, and with motives and ambitions to be constructive in all things as relating to the American economy. I am particularly proud this afternon that he accepted the invitation to attend the Convention and extend his felicitations and greetings to the delegates, together with such other statements as he may feel
897 necessary to make. I am honored to be able to present to the Convention at this time Honorable James P. Mitchell, Secretary of Labor of the United States."

I would like to read from Mr. Mitchell's address, this part. It is very short. This is Mitchell in his address.

"We have had discussions in government on this whole problem of national resources, and always in those discussions coal emerges as one of our basic resources. And when I say that we found a Walsh-Healey minimum determination for the purpose of excluding from government competition of the non-union mines, we were doing that not only for the benefit of the worker, not only for the benefit of the fair employer, but also for the benefit of our national security, for this reason: that so long as these strip mines and non-union mines which pay people a miserly wage exist and deprive union-operated mines of business, you are thereby reducing your strategic potential in time of emergency. So, it is our job as government officials to see to it that the potential production is kept at the highest possible level.

"We all know that in time of emergency when high
898 wages are paid in shipyards and in other activities, those people who work in these non-union mines will

disappear from the scene and the production of those mines will therefore disappear. So, in the national interest, as government officials, it is necessary for us to see that those operations which can produce coal quickly and efficiently are kept alive to the extent possible by government purchasing in peace time. And we intend to continue that policy.

"I approach this subject with some fear and trepidation. But, I am going to have my say on it. I understand this morning that your President made mention of seizures, Taft-Hartley injunction, and all the other dire things that have occurred in the past. And I want to tell this convention and your President that so far as I am concerned and so far as President Eisenhower is concerned, we believe that the government does not belong on either side of the bargaining table."

Thank you, your Honor.

Mr. Rowntree: We will file as the next exhibit the UMW Journal of July 15, 1954, page 13.

(Exhibit No. 43 was marked for identification and filed.)

* * * * * * * * * * *

899 Mr. Rowntree: This is an article in the lower left-hand corner. "Labor Department Steps Up Enforcement Drive Against TVA Coal Chiselers on Safety."

Mr. Kramer: What is the date of this Journal?

Mr. Rowntree: This is July 15, 1954.

"Secretary Mitchell announced the Labor Department has started 'a full-scale campaign' to enforce safety regulations in small coal mines supplying the Tennessee Valley Authority.

"Mitchell said he and Labor Department solicitor Stuart Rothman already have brought safety violation charges against eight small Tennessee mines and are considering action against 90 more.

"The safety enforcement drive apparently grew out of protests from some larger union-organized coal mine owners and from the United Mine Workers."

Mr. Kramer: Of course, your Honor, we continue our

objection. It should be specific to this and I make it specific to this in order to be able to make a motion to strike.

We are entering a different field, and we are talking about the field of safety, where before we have been talking
900 about the field of prevailing wage. And we continue our objection—certain statutes of the United States are enforced by the Secretary of Labor and the solicitor of his department.

The Court: Overruled.

Mr. Combs: May I point out, may it please the Court, that the section read by counsel was read from a press release from the Department of Labor and it appears in the Mine Workers Journal without comment. It is just simply the press release.

Mr. Rowntree: Yes.

Mr. Combs: Coming from the Secretary of Labor.

Mr. Rowntree: If it is agreeable with counsel, we will skip to bottom of page 266, referring to United Mine Workers Journal of February 15, 1958, pages 5 and 6.

* * * * * * * * * * *

(Exhibit No. 44 was marked for identification and filed.)

Mr. Rowntree: We have excerpts from this last exhibit, your Honor.

Mr. Kramer: We have our objection that we have made heretofore which we are continuing, as your Honor
901 understands.

The Court: All right.

Mr. Rowntree: This is an article headed, "Labor Department Holds Walsh-Healey Hearing." This is in 1958, and I might say, this is a second hearing on this question.

"The UMWA, Pittsburgh Consolidation Coal Co. and other coal producing companies made their formal plea to the U. S. Department of Labor for increased minimum wages in the bituminous coal industry under provisions of the Walsh-Healey Act. That Act requires that coal operators selling to agencies of the U. S. Government under contracts in excess of $10,000 must pay prescribed minimum

wages laid down by the Labor Department for the geographical area in which their mines are located.

"The UMWA and the operators stated their case at a hearing on February 3-5 presided over by Hearing Examiner Clifford Grant, the same man who heard an earlier case which resulted in a minimum wage determination by Secretary of Labor James P. Mitchell in 1955.

"The hearing was scheduled as a result of a petition late last year in which the union and the operators asked that the minimum wages be redetermined to take into
902 account the two wage increases negotiated by the UMWA since Mitchell's 1955 determination. Each of the two National Bituminous Coal Wage Agreements signed in 1955 and 1956 called for pay boosts of $2 a day—a total of $4 a day, or 50 cents an hour.

"Spokesman for the UMWA—and the man who presented the weightiest evidence in the case— was W. A. (Tony) Boyle, International Board Member for District 27 and special assistant to President John L. Lewis."

On the righthand column, the fourth paragraph.

"Chief witness for the Unionized coal industry was George A. Lamb, manager of business surveys, Pittsburgh Consolidation Coal Co. He was quizzed on direct examination by Frank R. Amos, retired general counsel of Pitt Consol, who represented Pitt Consol during the 1955 wage determination, both in the Labor Department and in its long haul through Federal Courts, and acted as the chief legal spokesman for the operators.

"Lamb, who was also a key witness in 1955, backed up Boyle's testimony. He also stated that in 1957 his company produced about 40 million tons of coal, of which only 310,000 tons were sold directly to the Federal govern-
903 ment. He blamed this on the wage advantage of at least 50 cents an hour enjoyed by non-union operators and added: 'The greater part of the bituminous coal industry will be damaged' if the higher prevailing wages are not put into effect."

Skipping one paragraph.

"Among the other operators witnesses who favored the increased wage rates was Frank J. Foresman, director of industrial relations, Pittsburgh and Midway Coal Mining Co. (Kans.), who preceded UMWA Safety Director Charles Ferguson as head of the Coal Mines Section of the National Safety Council."

Down to the last line, last paragraph, beginning at the bottom.

"Another operator witness was G. M. Davidson of Island Creek Coal Co."

That is all we care to read from that.

Mr. Combs: If the Court please, what counsel was reading was a descriptive article appearing in the Journal of the hearing. In addition to the named operators, this article shows that there were several more operators appearing in favor of the amendment to the prevailing wage.

It also shows that at least two persons appeared in
904 opposition to the order. It was a narrative of the hearing that was held by the Secretary.

The Court: Yes, sir.

Mr. Rowntree: We refer to UMWA Journal of October 1, 1958, page 11, and I will simply read the first paragraph.

Mr. Kramer: Just a moment please.

Mr. Rowntree: Under an article headed "Walsh-Healey Prevailing Wage Raised 50 Cents an Hour by Mitchell."

"Secretary of Labor James P. Mitchell on September 22 issued an amended determination under the Walsh-Healey Public Contracts Act, which finds that the minimum wages prevailing in the bituminous coal industry have increased by 50 cents an hour in virtually all of the Nation's coal producing districts."

Mr. Combs: May it please the Court, this again was a descriptive article appearing in the Journal, and goes ahead and describes the authority of the Secretary under the Walsh-Healey Act.

And I might point out, I think it would be correct to point

out this, that under the provisions of the Walsh-Healey Act, that these orders that are made by the Secretary
905 are first published in the Federal Register with its title as a proposed order, and it gives any person anywhere that receives that register a right to protest the order, to ask for a modification, or what not.

906 And I would like to say that in each of these instances that we are talking about, that that was adhered to by the secretary, so that everybody in the coal industry or any interested party, before these orders became effective, had at least 20 days under the law to protest or to modify those orders.

I want to say that it is not limited to people who receive the Federal Register. As the Court knows, the Federal Register is a governmental document where all the governmental departments are required to publish their orders or findings. That is for the general public's knowledge, in order that they may have any right that they may want to about any government agency's publication or board, that they may have a right to object to it. It is not limited to the one who receives it.

* * * * * * * * * *

(The reading of the deposition was continued.)

By Mr. Rowntree:

"Q. Well, you were aware, were you not, that there was a $10,000 provision in the Walsh-Healey Act— "A. Yes.

"Q. —which specified the contracts costing less than $10,000 would not come under the minimum wage re-
907 quirement? "A. Yes."

Mr. Rowntree: We refer here to the 1956 minutes, page 13, in the middle of the paragraph.

Mr. Kramer: Now, your Honor, before the reading of this, may I state that in none of these wage determinations were the trustees in anywise involved, the trustees of the Welfare Fund. They were not present, did not participate, and they did not receive any more royalty as a result of these determinations.

The Court: None of this evidence then will be considered in relation to the trustees' phase of the case that is involved in this litigation.

None of these statements are binding on the trustees; none of these statements shall be construed as prejudicial to the rights of the trustees.

Mr. Kramer: And dealt only with hourly wages, your Honor.

* * * * * * * * * * *

The Court: All right.

* * * * * * * * * * *

908 Mr. Rowntree: This is a statement by President Lewis at this convention:

"You will recall that our organization and certain coal companies petitioned the Secretary of Labor to establish a minimum wage scale in our industry. And after a year of testimony and examination and so forth the Department of Labor did promulgate that scale and fixed the scale at whatever the contract rate is in that district. That is the minimum wage in the coal industry. The Tennessee Valley Authority gets around that law now, to which they are obligated to adhere, because they are a government agency operating under a government name, by finding a clause that says that the minimum rate schedules do not apply to contracts for less than $10,000 in amount. So, wherever they can find a non-union operator willing to sell his coal for less than the organized mines under agreement, they will call him in and they will give him as much as five, six, seven or ten $1,000 contracts in one, two or three days—a clear evasion of the law, a clear conspiracy to evade
909 the law on the part of a governmental agency. Yet up to this time this agency has not been told, either by the Congress or the executive, to follow the proclaimed public policy of the United States and buy coal from mines that pay the industry wage and from operators who invest their money under the free enterprise system and expect to have a return on their investment. It is anti-social, it is

un-American. It is contemptible double-dealing on the part of the Tennessee Valley Authority."

(The reading of the deposition was continued.)

"Q. With reference to that paragraph, Mr. Lewis, did the Union make any effort to change the policy of TVA with respect to purchasing coal on these contracts for less than $10,000? "A. It is possible that in some of the conferences as held by representatives of the Union that question may have been raised and a viewpoint expressed on that. I have no personal knowledge.

"Q. Do you recall if Mr. Widman attended any such conferences? "A. He attended various meetings with the TVA executives.

"Q. Mr. Lewis, the Union has attempted, has it not, to sell the membership on the idea of mechanization in
910 the bituminous coal industry? "A. I think not. I think the Union has not undertaken to 'sell' the membership anything. I dislike that Madison Avenue term in all its aspects.

"The Union officers have reported from time to time to the membership on the question of mechanization and it has been policy for many years not to oppose mechanization but to demand from the industry a participation in the advantages of mechanization.

"We hold that God did not put in the mind of a genius an idea to increase production per man day for the sole benefit of some coal operators or a group of coal operators; that the advantages inherent in the progress of this economy should be on a basis where all interests concerned have a participation in the advantages.

"We hold also, in the Tennessee Valley Authority matter, that Congress did a disservice to that percentage of citizenship who are denied the protection of the Federal Safety Act because they were employed in mines having less than fifteen employees; and we hold that the citizens, before the law, however engaged or employed or occupied, are entitled to equality of protection under the law.

"We hold also that the $10,000 exclusion arrangement to which you refer, in contracts, made it possible for a purveyor of substandard coal to pyramid his $10,000
911 contracts and render abortive the Act of Congress as appertaining to that volume of tonnage.

"We held it was wrong and that redress should be given; and that the Tennessee Valley should carry out the intent of Congress in passing the Act.

"Q. Would not the elimination of that policy of TVA with respect to these small contracts bar the small coal operator from participating in the Tennessee Valley market, he having previously been barred by the minimum wage in the bituminous coal industry from selling on the larger term contracts? "A. Not necessarily. It would depend on the individual circumstances attendant upon his mining problems and his marketing problems.

"Be it known and recognized that, under the current agreement in the industry, there are thousands of unit signatories in this category of small mines who are paying the wages and fulfilling the contract in every particular, and maintaining proper safety standards.

"The question of why those who don't do it do not do likewise is something upon which I have no knowledge.

"It is my own concept and my own opinion that the fact that a mine is small does not necessarily, under efficient management, always bar that mine from paying only a sub-
standard price or maintaining some substandard con-
912 ditions in the mine."

Mr. Rowntree: We offer as the next exhibit United Mine Workers Journal, December 1, 1958, page 7.

(Exhibit No. 45 was marked for identification and filed.)

Mr. Rowntree: This has a picture on it with the legend under the picture: "Big Paul—This is 'Big Paul, the King of Spades,' now working at the Peabody Coal Co.'s new River King Mine near Freeburg, Ill. It is believed to be the largest stripping shovel in the world. Big Paul's dipper can be filled with 105 tons of overburden (enough to fill

two railroad cars), transport the load about a city block away and dump it on a bank almost 100 feet high. Big Paul is operated by one man, who rises to his third-floor operating cab by electric elevator. It is about 100 times the size of an ordinary power shovel. It uses more than half a mile of wire rope in operation. It could fill a freight train 175 miles long in one month. It has as much horsepower as the largest ocean freighter and uses as much electricity (coal-by-wire) as the homes and industries in a town of 10,000 persons. Big Paul can fill its dipper up a bank as high as a 12-story building and dump it on top of a bank the height of a 10-story building a city block away. It is the
913 first of three such shovels to be used by Peabody. It is a symbol of the dynamic technological progress of the American coal industry."

Mr. Combs: Your Honor, we object to the introduction of this on the ground that it has no possible relevancy to this case here, a picture of a steam shovel or electric shovel.

Mr. Rowntree: We are showing the competitive advantages of the alleged conspirators to pay wages under the repeated increases of the National Bituminous Coal Wage Agreement and the Walsh-Healey determination. This article says that one man can fill 175 miles of railroad cars in one month. These repeated increases of wages we say were tailored to meet the ability of Peabody Coal Company, among others, to pay these wages without having it affect them but a very small amount, in comparison with their increased production.

Mr. Combs: Your Honor, I fail to see how that it can show, by showing the picture of one big shovel, that the operators are able to operate and mine coal cheaper than other operators and how many of them there are. I think it just depicts a big shovel and that is a picture of it, and it says what it can do.

I don't think there is any question about what the picture describes. What bearing that could have on this
914 case, I fail to see, and we object to it.

Mr. Rowntree: We have to show these competitive advantages in order to prove our theory in which these wage increases were tailored to the ability of these big companies, not to effect their profits but to effect the profits of the small producers that can't do these things, and we have to start somewhere in proving this and this is where we start.

Mr. Combs: I would assume that it would be self-evident that if they are going to show a competitive advantage, the evidence would show they have to pay for such and the cost would eventually pay for it. I don't know whether it would.

I am talking about the intrinsic value of evidence of this character.

The Court: I will let it go into the record.

Mr. Rowntree: We put in as our next exhibit United Mine Workers Journal, November 1, 1959, pages one and three.

(Exhibit No. 46 was marked for identification and filed.)

Mr. Rowntree: I believe that page 18 is also in that exhibit.

Mr. Kramer: Your Honor, the main part of this exhibit is the same thing that was put in just a minute ago
915 and we continue the same objection. It is a picture of another large machine.

The Court: Same ruling.

Mr. Kramer: That is the main part of this exhibit.

Mr. Rowntree: That is right.

This is an article, "Coal's Present and Future Look." Reading the left-hand column—this also has a picture on page three here of one of these continuous mining machines that is spoken of in this record several times.

916 "Mining bituminous coal in the northern West Virginia fields—in the rich Pittsburgh Seam to be more specific—is 'like taking candy from a baby.' Both are comparatively effortless.

"That was the simple analogy to be drawn following a personal visit to one of the world's most modern coal pro-

duction facilities—the twenty million dollar Loveridge Mine and Preparation Plant of the Mountaineer Coal Company, a division of Consolidation Coal Company, located near here.

"The extraction with ease of one of this nation's vital minerals has been achieved through the adaptation of technological advances by Consol in the ever-expanding program of modernization at a cost of close to two hundred million dollars since 1947."

Mr. Combs: That word "its". You said "in the". I think it would make a difference.

Mr. Kramer: Perhaps I ought to point out, Your Honor, one thing. This machine he is now talking about isn't used in our area at all by anybody who was in any wise a competitor with the present plaintiffs here. This is in the Pittsburgh field, entirely removed from this location and has nothing to do with this location.

917 The Court: Well, I thought the word "Consolidated Coal" was mentioned.

Mr. Kramer: Consolidated Coal Company was mentioned, Your Honor. It is averred to be a conspirator, but Your Honor, Consolidated Coal does not operate in this area, and is not a competitor of Phillips Brothers.

Mr. Rowntree: Consolidation Coal Company does operate in this area.

Mr. Kramer: But this machine was not used in this area or involved in this area.

Mr. Rowntree: We say on that, Your Honor, we state the contention that they do have—that they did come into this area along about 1955, when they set their eyes upon TVA, and they established two mines in close proximity to the Kingston Plant.

We do—

Mr. Kramer: You can't contend that they use any machines like this in this area?

Mr. Rowntree: No, we don't we say machines like this, it's impossible to use in this area. We don't know why

they established two mines in this area, except that they began to sell to the TVA at about the time the Kingston Plant fully developed.

918 This is part of our case, Your Honor, that these machines cannot be used in this area, but that—

The Court: Well, I'll let you put it in the record, but there's nothing wrong, members of the jury, with bigness of business; if that is as far as it goes, it has no probative value in this case.

There is nothing wrong with a company buying big shovels and bulldozers, and things of that kind in the operation of a coal business, and these things standing along have no significance insofar as the anti-trust laws are involved.

Now I say these things that he is talking about that is mechanical operations of so-called large coal companies in and of themselves, have no significance with respect to the anti-trust laws. Again I call attention to the jury that before there can be any liability on the part of anybody there must appear to the jury from a preponderance of the evidence in this case that there was an agreement between the UMW, the Trustees, and one or more of these coal companies named in this alleged conspiracy to restrain trade in interstate commerce in this bituminous coal industry for the purpose of driving the little coal operators out of business, or an agreement between these alleged

919 parties to monopolize this bituminous coal industry in interstate commerce in this area, for the purpose of driving out the little operators in order that the big operators might take their place, or there must appear to have been an agreement between these alleged parties to attempt to monopolize this bituminous coal industry in this area in interstate commerce for the purpose of driving these little coal operators out of business including this cross-plaintiff, the Phillips Brothers Coal Company. That as a direct and proximate result of these alleged unlawful agree-

ments, that the Phillips Brothers Coal Company sustained damages.

Now those are the problems, and let's not get our mind off of the real problems that are involved in these lawsuits, and I don't want the jury to allow their minds to be prejudiced in any respect against any of these so-called coal companies because they had modern equipment, large equipment, or the last in the art in the operation, or the highest in the art in the operation of mechanical mines.

Now, gentlemen, with those observations, those are the rules of the Court on this evidence.

Mr. Rowntree: May I state a contention, maybe, to clarify the purposes of this?

920 The Court: Yes.

Mr. Rowntree: I feel that I get lost sometimes. It is really an intricate thing I am trying to do here, and sometimes—

The Court: I read your brief again last night, partially. I understand what you are undertaking to do, but you can't do it by showing bigness alone.

Mr. Rowntree: No, that's right.

The Court: Or by showing modern equipment alone.

Mr. Rowntree: Of course.

The Court: By showing that certain ones have developed the art, developed the art of coal mining—

Mr. Rowntree: No, that's true.

The Court: —to its highest stage, highest present stage. You can't do it by those things. The only way it can be done is to show an unlawful agreement upon the part of these so-called large operators, and the UMW, and the Trustees, to harm some other person including this particular plaintiff. That is the basic issue.

Mr. Rowntree: Yes, sir.

The Court: In this lawsuit, but I will let you state your theory, and I will let Mr. Kramer or Mr. Combs or Mr. Rayson state their theory, if they desire to do so,

921 again in reply to what you say on this particular point.

The only reason I am interrupting this trial is because there have been renewed objections from time to time, and I want all of these parties to know the basis of the Court's ruling on those objections.

Mr. Combs: Your Honor, we have no desire to go into it any further at this time, but if we do, I think it should be out of the presence of the jury.

Mr. Rowntree: There apparently is a misunderstanding as to why this is offered, and we want to show how it ties into our theory.

The Court: Now, you have a right to show why it is offered in accordance with the policy of the Court, throughout this case, and the other side may have a right to reply to that explanation of yours if it so desires.

Mr. Combs: I think we know what he is driving at. We think he is wrong, and we object to it. That is what it boils down to.

Mr. Rowntree: I am not sure that the jury does or the Court, what I am driving at.

Mr. Combs: I don't think it is appropriate to tell the jury as it goes in that way unless it is just for the purposes of clarification.

922 The Court: It is for the purpose of clarification.

Mr. Combs: That is all. We can't editorialize on it, what it ought to be. I don't think that is right.

Mr. Rowntree: Well, if Your Honor please, this conspiracy that we have alleged in this case, we say goes back to 1950, and we say that at that time there was an understanding reached, after this struggle between the big companies and the union, that there was an understanding reached between the major coal cmpanies and the union as to how this overproduction problem was to be taken care of, and we say that this National Bituminous Coal Wage Agreement, this uniform agreement that applied in its terms to everybody alike, was to be used over the succeeding years

as an instrument in knocking out part of the production of the country, the production of the small, "pallid, undernourished mines," as Mr. Lewis called them, and these smaller mines could not pay increases in wage. They used manpower.

On the other hand, the major coal companies were able to make rapid and tremendous advances in mechanization, the type of mechanization we are talking about here. They could afford to pay these wage increases without it
923 taking hardly a dime out of their pocketbooks, in comparison with what the small companies had to pay.

The Court: And these so-called large shovels—

Mr. Rowntree: Yes, sir.

The Court: —and like testimony is introduced purely and solely as bearing on the ability—

Mr. Rowntree: That's right.

The Court: —of certain companies to have and to use and to hold—using real estate law—large mechanical equipment in the operation of coal.

Mr. Rowntree: That's correct, Your Honor, and to show the ease with which they could pay these wage increases.

The Court: I think I understand. Now, Mr. Combs, if you want to answer.

Mr. Combs: Just this much for clarification.

The Court: Yes, sir.

* * * * * * * * * *

Mr. Combs: I think it is the position as stated by the United Mine Workers that the evidence and the law
924 shows that they had nothing to do with the type of mining an operator wanted to engage in.

Now if he wanted to mechanize his mines, or if he didn't want to mechanize his mines, they had nothing to do with that legally or factually. The evidence will show that. I think we overlook that, just as a comment, they have shown that one of their operators that they put on the witness stand is very highly mechanized.

The Court: All right.

* * * * * * * * * *

Mr. Rowntree: "Mining bituminous coal in the northern West Virginia fields—in the rich Pittsburgh Seam to be more specific—is 'like taking candy from a baby.' Both are comparatively effortless.

"That was the simple analogy to be drawn following a personal visit to one of the world's most modern coal production facilities—the twenty million dollar Loveridge Mine and Preparation Plant of the Mountaineer Coal Company, a division of Consolidation Coal Company, located
925 near here.

"The extraction with ease of one of this nation's vital minerals has been achieved through the adaptation of technological advances by Consol in its ever-expanding program of modernization at a cost of close to twenty million dollars since 1947.

"Development of the Loveridge Mine in a completely virgin coal area covering approximately twelve thousand acres of the Pittsburgh Seam will yield about ninety million tons of coal, assuring thirty years of production at the rate of three million tons annually. These figures are based on reserves presently allocated to Loveridge but which could be extended.

"Consol's over-all reserves in the northern part of this state cover six counties and total more than 1.3 billion tons of recoverable coal. These reserves alone assure an adequate supply for the next hundred years based on present-day production rates.

"In its vast network of operations, Consol operates thirty-three mines in five states—Pennsylvania, Ohio, Tennessee, Virginia and West Virginia—with twenty-one of the mines having a potential annual productive capacity
926 in excess of one million tons."

I can't read my copy. Skipping a paragraph.

"In the mining of the Pittsburgh Seam, which has been described as 'the most valuable mine deposit in the world,'

Consol has developed complete mechanization of its underground facilities at its Loveridge Mine.

"Here, deep in the mountainous region of the state, all coal is mined by teams of trackless borer-type continuous mining machines. These machines are capable of advancing a face 13 feet wide and 7 feet high at the rate of 60 feet an hour.

"The productive capacity of one of these machines, operating under normal conditions in the Pittsburgh Seam, can reach 1000 tons per eight-hour shift, according to a spokesman of the company.

"While the continuous miner gouges and bites out the coal, tractor-mounted loading machine operate behind it and with gathering arms sweep up the coal and empty it by conveyor into 7-ton capacity shuttle cars.

"These shuttle cars, traveling at the rate of 350 feet per minute, deliver the raw coal to an extensible belt conveyor which pours it into 20-ton mine cars which transport it to the surface.

927 "While mining goes on underground at Loveridge, the company has the most up-to-the-minute ventilating system in operation at all times, for the protection of life and property."

Mr. Combs: Just a brief comment. The part that counsel was reading was taken from an article in the Mine Workers Journal by a Journal correspondent—written by a Journal correspondent, and its dateline is Fairview, West Virginia, and the article goes on for two pages. It describes mostly the coal mining operation at West Virginia by units of Consolidation Coal Company.

On the same page there is an article by George J. Curilla, Jr., Journal correspondent, with a dateline of Fairmont, West Virginia, and covers basically the same subject on the future of coal mining.

* * * * * * * * * * *

Mr. Rowntree: May it please the Court, and ladies and gentlemen of the jury, we offer as the next exhibit UMW

Journal of December 1, 1959, pages 14 and 15.

923 Mr. Combs: We object to this. In the first place, it is after the filing of the complaint, dated after that. In the second place, it is a speech or something made by the Pittston Company president. I don't think it is admissible until we find a conspiracy, in line with our previous objection.

The Court: Unless the jury finds from a preponderance of the evidence that there was a conspiracy and that the statement was made in furtherance of the conspiracy, you will not consider it for any purpose in this suit.

(Exhibit No. 47 was marked for identification and filed.)

Mr. Kramer: I guess your Honor noted the objection also as to date—subsequent to the institution of the suit and it is subsequent to the end of the alleged conspiracy.

The Court: It will have no bearing on the question of alleged damages in this case unless the conditions to which the statement refers existed during the period involved in this lawsuit; namely, February 14, 1954 until and including December 31, 1958; then you will not consider it for any purpose.

929 Mr. Rowntree: Some of the dates are mentioned in here as to what the conditions described pertain to, and there will be subsequent proof with respect to the company itself. I think the subject matter will show a condition existed at certain times and the jury can judge with respect to that.

The Court: During the period that is involved in this lawsuit?

Mr. Rowntree: That is right.

* * * * * * * * * * *

Mr. Rowntree: Statement of Joseph P. Routh, president of Pittston Company, in the third paragraph.

"In 1953 our coal division produced 50.3 percent of our net income, our trucking and warehousing division produced 19.9 percent, and our oil division 21.2 percent, the rest being in miscellaneous income. Our coal division percentage, of

course, is off so far this year due to the steel strike, but nevertheless bituminous coal is our most important division and thus I will discuss this phase of our business first.

"Our coal division is made up of the following operating companies: Clinchfield Coal Company Division, Elk River Coal and Lumber Co., Amigo Smokeless Coal Co., Lillybrook Coal Co.

"The Clinchfield Coal Co. Division, which is the most important, operates modern coal mines in Virginia, northern West Virginia and Tennessee. Our Clinchfield properties in southwest Virginia encompass the ownership of the mineral rights in approximately 300,000 acres with an estimated billion tons of coal reserves. This we believe to be the largest single block of coal under one ownership east of the Mississippi if not in the entire country."

Skipping one paragraph.

"I am sure that most of you have heard about our great new Moss No. 3 Mine, which was dedicated on November 18, 1958, and will be completed in the early part of 1960 at a cost of approximately $50 million. This mine of tomorrow, when finished, we are confident will be the finest bituminous coal mine in the world. It will produce approximately 45 tons per man per day as against the average in this country of a little over 11 tons per man per day and 1.5 tons per man per day in Europe and also in Russia. Its cleaning plant resembles a hugh factory and cleans, dries and sizes 25,000 tons of coal per day automatically with push-button controls. This plant, equipped with the most modern automatic and electronic devices, compares with the great modern manufacturing plants of America. This mine is now running at approximately 60 percent of capacity due to delays in completion caused by the steel strike. However, it is already producing up to 30 tons per man per day, and its costs per ton are fully up to our expectations. Our Moss No. 3 Mine, when finished, will produce six million tons of coal annually, of which approximately 1.25 million tons are under long-term contract to the new utility plant

of the American Electric Power Co. that has been built close by this mine."

Mr. Combs: If the Court please, as a matter of explanation, this is a re-print of part of the remarks made by Mr. George Routh. He is the chairman of the Board and president of Pittston Company.

These remarks were made before the New York Society of Security Analysts. It concerns the coal producing activities of the company, his remarks addressed to that, and he read excerpts from the remarks to these security analysts that covers two pages. Thank you.

Mr. Rowntree: On page 273.

(The reading of the deposition was continued.)

"Q. Mr. Lewis, do you recall that in 1959 the Landrum-Griffin Act was passed which required the filing
932 of financial reports by Unions? "A. I, of course, have had knowledge of the presence of the Act of Congress.

"Q. And the United Mine Workers did file a report under that Act."

* * * * * * * * * * *

935 "Q. Now, Mr. Lewis, in dealing with the funds and the assets of the International Union, the International officers of the Union acted in a fiduciary capacity, did they not? "A. Depending on what interpretation you put on the word 'fiduciary'.

"Q. Did they not act in the nature of Trustees of the funds? "A. That's right.

"Q. Do you recall that many of these transactions involving the Union funds—the particular transactions with Mr. Coalton of the National Bank of Washington, and Mr. Cyrus Eaton—in each instance the notes which represented the transactions contained a provision that the individual to whom the funds were advanced could surrender the collateral which had been put up with the Union and relieve himself of personal liability for the balance due on that note? "A. That is right.

"Q. Now, Mr. Lewis, don't you think that that was sort of a Heads-I-lose-Tails-you-win proposition? "A. No, sir.

"Q. Well, will you explain that?

936 "A. It was simply a commonsense arrangement and there was no desire on the part of the mine workers, of those gentlemen acting in the individual case, to load them with a possible liability at a time of personal stress to themselves when they would be compelled to take the loss because of the market price on those securities.

"The values of those securities are their intrinsic value; and the Trustees were perfectly well satisfied with their knowledge of the future value of those securities and were not concerned with fluctuations in the market price because there was no intent to make a profit on the securities by selling them. If it were so we could easily have profited because the stock advanced around forty on the market, for West Kentucky, after acquisition of these shares.

"Mr. Kramer: In the use of the word 'Trustees' as you have used it here, you are not using it with reference to the Welfare Fund at all.

"The Witness: Oh, no.

"Mr. Kramer: You are using it with reference to the United Mine Workers alone.

"The Witness: That is correct, sir.

* * * * * * * * * *

937 By Mr. Rowntree:

"Q. Mr. Lewis, the rise of that West Kentucky stock to a price of 40, was that not immediately after the acquisition of that large block of shares? "A. I do not recall the exact period of time that elapsed before the rise came.

"Q. Did not that stock decline in value then down to a range of ten or twelve dollars per share? "A. On the market? Yes. But that is not the value of the stock in the minds of the Trustees, and we are not concerned with the market price at the current time.

* * * * * * * * * *

938 "Q. Does not the value of the coal properties

depend upon the ability to sell the coal? "A. Only the current value is all.

"Q. And the ultimate value would be dependent upon the ability in the future to take over the market, insuring the ability to sell the coal? "A. No, not in any sense of the word.

"Q. Is it not true that a buyer of coal lands and coal mining plants would be interested in the salability of the coal on those lands? Isn't that a major part of the analysis of value that a buyer would make? "A. You are asking me to define the intent and the purposes and opinions of people who invest in coal mines and whether or not they would not be concerned.

"There is no rule by which one can judge those things because much acreage of coal lands is purchased not for exploitation but to preserve the continuity of operations for that company in the future, the future value. The length of its life makes the investment more valuable.

"I can recall when the United States Steel Corporation had investments in coal lands that they did not expect to use in less than one hundred years. A hundred years more reserve supply of metallurgical coal.

"I do not know that they now have such outstand-
939 ing reserves. Time has made changes.

"I know of operating coal companies now, and I know of railroads, and I know of land companies that have in their possession vast acreages of reserve coal lands that possibly will not be exploited or mined in the next fifty or seventy-five years.

"So the answer is no. It is not necessarily concerned with current practice or current salability of tonnage of coal.

"Q. But the future prospect of a market being available for the sale of coal would be a strong question on the value of those coal properties, would it not? "A. I wouldn't think so, necessarily; because no one buys coal lands or invests in the erection of mining units, under current conditions, solely with regard to the present price of coal in the

market or the volume of demand. He is building for a long time, of necessity.

"I know a railroad that has over a half million acres of undeveloped coal lands that pays taxes on those lands year after year and charges them up to the gross cost of operating the railroad.

"There is no uniform method of conducting the business of the corporation.

"Q. Are these companies that you refer to interested in acquiring these great tracts of coal land because
940 the available coal lands in the country have become scarce? "A. Because what?

"Q. Because the available lands containing marketable coal have become rather scarce? "A. I wouldn't know on that, as an abstract question.

"Certainly the country has vast coal reserves. Coal is our most valuable national asset.

"When oil wells run dry and gas wells fail, there will still be coal, convertible into gas and convertible into oil, convertible into many other things. And I think that our shortage of coal, generally speaking—steam coal—would probably cover our requirements for two thousand years at the present rate of consumption.

"That is not true with regard to metallurgical coal. There is a limited acreage of that in the United States. It is being consumed faster and utilized more for coal.

"Much of our export coal is metallurgical coal."

* * * * * * * * * *

"But from a commercial, competitive standpoint
941 it costs too much. Progress may be made in the future. I think some experiments are taking place now. Dow Chemical is going to take a half million gallons a day on a project now out on the Gulf Coast, for which they will pay 30 cents a thousand gallons, while the domestic consumers in the cities affected will pay 20 cents.

"There is the element of cost, and each enterprise that

needs water in large quantities makes the choice of what they will do.

"The same way with regard to metallurgical coal.

"We have the lignite reserves. We have the sub-bituminous reserves and the bituminous. The metallurgical. The high and low volatile. And we have semi-anthracite in the western areas and we have anthracite in Pennsylvania. Those are the gradations in the types of coal. Each has its purpose. Each is utilized according to the needs of the economy and the rules governing from the standpoint of cost in the operation of any business.

"Q. Mr. Lewis, has the United Mine Workers of America been satisfied with the management of West Kentucky Coal Company and Nashville Coal Company since the Union acquired stock in those companies? "A. I could not express that in the terms of being 'satisfied' or 'dissastified'. The

942 United Mine Workers of America had nothing to do with the management of West Kentucky Coal Company. In no sense of the word. In the past or now. The same as with all other companies in the industry.

"We decline to assume the obligations of management; and the operators have always helped us in that declination and have proudly proclaimed that they owned the properties and would do as they pleased. And we have helped them to do that. Sometimes to their disadvantage.

"Q. But the Union has invested millions of dollars in those properties and has assumed the position of an owner or partial owner of those companies; is that not true? "A. The Union holds some securities and investments in West Kentucky Coal Company; and like our investments—the Trustees of the United Mine Workers—in other units of American industry, we do not undertake to assume the responsibilities of management in any way.

"Our private opinions of the efficiency of this manager or that manager in the industry is independent and separate and apart and has nothing to do with the policy of the United Mine Workers.

"Conceivably when one knows the record of an operating man in the industry in any company, one subconsciously forms an opinion as to his ability or his accomplishments; and those opinions are of no value to anybody and are not publicly uttered or privately uttered by representa-
943 tives of the United Mine Workers because we have no reason to try to prejudice the position of any man in any position in industry. It is a commonsense policy.

"Q. The International officers of the Union, as Trustees of Union funds, would have an obligation to check upon and to pass upon and to take steps when need be, to preserve the assets in which they had invested Union funds; is that not true? "A. Sir, I have a full appreciation of the obligations of the Trustees acting in a fiduciary capacity.

"It has been my lot to be a Trustee in a number of instances. I have an understanding of the obligations placed upon fiduciary Trustees under the law and the statutes made and provided. And all those things are taken into consideration when the Trustees exercise their judgment.

"The Trustees of the United Mine Workers are satisfied with the investment in the West Kentucky Coal Company and are quite content in the belief that, in the end, it will prove to be immensely profitable to the United Mine Workers of America in a financial sense; a wise investment of the funds."

Mr. Rowntree: That concludes our part.

Mr. Kramer: Now I call on counsel, under Rule 24(d)4 to read the cross examination.

Mr. Rowntree: You want me to read it?
944 Mr. Kramer: That is what the rule says.
(The reading of the deposition was continued.)

"CROSS EXAMINATION

By Mr. Combs:

"Q. Mr. Lewis, counsel has asked whether or not the Union has been aided in its organizing drives by certain big operators. They have submitted for the record here

certain excerpts from the Journal and different publications with reference to the acquisition of the Elk River Coal Company by the Pittston Company; the acquisition by the Peabody Coal Company of the St. Ellen and Millstadt Mines; and the purchase of certain stock by the United Mine Workers in West Kentucky.

"I ask you whether or not there was any understanding between you and any of these operators at any time or whether there was any concerted agreement that these companies would acquire these mines for the purpose of helping in these organizing drives? "A. No.

"Q. Now with reference to the question of the policy of the United Mine Workers over the years to demand equal pay for equal services and to secure a minimum uniform wage, I ask you whether or not—from your experience as at one time the president of the CIO for many years, and as an officer and official of the American Federation
945 of Labor for many years—whether or not this same policy or another policy exists in those labor organizations concerning a minimum wage for equal service? "A. To my knowledge, practically every organization in the CIO and the American Federation of Labor, and in many so-called independent unions, were unanimous in their opinion on that subject and were proponents of the idea; and they sought its passage by Congress in every proper way. And I personally have testified at some length before committees of Congress, urging the enactment of the minimum wage law in the United States, which finally was enacted in the form of the Walsh-Healey Bill.

"So Congress enacted the law and, in the opinion of this witness, it is an absolute and unqualified right on the part of any citizen to avail himself of the protection and privilege of an Act passed by the Congress of the United States, which is what we undertook to do for the mining interests.

"Q. For the purposes of the record, Mr. Lewis, how long were you connected with the CIO, officially? "A. Two years of preparation antecedent to its formation; five years

as president. I left it with five million members and a balanced budget for the preceding year.

"Q. Now did you hold certain official positions in the American Federation of Labor and how long? "A.
946 It varied at different times. I was one of the vice presidents of the American Federation of Labor and a member of the Executive Board.

"Q. And from your experience, based on this experience, you are familiar with the objectives of the labor movement in general on this uniform wage scale? "A. I so believe."

Mr. Rowntree: That concludes the deposition.

* * * * * * * * * * *

947 Mr. Rowntree: Interrogatory 63, of Set one, at page 21. This is addressed to the International Union, Your Honor.

"File a list of the property, stocks, bonds, cash and assets owned by the United Mine Workers of America, independent of any assets owned by the Welfare and Retirement Fund, together with the cost of each item listed."

"Answer: Following —

Mr. Kramer: Just a moment.

Your Honor, we object to this introduction of the interrofiatory and its answer for the reason that it is wholly irrelevant and immaterial for any issue in this case.

The Court: Well, now, Mr. Kramer, I know that you are familiar with the rule of law that states that testimony going into the assets of a defendant charged with the violation of Section One of the Sherman Act is competent as bearing on the ability of such corporation or part-
948 nership or concern to monopolize part of an industry, and I assume that that rule would be applicable in this case.

If not, why not?

I am sure it is applicable insofar as the private corporations are concerned, and if it should appear that the union was wrongfully dealing with these private corporations, or in violation of the anti-trust laws, wouldn't such testimony

be competent for whatever bearing, if any, it may have on that question?

Mr. Kramer: To be frank with Your Honor, I know of no rule of law or rule of evidence that would change the applicability of what Your Honor states, because the United Mine Workers of America are a party defendant rather than some corporation being a party defendant.

But there is this proposition, Your Honor, that in the Clayton Act, we, the provision that exempts unions—

The Court: Exactly, under Section Six of the Clayton Act.

Mr. Kramer: Yes, Your Honor.

The Court: The union is exempted from the restrictions of the anti-trust laws provided it appears to the jury
949 that the activities in which the union was engaged was to promote the legitimate objectives of the union, namely to increase the wages of the employees, to better the working conditions and kindred matters that relate to employees.

Mr. Kramer: Now, Your Honor, we followed that with this provision, and therefore the accumulation of assets by the United Mine Workers does not indicate a violation of the anti-trust laws.

The Court: No, but might they not, if used wrongfully or in agreement with private business, indicate the ability of the union as well as private business to monopolize a certain industry?

For example, a little grocery store here in Knoxville with, say, five hundred dollars worth of merchandise couldn't monopolize any part of the grocery industry, and maybe the industry is so small that it couldn't, under any stretch of the imagination, monopolize any segment of the industry.

But the cases hold, Mr. Kramer—the reason I know, I have just gone through another trial involving the anti-trust laws, in the roofing industry—and the cases definitely hold that evidence bearing on the size, that bears on the size of the concern that is charged is competent.

950 Mr. Kramer: I agree that that is the law generally. We think, Your Honor, that the provision of Section Six—

Mr. Combs: Sixteen.

Mr. Kramer: Whatever that section is, takes this union, or a labor organization, out from under that provision. Now that is our insistence here, Your Honor. We think it takes it out from under.

Generally that kind of evidence is admissible. We don't say by virtue of the Clayton Act it is admissible.

Then our second objection, the date of the ownership of these stocks, according to this evidence, was whatever it is, was July 1, July 31 —

Mr. Rowntree: July 1.

Mr. Kramer: July 1, 1958, which is practically at the end of the alleged period of the conspiracy, but for both reasons, we do insist that under the provisions of the Clayton Act, the general rule does not apply.

• • • • • • • • • • •

951 The Court: The Court overrules the objection.

Mr. Rowntree: The answer to the interrogatory:

"Following is a list of the property, stocks, bonds, cash, and assets owned by the United Mine Workers of America as of July 1, 1958:

"$2,153,279.50, Chertsey Corporation, loan; collateral 84,560 shares West Kentucky Coal Company stock."

• • • • • • • • • • •

Mr. Rowntree: I think it might be well if I utilize this little chart here, because these are the figures that we are particularly interested in in this case.

• • • • • • • • • • •

953 Mr. Combs: The only comment on the chart that counsel has, Your Honor, and I just have seen it, what I wanted to be careful about, and I'm sure counsel does, he says it is marked as the interests of the United Mine Workers in West Kentucky Coal and Nashville Coal Company.

Now in citing the shares of stock, for instance to certain corporations that the Mine Workers have collateral, he leaves out the loan part that is contained in our answers to the interrogatories, which isn't a true reflection of
954 what we have said.

If he wants to put some other connotation on it, it is different, but for instance, when they are talking about Chertsey collateral, that is all he says. Now the interrogatory shows that that was a loan to Chertsey. He's left the word "loan" out, and he doesn't truly reflect the interest, is my point.

* * * * * * * * * * *

The Court: Why don't you write "loan" in there, Mr. Rowntree?

* * * * * * * * * * *

957 Mr. Kramer: Oh, yes. I think these figures are about correct from a hurried look at this.

Here is the proposition. When you say X shares of something, some company, West Kentucky Coal as an example, and it says collateral for a loan made to somebody and then shows the amount of the loan, it does not show the equity that may exist in the X company, West Kentucky Coal Company. It doesn't show that.

What it shows here is that there was a loan of X dollars made to Mr. Colton or Mr. Eaton or somebody else, say a loan of two million dollars, whatever it may have been, and they put up a certain number of shares of West Kentucky Coal Company or some other company as collateral. That does not show the interest—what we are saying, so that we are clear—that does not show the interest United Mine Workers had in West Kentucky Coal or whatever other company it was whose stock was put up.

The Court: Ordinarily it would not have any interest in the coal company unless title to that stock was trans-
958 ferred to the union.

Mr. Kramer: That is correct.

The Court: And in order for that to be done, I take it the borrower would have to default on the loan.

Mr. Kramer: Ordinarily that is true, and what this is is simply—this list here simply shows that loans of X dollars was made to Cyrus Eaton or somebody else, and that Mr. Eaton put up so many shares of stock of West Kentucky as the collateral for the loan.

That is all it shows.

The Court: The owner of that stock continued to be the owner of it unless he defaulted on the loan and the title to the stock was divested out of the person who borrowed the money and vested in the union.

Mr. Combs: That is right, your Honor, and as pointed out awhile ago, that is the reason why I want the loan to be reflected because it is a question of fact here of whether or not the union controlled these companies and there is a difference in a loan and owning stock.

* * * * * * * * * * *

959 (Exhibit No. 48 was marked for identification and filed.)

The Court: You may put it on the board.

* * * * * * * * * * *

Mr. Rowntree: Continuing, the answer. Starting off again.

"$2,153,279.50—Chertsey Corp.—loan—collateral, 84,560 shares West Kentucky Coal Co. stock.

"$2,287,809.32—Sagamore-Summit Corp.—loan—collateral, 84,912 shares West Kentucky Coal Co. stock.

"$2,513,895.18—Cyrus S. Eaton—loan—collateral, 90,600 shares West Kentucky Coal Co. stock.

"$1,207,900.33—Tower Industries, Inc.—loan—collateral, 59,928 shares West Kentucky Coal Co. stock.

"$1,006,875.00—Harrison Combs—loan—collateral, 25,000 shares West Kentucky Coal Co. stock.

960 "$1,506,875.00—B. L. Colton—loan—collateral, 50,000 shares, West Kentucky Coal Co. stock.

"$2,354,522.04—85,400 shares West Kentucky Coal Co. stock.

"$2,500,000.00—50,000 shares West Kentucky Coal Co. preferred stock.

"$2,625,000.00—Chertsey Corp.—loan—collateral, 25,000 shares Nashville Coal Co., Inc., Stock.

"$1,050,000.00—Sagamore-Summit Corp.—loan—collateral, 10,000 Nashville Coal Co., Inc., stock.

"$1,050,000.00—Tower Industries, Inc.—loan—collateral, 10,000 shares Nashville Coal Co., Inc. stock.

"$3,609,035.87 — Cyrus Eaton—loan—collateral 102,427 shares C. & O. Ry. Co. stock.

$780,948.93—Chertsey Corp.—loan—collateral, 22,500 shares C. & O. Ry. Co. stock.

"$4,390,009.88—124,927 shares C. & O. Ry. Co. stock.

"$690,850.00 — Cyrus Eaton — loan collateral, 20,000 shares Cleveland Elec. Illum. Co. stock.

961 "$1,162,894.31 — Cyrus Eaton — loan — collateral, 27,500 shares Kansas City Power & Light Co. stock.

"$290,374.73 — Cyrus Eaton — loan — collateral, 10,000 shares Union Electric Co. stock; 333 shares Hevi Duty stock.

"$9,067,984.62 — 287,884 shares The National Bank of Washington stock.

"$12,428,241.99—B. L. Colton—loan—collateral, 275,410 shares National Bank of Washington stock.

"$1,666,700.00—16,667 shares American Coal Shipping, Inc., stock.

"$1,666,700.00—A. H. Bull Steamship Co.—loan.

"$666,680.00—A. H. Bull Steamship Co.—loan.

"$550,000.00—Chertsey Corp.—Deposit on interest.

"$13,355.06—C. R. Griffiths—loan.

"$3,825,706.67—Anthracite Health and Welfare Fund—loan.

"$1,128,950.73—Lewmurken, Inc.—loan.

"$1,000,000.00 — Charles Murchison — loan — collateral, Capital airline stock.

"$13,318,417.88 — U. S. Treasury bonds — cost
962 value.

"$2,163,782.57—Pension Fund Account.

"$14,448,465.47—Amounts on deposit and cash on hand.

"$500,000.00—District 18 Welfare and Retirement Fund —loan.

"$2,771,000.00—Real Estate in Washington and District buildings owned by UMWA.

"$75,000.00—Office equipment."

Total, $96,471,254.10.

"NOTE: This does not include loans totalling $20,671,-966.88 made to District 50 through the years."

We turn to the back part of the interrogatories on page 38 of that set.

Mr. Combs: Still on interrogatory one?

Mr. Rowntree: That's right.

Turning to page 39; the question is on 38, I am sorry.

"It is requested that the cross-defendant, United Mine Workers of America, furnish a statement or produce the records showing in detail the nature of, and the purposes of the following loans or pledges of security which have been disclosed in the report filed by the Union pursuant to
the Labor Management Reporting and Disclosure
963 Act of 1959:

"a. The $15,000,000.00 of Union assets pledged as security for bank loans 'to companies engaged in coal mining or allied industries.' "

Answer: "Pledged as security for bank loan to West Kentucky Coal Company: $5,200,000.00 United States Treasury Bonds—September 21, 1956.

"Purposes of the pledge—at the request of West Kentucky Coal Company,—United Mine Workers made this pledge in order that this company could expand its holdings and its operations to provide employment for employee members of United Mine Workers of America.

* * * * * * * * * *

Mr. Rowntree: There is on page 40 answer to Question 4, or item four.

"Pledge of security for bank loan to North Fork Coal Company: $1,500,000.00"—

Mr. Kramer: We object to this, your Honor. If
964 your Honor please, if you have that in front of you it is on page 40—because of the date, and this, your Honor, could not under any theory of what has been said, as I understand it, be admissible here.

A loan was made long after the date of the alleged conspiracy. It could not throw light on the act, or could not during the period claimed, and we object seriously, your Honor, to the introduction of this testimony.

Your Honor notes the date.

Mr. Rowntree: We have taken two depositions on this subject.

Mr. Kramer: That would not, your Honor, make it admissible, your Honor, what occurred on this financial deal which may have been long subsequent to the date of the termination of the alleged conspiracy.

The Court: Well, Mr. Rowntree, why do you want to get into matters that—

Mr. Rowntree: It does have to do with time subsequent to December 31, 1958, but we think that it shows a pattern of continuing conspiracy along the lines that we charge in this case with particular reference to the TVA market, and the conduct of this particular transaction, I think
965 would be proof of the nature and existence of the type of conspiracy we charge in the preceding years.

Mr. Kramer: It is not claimed that financial transactions of this type of this company were made prior to the terminatio nof the conspiracy, therefore the theory even of showing a pattern could not apply.

This is a single, solitary transaction so far as this record is concerned that occurred five, six months, whatever it is, five and a half months, subsequent to the termination of the alleged conspiracy.

Mr. Rowntree: We don't say that conspiracy terminated, your Honor. We say it is going on today, the same conspiracy. Of course, our company was run out of business.

966 The Court: This testimony has no bearing on the question of alleged damages, because it is beyond and outside of the alleged damage period. You will not consider this testimony as bearing on the question of alleged damages, but it may be considered on the question of whether there was a pattern set by the UMW and one or more of these coal companies, and whether or not that pattern was followed during the period that is involved in this lawsuit and whether it continued beyond the period involved in the lawsuit. That is the only purpose of admitting this type of testimony.

Mr. Rowntree: "Pledge of security for bank loan to North Fork Coal Company:

"$1,500,000.00—Certificate of Deposit—May 11, 1959."

The Court: Who is the North Fork Coal Company?

* * * * * * * * * * *

967 Mr. Rowntree: "This company is located in the depressed coal areas of eastern Kentucky. It applied for a line of credit in the above amount, to be used for the purpose of purchasing coal leases and coal operating units in the Hazard Field of eastern Kentucky. The plans involved the promotion of coal land leases with reserves of 65,000,000 tons of minable coal. The purpose of the United Mine Workers in making this pledge was to try to expand the employment opportunities for its employee members in this depressed coal area."

* * * * * * * * * * *

"The $20,000,000.00 loaned by the Union to individuals not named."

Paragraph 4-b:

"1. Loans in the total amount of $14,685,116.99 were made to B. L. Colton:

968 "$12,428,241.99—B. L. Colton, commencing on

March 11, 1954—collateral 275,410 shares stock National Bank of Washington.

"$2,256,875.00—B. L. Colton, commencing on October 28, 1955—collateral 75,000 shares stock West Kentucky Coal Company.

"The purposes of these loans were for investment and to enhance employment opportunities of the members of the United Mine Workers of America: Investments by Mr. Colton were primarily in stock in The National Bank of Washington and West Kentucky Coal Company.

"2. Loans in the total amount of $6,122,930.05 were made to Cyrus S. Eaton:

"$1,793,750.00—Cyrus S. Eaton, commencing February 7, 1951—collateral 50,000 shares Chesapeake & Ohio Railway Co. stock.

"$1,815,284.87—Cyrus S. Eaton, commencing February 7, 1951—collateral 52,427 shares Chesapeake & Ohio Railway Co. stock.

"$2,513,895.18—Cyrus S. Eaton, commencing October 9, 1951—collateral 90,600 shares West Kentucky Coal Co. stock.

"These loans were made primarily for the purposes of investment, and to enhance employment opportuni-
969 ties of its members. The principal investments by Mr. Eaton from these loans were in stock of the Chesapeake & Ohio Railroad Company and the West Kentucky Coal Company."

We will skip the next item, and the next.

Paragraph 4-c: "The $13,500,000.00 loaned by the Union to unnamed business enterprises."

We will skip the first paragraph.

"2. Loans in the total amount of $5,684,228.43 were made to Chertsey Corporation:

"$780,948.93—Chertsey Corporation, commencing February 7, 1951—collateral 14,783 shares Chesapeake & Ohio Ry. Co. stock.

"$2,750,000.00—Chertsey Corporation, commencing Sep-

tember 5, 1955—collateral 25,000 shares Nashville Coal, Inc. stock.

"$2,153,279.50—Chertsey Corporation, commencing October 9, 1954—collateral 42,280 shares West Kentucky Coal Co. stock.

"These loans were made primarily for the purposes of investment and to enhance employment opportunities of the members of the United Mine Workers of America.

"3. Loans in the total amount of $3,387,809.32 were made to Sagamore-Summit Corporation:

970 "$1,100,000.00 — Sagamore-Summit Corp. commencing on September 6, 1955—collateral 10,000 shares Nashville Coal, Inc. stock.

"$2,287,809.32—Sagamore-Summit Corp. commencing on October 9, 1951—collateral 84,912 shares West Kentucky Coal Co. stock.

"These loans were made primarily for the purposes of investment and to enhance employment opportunities of the members of the United Mine Workers of America.

"4. Loans in the amount of $2,307,900.33 were made to Tower Industries, Inc.:

"$1,100,000.00—Tower Industries, Inc., commencing September 6, 1955—collateral 10,000 shares Nashville Coal, Inc. stock.

"$443,223.90—Tower Industries, Inc., commencing October 9, 1951—collateral 25,300 shares West Kentucky Coal Co. stock.

"$77,938.32—Tower Industries, Inc., commencing October 9, 1951—collateral 5,200 shares West Kentucky Coal Co. stock.

"$18,847.04—Tower Industries, Inc., commencing October 9, 1951—collateral 1,300 shares West Kentucky Coal Co. stock.

"$176,461.07—Tower Industries, Inc., commenc-

971 ing October 9, 1951—collateral 8,128 shares West Kentucky Coal Co. stock.

"491,430.00—Tower Industries, Inc., commencing October

9, 1951—collateral 20,000 shares West Kentucky Coal Co. stock.

"These loans were made primarily for the purposes of investment and to enhance employment opportunities of the members of the United Mine Workers of America.

"5. Loans in the total amount of $1,528,950.73 were made to Lewmurken, Inc. commencing on August 12, 1941. These loans were made primarily for the purposes of investment and to enhance employment opportunities of the members of the United Mine Workers of America.".

* * * * * * * * * * *

972 Mr. Rowntree: May it please the Court and ladies and gentlemen of the jury, we take up Set No. 2 of interrogatories, addressed to the international union.

Mr. Kramer: You are reading Interrogatory No. 1?

Mr. Rowntree: "Interrogatory 1:

"Will you kindly attach hereto as collective Exhibit 1 to these interrogatories copies of the underlying papers by which the following transactions were consumated, or which represent the legal rights of the parties with respect to the following transactions; and if the bulk of these papers would impose unreasonable hardships on the Union, will you kindly make these papers available for inspection and copying; the transactions involved being as follows:

"(a) One Million Seven Hundred Ninety-Three Thousand Seven Hundred and Fifty Dollars ($1,793,750) loaned to Cyrus S. Eaton —"

973 Mr. Kramer: Now, your Honor, that goes far as to disclose the name. Mr. Eaton is not a co-conspirator and is not charged with being a co-conspiration. It seeks to elucidate in answer from this the type of collateral, or as he says the underlying papers that were involved in connection with these loans.

We say it is irrelevant and immaterial for any purpose, your Honor, and the facts should not be admitted.

Mr. Rowntree: If your Honor please, we charge that the company of which Mr. Eaton is chairman of the board is a

co-conspirator, West Kentucky Coal Company. The nature of these transactions is what we go into, particularly in the deposition of Mr. Eaton, and we have to get at the fundamental papers to do it.

The Court: Objection overruled. Go ahead.

Mr. Rowntree: "(a) One Million Seven Hundred Ninety-Three Thousand Seven Hundred and Fifty Dollars ($1,793,750) loaned to Cyrus S. Eaton, commencing February 7, 1951, secured by collaterial of 50,000 shares Chesapeake & Ohio Railway stock, and the One Million Eight Hundred Fifteen Thousand Two Hundred Eighty-Four Dollars and Eighty Seven Cents ($1,815,284.87) loaned to Cyrus S. Eaton commencing February 7, 1951, secured by collateral of 52,427 shares of Chesapeake & Ohio Railway Company stock.

"See attached Exhibit 1-A."

974 Mr. Combs: May it please the Court, I would like to add in addition to the objection, it discloses now, the question does that they are talking about transactions involving Chesapeake & Ohio Railway Company stock and that company has nothing to do with this case, and I don't think it is proper to introduce that. And is not claimed to be a conspirator.

Mr. Rowntree: We are seeking the relationship between Mr. Eaton and the international union, which—all of these transactions are in the same form. It is a rather unusual form. We have examined Mr. Eaton with respect to the style of these transactions. Many of our questions are concerning the style of the C & O transaction, which is identical with the type and style of the West Kentucky transaction on the face of the notes.

There is probative value in our questions with respect to the C & O stock upon eht nature of these transactions, the nature of the interest that the United Mine Workers had under these transactions in West Kentucky Coal Company.

The form of the notes—I might say this, each of them has this type of provision in it, quoting—

Mr. Kramer: Before we express that type, your
975 Honor, I have no objection to your Honor taking it and looking at the provision so that your Honor may intelligently rule upon the objection.

Mr. Rowntree: I don't know whether you can read it.

(Paper given to the Court.)

* * * * * * * * * * *

The Court: Objection overruled. Gentlemen, this
976 is a part of the story, whatever bearing it may have on this alleged conspiracy, the jury may consider.

Mr. Rowntree: We will offer this as Exhibit 49. Let me designate this by numbers.

Exhibit 49 is a promissory note, February 7, 1958, executed by Cyrus S. Eaton, in the amount of $1,793,750.00.

* * * * * * * * * * *

Mr. Rowntree: And also promissory note, January 26, 1958, executed by Cyrus S. Eaton in the amount of $1,815,-284.87.

Mr. Combs: May our objections run, Your Honor, through all of these notes that just had to do with the so-called collateral?

977 The Court: Yes, sir.

(Exhibit No. 49 marked for identification and filed.)

* * * * * * * * * * *

The Court: Now, members of the jury, unless these notes are connected up in some way to the alleged monopoly or attempted monopoly that is charged in this cross action, then they will not be considered by the jury. This evidence will not be considered by the jury for any purpose unless the evidence has some bearing on this monopoly question or on the alleged restraint of interstate commerce.

In that connection it is a violation of the anti-trust laws for a union to aid or abet a private operator, private business to monopolize or attempt to monopolize an industry that is engaged in interstate commerce.

Now if this testimony or these exhibits have any bearing upon those issues, then the testimony may be considered by

the jury. If not, if the jury finds that these notes, or this indebtedness to which the notes, or which the notes
978 purport to evidence, have no relation to any alleged monopoly, or alleged restraint of trade upon the part of these alleged co-conspirators, then the testimony has no probative value in this case and will not be considered by the jury for any purpose.

* * * * * * * * * * *

Mr. Combs: And I would like to point out in connection with that that the C&O Railroad is a coal-hauling railroad, it hauls other products and passengers, and all. It is a big railroad. Its tariffs and all are set by the Interstate
979 Commerce Commission. Its stock is on the board of Exchange, Securities and Exchange, big market board. These transactions, this is all counsel can show, and how in the world they can have anything to do with this case, I don't see.

The Court: If that is all that can be shown, they have nothing to do with the case. The Court so tells the jury at this time, because the Court can see no relationship between the Chesapeake and Ohio Railroad and the issues that are involved in this case. Unless something can be shown to connect the Chesapeake and Ohio up with the issues in this case, then we are taking up time for no —

Mr. Rowntree: There is also —

The Court: —shall I say legitimate purpose?

Mr. Rowntree: That is a good word.

There is also involved, Your Honor, the relationship between Mr. Eaton and the United Mine Workers of America, Mr. Eaton being the Chairman of the Board of the West Kentucky Coal Company and Nashville Coal Company, whom we say were used as a "fighting ship" in the coal industry in the Tennessee Valley to hurt the small operators.

The Court: Now you say Mr. Eaton, what connection does he have with West Kentucky?

980 Mr. Rowntree: He's Chairman of the Board.

The Court: Eaton, Chairman of the Board of West Kentucky.

Now, what relation does he have with this other coal company you mentioned?

Mr. Rowntree: Nashville Coal Company, Chairman of the Board.

The Court: Chairman, Nashville Coal Company.

Now where is the Nashville Coal Company located? Sounds like it was located at Nashville. I thought they had a Bluegrass Company and walking horses?

Mr. Rowntree: It is located in West Kentucky in Madisonville, Kentucky, in the offices of West Kentucky Coal Company.

The Court: Where is the West Kentucky Coal Company located?

Mr. Rowntree: The West Kentucky Coal Company is located at Madisonville, Kentucky.

The Court: Madisonville, all right.

Mr. Rowntree: That is over in West Kentucky.

The Court: All right.

Mr. Rowntree: We offer as next exhibit, Exhibit 50, letter, United Mine Workers of America to the National Bank of Washington, without date.

The Court: Yes, sir.

981 (Exhibit No. 50 marked for identification and filed.)

* * * * * * * * * *

982 Mr. Rowntree: I offer as the next exhibit note of B. L. Colton of March 15, 1954 in the amount of $1,320,750.00; one note of B. L. Colton of April 26, 1954—

Mr. Combs: I just want to point out there are some notations on the copy of the notes, and that is the only one we have available and I think counsel will stipulate that the notations are not parts of the notes. I think it is for the information of the bookkeeper or somebody else. It is a pencil notation on the first one.

* * * * * * * * * *

Mr. Rowntree: —in the amount of $9,170,487.00; and note dated September 15, 1955, $2,754,105.00, all of which papers were previously marked as Exhibit 1-C to the set 2 of interrogatories. Exhibit No. 51.

Mr. Kramer: May it please the Court, the last note that counsel has tendered, dated September 15, 1955, has to do with collateral posted in the National Bank of Washington.

I do not think this transaction has anything, any
983 possible relation to this suit, and we are objecting to this. It is simply a transaction between Colton and the United Mine Workers of America and relates to stock in the National Bank of Washington.

The Court: It should not go into the record if it has no bearing on any of the issues, Mr. Rowntree.

Mr. Rowntree: The National Bank of Washington is the bank which made some loans in this record in the coal industry.

It is our position that the United Mine Workers of America owned a very substantially large block of the National Bank of Washington Stock; and that at one time at least, that it was the holder of over 50 per cent of the stock until these transactions in which they loaned the money to Mr. Colton, the nature of which we explored in the deposition of Mr. Colton.

The Court: Who is Mr. Colton?

Mr. Rowntree: He is president of the National Bank of Washington. It is a rather complicated transaction.

The investment powers of the United Mine Workers of America include consideration of the investment powers of this National Bank of Washington.

984 Mr. Combs: May I make this observation, your Honor. The National Bank of Washington was chartered by an Act of Congress. It is one of the oldest banks in Washington. It is controlled by the Federal Reserve, the same as any other bank, and the fact that the United Mine Workers may own or may not have owned stock in the National Bank of Washington under those conditions, I

do not see how it could have any relevancy to this case.

Mr. Rowntree: The National Bank of Washington made loans to the West Kentucky Coal Company.

Mr. Combs: Of course, it is a public institution. It makes loans to anybody that has the collateral.

Mr. Rowntree: It makes loans which are supported by pledges of United Mine Workers of America assets. There is close affiliation between the bank and the union.

Mr. Combs: That has nothing to do with this particular transaction. This is just a straight out transaction between Mr. Colton and the United Mine Workers and the Bank of Washington stock is pledged for the loan of Colton.

Mr. Rowntree: We are investigating the power of the union, your Honor, to have an economic force in the industry, the extent to which it has used that economic
985 force and this is part of it, a substantial part of it.

The Court: Overruled. Go ahead.

(Exhibit No. 51 was marked for identification and filed.)

Mr. Rowntree: We offer as the next exhibit, No. 52, note of Mr. Colton dated December 30, 1959 in the amount of $750,000; note dated October 28, 1958 in the amount of $631,875.00; note dated March 1, 1956, signed by Mr. Colton in the amount of $875,000.00.

Mr. Kramer: One of these notes I notice, if I did not misunderstand the date, was long subsequent to the date of any alleged conspiracy, and for that additional reason as heretofore given we except to it.

The Court: Mr. Rowntree, are these personal transactions between Mr. Colton and the bank?

Mr. Rowntree: These transactions deal with the purchase of West Kentucky stock with the funds of the United Mine Workers.

The Court: Well, overruled, gentlemen.

(Exhibit No. 52 was marked for identification and filed.)

* * * * * * * * * * *

987 Mr. Rowntree: We offer as the next exhibit, No. 53, a note in the amount of $1,006,875, concerning se-

VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1964

No. [redacted] 48

UNITED MINE WORKERS OF AMERICA,
PETITIONER,

vs.

JAMES M. PENNINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 17, 1964
CERTIORARI GRANTED MAY 18, 1964

No. 927

Office-Supreme Court, U.S.
FILED
MAR 17 1964
JOHN F. DAVIS, CLERK

Joint Appendix

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 14,809

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admrx. of the Estate of Burse Phillips, deceased,
Cross-Plaintiffs-Appellees,
v.
UNITED MINE WORKERS OF AMERICA,
Cross-Defendant-Appellant.

No. 14,810

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, as Trustees of the UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND,
Plaintiffs-Appellees,
v.
JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admrx. of the Estate of Burse Phillips, deceased,
Defendants-Appellants.

Appeals from Judgments and Orders of the United States District Court for the Eastern District of Tennessee, Northern Division

---

VOLUME II
Pages 513a-1000a

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

TABLE OF CONTENTS OF APPENDIX

	Page
Caption in District Court	1a
Relevant Docket Entries	2a
Complaint	9a
Answer of Defendants	11a
Counterclaim	18a
Cross-Claim against Plaintiffs and United Mine Workers of America	19a
Order, February 19, 1958	21a
Amendment to Answer	21a
Motion of Cross-Defendant, United Mine Workers of America, to Dismiss Action	23a
Motion to Vacate Order Granted Under Rule 13(h) and to Dismiss Cross-Claim as to Plaintiff Trustees	25a
Answer to Counter-Claim	25a
Motion to Amend Answer, Counter-Claim and Cross-Claim filed by Defendants	26a
Motion to Add a Party Plaintiff	28a
Order, August 11, 1958	29a
Additional Motion to Amend Answer, Counter-Claim and Cross-Claim filed by Defendants	30a
Memorandum (Delivered from the Bench), July 1, 1959	34a
Order, July 2, 1959	36a
Answer of United Mine Workers of America to Amended Cross-Claim filed Against It and Others	38a
Motion of Cross-Plaintiffs to Amend the Cross-Claim or Counter-Claim to Specify Period of Time Encompassed by the Cross-Claim or Counter-Claim	40a

Order of Substitution of Parties, September 30, 1960 41a

Order, November 25, 1960 42a

Amended Answer to Counter-Claim 42a

Order, January 16, 1961 44a

Motion of Defendants and Cross-Plaintiffs for Order Consolidating Claims for Trial and Dismissing Claim of Cross-Plaintiffs Against Cross-Defendants 44a

Response of United Mine Workers of America to Motion of Defendants and Cross-Plaintiffs to Consolidated Claims and Motion to Dismiss 46a

Order, April 10, 1961 47a

Order Pursuant to Pre-Trial, April 10, 1961 48a

Motion of United Mine Workers of America for Judgment in Accordance with Motions for Directed Verdict or in the Alternative Motion For a New Trial 64a

Motion of Trustees for Judgment in Accordance with Motions for Directed Verdict or in the Alternative Motion For a New Trial 73a

Judgement, August 2, 1961 82a

Opinion Rendered From the Bench, July 31, 1961 85a

Notice of Appeal filed by Cross-Defendant 100a

Notice of Appeal filed by Defendants 101a

Order, August 28, 1961 101a

Order, October 2, 1961 102a

TRANSCRIPT OF PROCEEDINGS

Caption in District Court 103a

Court's Statement of Case 104a

Defendants' Opening Statement 108a

Stipulation 117a

Defendants' and Cross-Plaintiffs' Evidence

Jack Shattuck
- Direct Examination 118a
- Cross Examination 129a
- Redirect Examination 130a

Andrew Frost
- Direct Examination 130a
- Cross Examination 137a

H. B. Wicks
- Direct Examination 138a
- Cross Examination 145a
- Redirect Examination 146a

Will Hood Wender
- Direct Examination 146a
- Cross Examination 152a
- Redirect Examination 154a

Alonzo Cox
- Direct Examination 155a
- Cross Examination 159a
- Redirect Examination 163a
- Recross Examination 164a

John Van Huss
- Direct Examination 164a
- Cross Examination 169a

Raymond E. Phillips
- Direct Examination 173a
- Cross Examination 211a

James M. Pennington
Direct Examination 220a
Cross Examination 225a

Albert Pass
Direct Examination 231a
Cross Examination 242a
Redirect Examination 243a

United Mine Workers of America
Interrogatories 244a

John L. Lewis (Deposition)
Direct Examination 251a
Cross Examination 493a

United Mine Workers of America
Interrogatories (resumed) 495a

Judge Charles I. Dawson (Deposition)
Direct Examination 518a
Cross Examination 527a

George H. Love (Deposition)
Direct Examination 530a

Robert L. Kaiser (Deposition)
Direct Examination 550a

Cyrus S. Eaton (Deposition)
Direct Examination 556a

Mark Eastin (Deposition)
Direct Examination 586a
Cross Examination 613a
Redirect Examination 619a

Barnum L. Colton (Deposition)
Direct Examination 623a

James W. Haley (Deposition)
Direct Examination 646a

William B. Sturgill (Deposition)
Direct Examination 656a

Albert B. Hill (Deposition)
Direct Examination 667a
Cross Examination 686a

J. S. Routh, Jr.
Interrogatories 689a

R. H. Hughes
Interrogatories 696a

Herbert C. McCollum (Deposition)
Direct Examination 699a
Cross Examination 710a
Redirect Examination 710a

Merle C. Kelce (Deposition)
Direct Examination 711a
Cross Examination 746a
Redirect Examination 751a

R. J. Snider (Deposition)
Direct Examination 753a

Raymond Dupee (Deposition)
Direct Examination 757a

Dino Franiglioni (Deposition)
Direct Examination 764a

George Schmidt (Deposition)
Direct Examination 766a
Cross Examination 770a

Frank Kreitner (Deposition)
Direct Examination 770a

J. L. Hamilton
Interrogatories 774a

H. D. Waters
Interrogatories 777a
Cross Interrogatories 779a

Michael F. Widman, Jr. (Deposition)
Direct Examination 780a

Elmer C. Hill (Deposition)
Direct Examination ---------- 787a
Cross Examination ---------- 806a
Redirect Examination ---------- 830a

Martin Hochdorf (Deposition)
Direct Examination ---------- 834a
Cross Examination ---------- 838a
Redirect Examination ---------- 839a

Taylor Maddox, Sr. (Deposition)
Direct Examination ---------- 841a
Cross Examination ---------- 844a
Redirect Examination ---------- 855a

I. E. Schmidt
Direct Examination ---------- 856a
Cross Examination ---------- 888a

John H. Amos
Direct Examination ---------- 907a

Leon Day
Direct Examination ---------- 964a
Cross Examination ---------- 970a

Arlow Hutson
Direct Examination ---------- 971a

Richard A. Hutson
Direct Examination ---------- 975a

Ralph Phillips
Direct Examination ---------- 980a
Cross Examination ---------- 983a

John H. Amos (testimony resumed)
Cross Examination ---------- 984a
Redirect Examination ---------- 990a
Recross Examination ---------- 993a

Plaintiffs' and Cross-Defendants' Evidence

Josephine Roche
Direct Examination ---- 1005a
Cross Examination ---- 1045a

H. G. Schmidt
Direct Examination ---- 1048a
Cross Examination ---- 1061a
Redirect Examination ---- 1066a

Val J. Mitch
Direct Examination ---- 1066a
Cross Examination ---- 1083a
Redirect Examination ---- 1092a
Recross Examination ---- 1093a

John L. Lewis
Direct Examination ---- 1093a
Cross Examination ---- 1140a
Redirect Examination ---- 1175a

John Owens
Direct Examination ---- 1178a
Cross Examination ---- 1225a

S. L. Jewell
Direct Examination ---- 1249a
Cross Examination ---- 1270a

T. Reed Scollon
Direct Examination ---- 1280a
Cross Examination ---- 1310a

Patrick B. C. Smith
Direct Examination ---- 1318a
Cross Examination ---- 1349a
Redirect Examination ---- 1377a
Recross Examination ---- 1381a

T. J. Hoffman
Direct Examination ---- 1382a
Cross Examination ---- 1406a

Albert Pass
Direct Examination 1415a
Cross Examination 1420a
Redirect Examination 1421a

Mark E. Eastin
Direct Examination 1422a
Cross Examination 1446a

R. E. Phillips (Deposition)
Cross Examination 1466a

Elliott D. Adams
Direct Examination 1467a
Cross Examination 1471a

Welly K. Hopkins
Direct Examination 1472a
Cross Examination 1501a
Redirect Examination 1505a
Recross Examination 1507a

Statements of Counsel 552a

Statements of Counsel 697a

Statements of Counsel 994a

Trustees' Motion for Directed Verdict 1003a

UMW's Motion for Directed Verdict 1004a

TVA Annual Reports 1508a

Rebuttal Evidence 1513a

Trustees' Renewal Motion for Directed Verdict 1523a

UMW's Renewal Motion for Directed Verdict 1524a

Arguments on Motions 1525a

Motions for Mistrial 1532a

Arguments on Motions 1533a
Trustees' Renewal Motion for Directed Verdict 1535a
Closing Arguments 1535a
Court's Charge to the Jury 1537a
Forms of Verdict 1577a
Objections to Court's Charge 1579a
Court's Further Charge to the Jury 1585a
Verdict of the Jury 1588a

EXHIBITS

No.		Page
13-21	Resume of Phillips Brothers Coal Company income tax returns for the years 1953-1958 (composite of Exhibits Nos. 13 thru 21)	1591a
22	Profit or loss, rail tons, etc., years 1955-1958	1592a
23	Check Letter of Advice, Phillips Bros. Coal Co., 11-12-53	1593a
24	Check Letter of Advice, Phillips Bros. Coal Co., 1-5-54	1594a
25	Check Letter of Advice, Phillips Brothers Coal Co., July 29, 1955	1595a
26	Check Letter of Advice, Phillips Brothers Coal Co., 12-17-55	1596a
27	Check Letter of Advice, Phillips Brothers Coal Co., August 4, 1956	1597a
34	Application Forms for Fund-Benefits	1598a
39	List of cases brought by Trustees	1607a
40	List of Coal Companies	1619a
41	Walsh-Healey Act, Minimum Wage Determinations	1620a
42	United Mine Workers Journal, February 15, 1955	1625a
44	United Mine Workers Journal, February 15, 1958	1634a
48	Interests of United Mine Workers of America in West Kentucky Coal Company and Nashville Coal Company	1639a
72	Statement of Condition, The National Bank of Washington, October 3, 1960	1640a

EXHIBITS

No.		Page
73	Interest of United Mine Workers of America in National Bank of Washington	1642a
92	Table, "FACTS ABOUT TVA STEAM PLANTS"	1643a
98	Phillips Bros. Coal Co., TVA bids, 1956-1958	1644a
99	Average BTU Cost, 1956-1958 (Eastern plants & TVA system)	1645a
100	Total Tons purchased, 1956-1958 (Eastern & Western plants)	1646a
101	Pittsburgh-Midway Mines and Peabody Mines, table, 1956-1958	1647a
102	Table, West Kentucky & Nashville Coal Co., 1956-1958	1652a
103	Table, Debardeleben Coal Corp. & Traux-Traer Coal Co., 1956-1958	1656a
104	Table, Term Contract Awards, 1956-1959	1658a
107	Table, TVA Weighted Averages 1954-1958	1659a
110	Purchase Order from Tampa Electric Co. to Love & Amos Coal Co., December 23, 1957	1660a
111	Table, Love & Amos shipments to Tampa Electric Co., 1959-1961	1661a
115	Summary charts, "Tons of Coal For Steam—Electric Utilities" (United States, Tennessee, Virginia and Top Six States)	1662a
117	Summary chart showing National Average Price of coal, and Phillips' Average Price, 1956, 1957 and 1958	1663a
118	"Thickness of Bituminous Coal and Lignite Seams"	1664a

EXHIBITS

No.		Page
119	"Summary of method of haulage", etc.	1665a
120	"Number and production of bituminous coal and lignite strip mines", etc.	1666a
121	Chart, "Tennessee Mines Number and Production by Class", 1955 and 1959	1667a
123	"Supplementary Summary Chart" showing State, Delivered Price and Utility Tonnage	1668a
138	Excerpts from UMW Welfare & Retirement Fund File, re: Clem Terreo	1669a
139	Excerpts from UMW Welfare & Retirement Fund File, re: Steve Molnar	1678a
140	Excerpts from UMW Welfare & Retirement Fund File, re: John Shenkarik	1684a
141	Excerpts from UMW Welfare & Retirement Fund File, re: Rico Boggio	1694a
142	Excerpts from UMW Welfare & Retirement Fund File, re: Robert Taylor	1699a
143	Excerpts from UMW Welfare & Retirement Fund File, re: Thomas Liddle	1708a
145	Map of TVA	1713a
146A	Table 1, "UNITED STATES CONSUMPTION OF ENERGY FUELS", etc.	1714a
147A	Table 2, "UNITED STATES CONSUMPTION OF BITUMINOUS COAL", etc.	1715a
148A	Table 3, "TRENDS IN BITUMINOUS COAL PRODUCTION", etc.	1716a

EXHIBITS

No.		Page
149A	Table 4, "UNITED STATES TOTAL PRODUCTION OF BITUMINOUS COAL", etc. (by size of annual output)	1717a
150A	Table 5, "TENNESSEE TOTAL PRODUCTION OF BITUMINOUS COAL", etc. (by size of annual output)	1718a
151A	Table 6, "NUMBER OF BITUMINOUS COAL MINES", etc. (in United States)	1719a
152A	Table 7, "NUMBER OF BITUMINOUS COAL MINES", etc. (in Tennessee)	1720a
153A	Table 8, "UNITED STATES TOTAL PRODUCTION OF BITUMINOUS COAL", etc. (by method of mining)	1721a
154A	Table 9, "TENNESSEE TOTAL PRODUCTION OF BITUMINOUS COAL", etc (by method of mining)	1722a
155A	Table A, "UNITED STATES EXPORTS OF BITUMINOUS COAL"	1723a
156A	Table B, "SALIENT STATISTICS ON BITUMINOUS COAL IN THE UNITED STATES"	1724a
157A	Table C, "SALIENT STATISTICS ON BITUMINOUS COAL IN TENNESSEE"	1725a
165	Table, "AVERAGE PRICE F.O.B. MINE"	1726a
166	Chart, TVA "ANNUAL CONSUMPTION OF COAL IN TONS", 6-30-56 thru 6-30-59	1727a
167	"COAL—BITUMINOUS AND LIGNITE, PRICES"	1728a
168	Table, "COAL SHIPPED TO T.V.A. FROM WEST KENTUCKY & NASHVILLE", etc.	1729a

EXHIBITS

No.		Page
169	"BIDS ON COAL TO TVA FROM UNIONTOWN MINE", West Kentucky and Nashville, Table	1730a
170	Table, "BARGE LOADINGS AT UNIONTOWN 1958"	1731a
171	Table, "COMPARISON OF TOTAL COAL PRODUCTION" (West Kentucky, Nashville and Total National production)	1732a
173	Table showing Phillips' tonnage shipped by rail, etc.	1733a



curity in West Kentucky Coal Company, the copy being unsigned; letter of December 15, 1959, secretary-treasurer to Mr. Harrison Combs; memorandum dated December 30, 1959 for Mr. John Owens, secretary-treasurer; this being introduced as collective Exhibit 53, having been introduced as Exhibit 1-F to Set 2 of the interrogatories.

(Exhibit No. 53 was marked for identification and filed.)

Mr. Combs: Your Honor, these letters he refers to and document are dated respectively December 15, 1959 and December 30, 1959, and we object to their introduction on the ground that they are past the date pertinent here, in addition to other objection.

The Court: On the question of alleged damages in this case, if they have any bearing on the alleged pattern followed by the union and alleged so-called large coal companies, some of them, they may be considered as part of the entire story.

988 Mr. Rowntree: Introduced as Exhibit 54, letter dated March 14, 1960 from Mr. Eaton to John L. Lewis, Thomas Kennedy, John Owens, trustees, International Union.

(Exhibit No. 54 was marked for identification and filed.)

Mr. Kramer: Same objection, your Honor.

The Court: Same ruling.

These matters come subsequent to the date of December 31, 1958. As I understand, Mr. Rowntree, these are offered solely for the purpose of showing that they followed a pattern or alleged pattern that existed during the periods involved in this lawsuit.

Mr. Rowntree: Yes, sir, that particular transaction showed that the United Mine Workers picked up some additional shares of stock in West Kentucky Coal Company.

Mr. Combs: Of course, that is very indefinite, your Honor. I don't think that that is exactly right. We have been talking about three or four instruments here. Certainly all of them didn't apply to West Kentucky Coal Company. Some of the referred documents, and I don't desire to go into

them, but some of them are closing out accounts.

Mr. Rowntree: I said that particular transaction.

989 Mr. Combs: What I mean, you ought to say which one you are talking about. I don't know.

Mr. Rowntree: That last one I said.

* * * * * * * * * * *

Mr. Combs: I might remark that that letter has nothing to do with West Kentucky Coal Company stock. It is not mentioned there.

Mr. Kramer: It has absolutely no reference.

Mr. Rowntree: If I was confused, I beg your Honor's pardon. The document I was making reference to was the document which started off with the note of $1,006,875, which was immediately before this last one, Exhibit 53, in other words. But the last one was Exhibit 54 and deals with the purchase of utility company stocks by Mr. Eaton and a resale of those stocks to United Mine Workers, coal consuming utilities.

Mr. Kramer: But, your Honor, none of those utility companies are claimed to be conspirators. They have no charges of being engaged in conspiracy and how some dealings with buying stock, outside of your Honor's previous ruling, buying other stocks on the market, could show anything to indicate a conspiracy — and furthermore,

990 March 14, 1960, 15 months after it is admitted was the end of the conspiracy, we cannot see any evidentiary value at all and move to strike this exhibit, your Honor.

The Court: It might have some bearing on the relationship of Mr. Eaton with the union and the relationship of Mr. Eaton with some of the so-called large coal companies that are charged as being conspirators. It might have some bearing on those matters, Mr. Kramer.

Mr. Rowntree: If your Honor please, for instance, one of those utilities was Cleveland Electric Illuminating Company, of which Mr. Eaton is chairman of the board, or is on the board of directors. Another is the Tampa Electric Company, with respect to which there is some proof in the

record about West Kentucky Coal Company and Peabody Coal Company. Our client shipped some coal to Tampa Electric Company and we will have proof about the competitive sales with respect to some of these utilities. It certainly has a bearing of the tying up of the interests on the other side.

Mr. Kramer: The only thing I care to add to what we have already added, the instrument says "The above transactions are consummated December 29, 1959," and
991 how that sort of transaction of buying stock 15 months after any claim of any violation, and how the letter itself, dated March 14, 1960, we do not see and we continue our objection.

The Court: Same ruling.

Mr. Rowntree: We offer as the next exhibit, as Exhibit 55, note of Chertsey Corporation, January 30, 1958.

* * * * * * * * * * *

Mr. Rowntree: This is in connection with Set No. 2, Exhibit 1-A, not being in the amount of $2,153,279.50.

(Exhibit No. 55 was marked for identification and filed.)

Mr. Rowntree: As the next exhibit No. 56, note dated an unclear date by Chertsey Corporation in the amount of $2,625,000, and note of Chertsey Corporation, September 13, 1959, in the amount of $2,750,000.

(Exhibit No. 56 was marked for identification and filed.)

* * * * * * * * * * *

993 Mr. Rowntree: We offer as next exhibit number 57, note in the amount of $780,948.93, dated June 3, 1959 —

* * * * * * * * * * *

994 Mr. Rowntree: Also promissory note by Chertsey Corporation, December 3, 1957, for $517,484.54; and promissory note, February 14, 1958, by Chertsey Corporation, for $263,464.13.

Mr. Combs: Your Honor, I believe it would be more clear to the Court and the jury if he would mention what stock is involved. Now these last three notes have involved

Chesapeake and Ohio Railway Stock.

The Court: All right, will you mention the stock.

Mr. Rowntree: All right.

(Exhibit No. 57 was marked for identification and filed.)

Mr. Rowntree: We introduce as next exhibit, Number 58, previously introduced as Exhibit 1D to Set Three Interrogatories, promissory note involving West Kentucky Coal Company stock dated January 30, 1958, by Sagamore-Summit Company, for $2,287,809.32.

(Exhibit No. 58 was marked for identification and filed.)

Mr. Rowntree: Offer as next exhibit, promissory notes, one dated September 13, 1959, involving preferred stock of Nashville Coal Company by Sagamore-Summit Coal Company in the amount of $1,100,000, previously exhibited as 1E to Set Three Interrogatories; and also promissory note dated September 13, 1957, of Sagamore-Summit Company for $1,050,000, involving preferred stock of Nashville Coal Company.

995

(Exhibit No. 59 was marked for identification and filed.)

Mr. Rowntree: We offer as next exhibit the note previously exhibited as Exhibit 1F to Set Three Interrogatories dated January 5, 1958, signed by Cyrus S. Eaton for $2,513,895.18, involving stock of West Kentucky Coal Company.

(Exhibit No. 60 was marked for identification and filed.)

Mr. Rowntree: We next offer as Exhibit 61, the note previously exhibited as Exhibit 1Fa, to Set Three, Interrogatories, promissory note of Tower Industries dated February 5, 1958, in the amount of $443,223.90, dealing with West Kentucky Coal Company stock.

(Exhibit No. 61 was marked for identification and filed.)

Mr. Rowntree: We next offer as Exhibit 62 note previously exhibited as 1Fb to Set Three Interrogatories dated April 21, 1958, by Tower Industries, Incorporated, in the amount of $77,938.32, dealing with West Kentucky Coal Company stock.

996

(Exhibit No. 62 was marked for identification and filed.)

Mr. Rowntree: We offer next as Exhibit 63, note previously exhibited as 1Fc to Set Three Interrogatories dated March 1, 1958, by Tower Industries in the amount of $18,847.04, dealing with West Kentucky Coal Company stock.

(Exhibit No. 63 was marked for identification and filed.)

Mr. Rowntree: We offer next as Exhibit 64, note previously exhibited as 1Fd to Set Three Interrogatories, dated January 26, 1958, by Tower Industries in the amount of $176,461.07, dealing with West Kentucky Coal Company stock.

(Exhibit No. 64 was marked for identification and filed.)

Mr. Rowntree: We offer next as Exhibit 65, note previously exhibited as 1Fe dated March 27, 1958, by Tower Industries in the amount of $491,430.00 dealing with West Kentucky Coal Company stock.

(Exhibit No. 65 was marked for identification and filed.)

Mr. Rowntree: We offer next as Exhibit 66, note of Chertsey Corporation, dated September 18, 1957, or
997 aproximately, in the amount of $550,000.

(Exhibit No. 66 was marked for identification and filed.)

The Court: Who are the Tower Industries?

Mr. Rowntree: That is among several corporations that have their headquarters in the Cleveland Tower in Cleveland, Ohio, amidst the other offices of Mr. Cyrus Eaton. There is a deposition in the record which will bring out the closeness of these corporations. I would say it is a holding company, however it's interests are gone into only so far as it pertains to this matter.

The Court: All right.

Mr. Kramer: Now, Your Honor, for the record, and in an effort to shorten an objection with respect to objections that have heretofore been made, with respect to these notes are renewed.

The Court: Yes, sir.

Mr. Kramer: But they must be on a variety of grounds

because of the dates, but those objections are renewed. Will that be accepted without me being more specific?

The Court: Yes, sir.

Mr. Rowntree: We will read the deposition of Judge Charles I. Dawson.

* * * * * * * * * *

998 "CHARLES I. DAWSON

called as a witness by counsel for defendants and cross plaintiffs, being first duly sworn, was examined by Mr. Rowntree and stated as follows:

"Q. This is Judge Charles I. Dawson, is that correct? "A. Yes.

"Q. What is your residence, Judge? "A. I live here in Jefferson County; I live out in the suburbs, outside of town about twelve miles, out at Anchorage, Kentucky.

"Q. That is more than one hundred miles from Knoxville, Tennessee? "A. Well, quite a good deal more than a hundred, yes.

"Q. May I ask your age, Judge? "A. If I live on the 13th day of February next year, I will be eighty years of age.

"Q. You are a lawyer by profession? "A. Yes, sir.

"Q. How long have you been practicing law,

999 Judge? "A. Well, I got my license to practice law in the fall of 1905. I had actively practiced law up till I went on the Federal bench—well, I practiced law actively until I became Attorney General of Kentucky in 1920. I resigned as Attorney General in 1923, and went back to the general practice of law. And then in February of 1924, I was appointed United States District Judge for the Western District of Kentucky with headquarters here at Louisville, and I was out of the practice as long as I stayed on the bench. I resigned as Federal Judge effective July 1st, 1935, and I have been actively in the practice all that time till this date.

"Q. And you are a senior partner in one of the largest and oldest firms in Louisville at the present time? "A. Well, I am the senior partner of the firm of Bullitt, Dawson, and

Tarrant, with its various former relations over the years as one of the larger firms, and—

"Q. (Interrupting) And one of the very best? "A. And we like to think one of the very best and largest.

"Q. Do you know, Judge, who succeeded Ezra Van Horn as the Operator's Trustee on the United Mine Workers Welfare and Retirement Board? "A. Yes. I know John L. Lewis didn't seem to recognize it, though. I was
1000 appointed by the Operators as their representative on the Welfare Board following the resignation of Mr. Van Horn in the latter part of 1949. I think I was selected by the Operators in the early part of November, 1949, as their representative on the Board, and I accepted it, I think, about the 5th day of November, 1949.

"Q. Is that the date you accepted? "A. Let me see for certain. Yes.

"Q. You accepted it on November 5, 1949? "A. 1949, yes.

"Q. Did any representative of the Coal Operators talk to you about your appointment? "A. Yes, sir.

"Q. Who was it, when and where? "A. The first intimation that I had that I was under consideration by the Operators as the successor of Mr. Van Horn as a representative of the Operators on hte Welfare Board was in the form of a telephone conversation from a Mr. Harry Moses, who was the President, as I recall, of the Frick Coal Company, with headquarters at Pittsburgh, Pennsylvania. I have known Mr. Moses for many years, he having at one time been connected with the United States Steel Company's operation in Harlan County, and I at that time and for many years after that time represented the Harlan County Coal Operators Association as their general counsel. However,
1001 the mines of the United States Steel Company was not a member of the association. That mine was a captive mine.

"Q. What was the substance of that 'phone call? "A. He said the operators wanted me to act as their representative on the Board and as Trustee, that Mr. Van Horn, who was

the Trustee, had resigned or was intending to resign, I don't know which, and wanted to know if I would accept appointment as the Operators' representative on the Board. I told him that there were a great many things to be considered. That No. 1, I would not think of accepting the appointment unless I was the unanimous choice of the Operators signatory to the contract with the United Mine Workers who had the authority to select the Operator representative. No. 2, that I would not accept the position unless it was satisfactory to the Harlan County Coal Operators Association, as I represented that organization as their general counsel. And unless it was satisfactory to the Southern Coal Operators Association, when was an organization made up of most of the railroad mines in what was known as the Southern coal area of the United States, and No. 3, that I would have to know something more than he gave me at that time about the duties of the job, how much time I had to give to it, and if it meant that I would have to quit practicing law, and that I would like very much to talk to
1002 some of the prime movers, including Mr. Moses, about the whole situation.

"Q. Did you subsequently talk to them?

* * *

"Q. Judge, did you talk to any of the other prime movers?

"A. Yes. At that time I was talking to Mr. Harry
1003 Moses, who was president of the Frick Coal Company, and who represented that he was speaking for a group of operators. As a result of that conversation I had a meeting with some of the Pennsylvania operators, and I don't recall all who were there. I know that Mr. Harry Moses was there. I think Mr. Frank Amus, who was an officer and as I understood counsel for the Consolidation Coal Company, was there, and I am quite sure that Mr. George Love was there."

* * * * * * * * * * * *

"Q. Will you state the substance of the conversation that you held at that time? "A. I cannot state the substance

of the conversation. I can state the result of the conversation.

"Q. All right, sir. "A. The result was that they were earnestly insisting that I take the place, and my decision had to be postponed until I had a chance to contact the Harlan County Coal Operators and Mr. Joe Moody, who was at that time the President of the Southern Coal Operators Association.

"Q. Will you state whether or not these questions that you mentioned that you had in your mind were ironed out to your satisfaction prior to the acceptance on No-
1004 vember 5, 1949? "A. Yes, they were. And I found that neither the Harlan County Coal Operators Association nor Southern Coal Operators Association had any objection to me acting as the Operators' representative, but on the contrary were unanimous in their desire that I should act as such. And either on or about the 5th day of November, I think it was 1949, I notified Harry Moses over the telephone that I would accept it."

* * * * * * * * * * *

"Q. Now, Judge, did meetings occur with the Trustees of the Welfare Fund after you accepted the appointment? "A. Yes, sir.

"Q. Did you make notes and memoranda of what took place at those meetings, and do you have those memoranda available? "A. The first meeting of the Board that I attended was held in the office of the Welfare Fund in Washington, D. C. on November 21st, 1949. There was present at that meeting John L. Lewis, acting as Chairman of the Board, Miss Josephine Roche, who had some position on the Board — let me see if I can find out what it is — she seemed to be the chief administrator of the Fund, and Senator Styles Bridges, who was United States Senator from the State of New Hampshire, and who had been se-
1005 lected by Mr. Van Horn and Mr. John L. Lewis in 1947 as the public representative on the Board.

"Q. When you say public representative, is that the

same as neutral representative? "A. Yes. I can't refer you to any minutes that were made at that Board meeting about what took place because Mr. Lewis instructed the Secretary of the meeting to make no record of motions made by me, and announced that he would not recognize me as a member of the Board. As soon as I returned to my home here in Louisville following that meeting I wrote out in detail what took place at that meeting while the matter was fresh in my mind, and I am prepared to swear and do swear that the memorandum which I then made correctly and in detail stated what took place at that meeting. I have before me now a carbon copy of the original of that memorandum made up of thirteen and about a half pages, and it is headed, 'Narrative of the Meeting of the Trustee United Mine Workers of America Welfare & Retirement Fund held at the office of the Fund, 905 Fifteenth Street, N.W., in Washington, D. C., on Monday, November 21, 1949 at 11 A. M. Central Standard Time.' I show you that statement, if you desire. And I can't spare this one, but I show you gentlemen the original of it. I put a memorandum recently on it of Mr. Rountree's address that wasn't on there until a few days ago."

* * * * * * * * * * *

1006 Mr. Kramer: Your Honor, may I suggest a correction in this record back on page 9 of this deposition. There is evidently a typographical error there. The word "mutual" is used and it should be "neutral".

Mr. Robertson: And I read it into the record as "neutral".

Mr. Kramer: But in the answer, I think the answer took the word "mutual"—but it is "neutral".

You skip to where?

Mr. Robertson: Skip to Question 25 on page 11.

(The reading of the deposition was continued.)

"Q. Now, Judge, was another meeting held after that first meeting? "A. Yes, sir.

"Q. When was that? "A. It was held on December the

2nd, 1949, at the same place—on Friday, December 2nd, 1949.

"Q. And who was present at that meeting? "A. The same parties were present as were present at the first meeting. In my previous answer I stated as present Mr. John L. Lewis, Senator Styles Bridges, Miss Josephine
1007 Roche, and myself. I neglected to state that Mr. Mitch, I don't know his given name, attorney for the Fund, was also present.

"Q. Now, did you make memoranda of this meeting similar to the way you did the first one? "A. Yes.

"Q. Will you state whether or not Mr. Lewis' position with respect to recognition of you as a Trustee on the minutes was the same as the first meeting? "A. Yes. Except more emphatic.

"Q. Do you have a copy of your memorandum?

* * * * * * * * * *

1008 "A. Yes, sir. Inasmuch as Mr. Lewis refused to recognize me as a member of the Board of Trustees, refused to put any motion I made and refused to have my vote counted on any matter that came up, and because of that fact * * * as soon as I got back to Louisville, which was the following day as I recall, I sat down and did the same thing as I did in respect to the meeting of November 21st, 1949. I dictated to my stenographer a full and complete statement of what took place, and that was transcribed, and I have before me now a copy of what I dictated in respect of what took place at that December the 2nd, 1949 meeting, and I am prepared to say and do say that that statement truthfully reflects that actually took place on that date. The stenographer in transcribing my dictation in the heading showed that the meeting was held 'on Friday 2, 1949, at
11 A. M. Central Standard Time'. It should have
1009 been Friday, December 2, 1949. And I have noted that fact in pencil in the heading of the statement.

"Q. Judge, will you state whether or not at the time these memoranda were prepared, and also recently in prep-

aration for this deposition, did you read these over and do they correctly set forth what transpired at the meetings? "A. Yes. And I might add furthermore that a copy of each of these statements was furnished to Mr. Moses and I think to Mr. Love.

"Q. Mr. George Love? "A. Yes, sir.

"Q. At what time? "A. Shortly after they were —

"Q. After they were prepared? "A. Yes."

Mr. Robertson: Your Honor, we come to this second memorandum, and here again we will not put this entire memorandum in; however, we do want to read into the record the two telegrams which are contained in that memorandum which telegrams Mr. Lewis was shown in the memorandum. I believe in the reading yesterday he verified them as being correct.

* * * * * * * * * *

1010 Mr. Robertson: The first telegram is dated November 14, 1949. It is addressed to Ezra Van Horn, Rockefeller Building, Cleveland. It states:

"Truman E. Johnson, Secretary, Operators' Negotiating Committee National Bituminous Wage Agreement 1948, Address, Fairmont, West Virginia, on date of November 3, 1949 in communication to Trustees, United Mine Workers of America Welfare and Retirement Fund, avers that Judge Charles I. Dawson of Louisville Kentucky is certified by 51% of the tonnage signature to the contract as the successor trustee to yourself, resigned. Do you confirm resignation and validity of action of parties represented by Truman E. Johnson? Will you advise."

Signed John L. Lewis, Chairman Trustees United Mine Workers of America Welfare and Retirement Fund.

The second telegram is addressed to Mr. John L. Lewis, Chairman, Trustees, U. M. W. of A. Welfare & Retirement Fund, 907 Fifteenth Street, N.W., Washington, D. C., and I quote:

"Retel of November 16 I again confirm my resignation of September 14 as Trustee of UMWofA Welfare and Re-

tirement Fund. I will not be present at the meeting of the Trustees on Monday morning at 10:00 o'clock, No-
1011 vember 21. I am notifying Judge Charles I. Dawson of this meeting who has been appointed by the coal operators as my successor according to the information I have received. I have no doubt that this appointment has been made in a proper manner and that Judge Dawson is a member of said Board. Sending a copy of your wire and this wire to Senator Bridges and Judge Dawson."

From Ezra Van Horn.

Begin with Question 36 on top of page 14.

(The reading of the deposition was continued.)

"Q. Judge, did you consult with Mr. Love and Mr. Moses with respect to the difficulties you were having in these meetings? "A. Oh, yes, they knew all about what was happening. And I might say that Mr. Moses, and I think Mr. Love, were insisting that I take action to compel the resignation of me as the Operators' representative, and I did take such action."

* * * * * * * * * * *

1012 "Mr. Rowntree: It is stipulated by and between counsel for parties that under docket number 5374-49 Judge Dawson filed a suit in the United States District Court for the District of Columbia resulting from the action which took place at the two meetings previously testified about."

* * * * * * * * * * *

"Q. Now, Judge, when the National Bituminous Coal Wage Agreement of 1950 was signed, will you state whether or not you were named as Trustee by the Operators in that contract? "A. No, sir, I was not. A man by the name of Owens was named.

"Q. Is that Charles Owens? "A. Yes. And I
1013 might say, as I recall, that contract at that time was not signed by the Harlan County Coal Operators at all. It was signed by the Northern and Eastern Operators,

and I was left out and not named as the representative of the Operators, and Mr. Owens was named."

The Court: What is the date of that contract?

Mr. Robertson: That was the 1950 contract. I believe it is March 5, 1950.

(The reading of the deposition was continued.)

"And of that action I had absolutely no prior notice from Mr. Love or from Mr. Moses or from Mr. Amos, or any of the other crowd that was active in making that contract."

Mr. Robertson: Your Honor, just for purposes of clarification, this Mr. Charles Owens was one of the original plaintiffs in this suit, I believe.

Mr. Kramer: That is right, and he died and he was replaced.

Mr. Robertson: Replaced by Mr. Schmidt.

(The reading of the deposition was continued.)

"Q. Had you notified Mr. Love and Mr. Moses of the commencement of the lawsuit which you had started? "A. I don't recall whether I notified Mr. Love specifically. I know I notified Mr. Moses. And I know that Mr. Love and Mr. Moses were right there in the same building and in close contact with each other.

1054 "Q. Will you state whether or not through this period of time the negotiations over the 1950 contract were going on from time to time? "A. I knew absolutely nothing about the negotiations."

* * * * * * * * * * *

"A. I knew absolutely nothing about the negotiaions. I didn't even know that the contract was up for negotiation. I finally learned that that contract —"

* * * * * * * * * * *

"A. That contract on its face as disclosed by a copy which I have got, I don't know how I got it, was made as of the 5th day of March, 1950.

"Q. I think a copy of that is already in the record, Judge. What happened to the lawsuit? "A. Well, after I was eliminated as Trustee I took the position there wasn't any

reason for my continuing with a lawsuit for people — fighting a lawsuit for people who had proven themselves as treacherous as these operators had proven themselves to be, and I got permission from them to dismiss the
1015 suit."

Mr. Robertson: This is all of the direct examination we wish to read. We would like to read the cross examination by Mr. Kramer, if that is agreeable.

Mr. Kramer: Go ahead.

I except to the part we desire to object to, your Honor. This was discovery, your Honor.

Mr. Roberts: Page 19, question No. 47.

(The reading of the desposition was continued.)

"CROSS EXAMINATION

By Mr. Kramer:

"Q. Judge Dawson, when you were approached and agreed to serve as one of the Trustees of the United Mine Workers Welfare & Retirement Fund, were you approached and agreed to accept the appointment or designation as a lawyer for the Operators? "A. I was a lawyer for the Harlan County Coal Operators Association, which was made up of the principal commercial railroad mines in Harlan County and Bell County, and in Knox County and Whitley County, Kentucky.

"Q. And were you accepting the appointment or designation as the attorney for those Operators? "A. I was accepting the appointment as the Mine Operators' representative on that Trustee Board which the contract specifically provided for. That contract, as you are well aware,
1016 provided that the United Mine Workers should have a representative on that Board, and that was named as John L. Lewis, and that the Operators should have a representative on that Board selected by them, and that they should have by agreement a so-called neutral member. And at that time that I had been talking about Senator

Styles Bridges was the neutral member. I don't know if he is still or not.

"Q. As I recall the contract there was no provision therein with reference to the compensation to be paid those Trustees. What arrangements did you have for compensation as functioning as a Trustee? "A. It was distinctly understood with the coal operators who placed me on that trusteeship that they were paying all the money into the Fund, that the miners paid no part of it, and that they had a vital interest in seeing that that fund was administered for the purposes for which it was purportedly created. They realized that and openly stated so, that if there was —"

Mr. Robertson: That is supposed to be "not".

Mr. Kramer: From there it is a voluntary statement not responsive to the question, and we object to the introduction of the remainder of this so-called answer.

Mr. Robertson: Your Honor, our position is that
1017 it is extremely responsive to it.

(Court looked at deposition.)

The Court: Well, this is just a long statement of the views of the judge. Mr. Lewis put his views in the record, Mr. Kramer. Why not the views —

Mr. Kramer: Because Mr. Lewis is a party to the contract, and Mr. Dawson, if your Honor looks on down, we objected at the time that Mr. Dawson's answer was not responsive to the question at all. The question was simply this —we didn't ask him for his views. The question was with reference to the compensation. Now he starts into his understanding of what the operators thought and so on. We asked no question of that sort at all. It is a mere voluntary statement.

The Court: I will let you read that part where it refers to the small operators. Those observations that he makes about Mr. Lewis, just leave them out.

It is a contest between him and Mr. Lewis. They didn't view things alike, and there is no use to put that in. I will let you read what he said about these little operators.

You and Mr. Kramer can agree there what it is. Just so you don't bring in what he said about Mr. Lewis.

* * * * * * * * * *

1018 (The reading of the deposition continued.)

"That I wanted the compensation I received to be paid by the people who employed me and who selected me, and I told them that I would not accept compensation from the Welfare Fund itself, that I did not think that anyone except the neutral member had any right to accept compensation from the Fund, because the other two members were representing specific definite interests."

* * * * * * * * * *

"Q. Was the amount of compensation agreed upon by you and the Operators before the meeting of either November the 21st or December the 2nd?

* * * * * * * * * *

1019 "A. I wouldn't say that there was a specific definite contract before that, except to this extent, before I accepted I ascertained that Senator Styles Bridges, the neutral member, was drawing $35,000 a year, I think it was, and that my compensation would be comparable to that. And I proceeded throughout the time that I was trying to act as Trustee with the thought that that would be what I would receive."

Mr. Rowntree: If your Honor please, for the judge's protection, I think it should be understood that he was not expecting any compensation from the Welfare Fund.

Mr. Kramer: That is just what he read.

Mr. Rowntree: I want it clearly understood, be-
1020 cause we have eliminated part of his answer in respect to that and I don't want to prejudice the judge.

* * * * * * * * * *

1021 "Q. Was there later some dispute between you and the Operators which resulted in litigation over the amount of compensation which you were paid? "A. No, sir.

"Q. No dispute at all? "A. No, sir.

"Q. And were you paid compensation? "A. Yes, sir. I was not paid the full $35,000 though, because some of the operators wouldn't put up after the thing blew up, but I got substantially that.

"Q. But there was no litigation about it? "A. No, sir, no litigation or no ill feeling. There never has been any ill feeling only against the fellows.

1022 "Q. Now, there has been some testimony about a lawsuit you instituted in the United States District Court at Washington, and then later a non-suit was taken. And, of course, in a non-suit, as I understand, the costs are taxed against the plaintiff. What happened in that lawsuit? "A. That I don't know. That is easily ascertained. Mr. John Wilson, an attorney in Washington, handled the details of that.

"Q. You didn't personally pay the costs, though? "A. No, sir.

"Q. And you didn't personally pay Mr. John Wilson the attorney's fee that was paid for that? "A. No, sir. The Operators paid that. I might say he was employed on authority from the Operators that I represented given in advance before the suit was filed."

* * * * * * * * * *

1023 Mr. Rowntree: Deposition of George H. Love, a witness called by the defendants and cross-plaintiffs, at Pittsburgh, Pennsylvania, November 29, 1960.

"GEORGE H. LOVE

"By Mr. Rowntree:

"Q. What is your name, sir? "A. George H. Love.

"Q. Where do you reside, Mr. Love? "A. Pitts-

1024 burgh, Pennsylvania.

* * * * * * * * * *

"Q. What position do you hold? "A. I am Chairman of the Board of Consolidation Coal Company.

"Q. How long have you held that position? "A. I believe I became Chairman at the end of '56 or the very beginning of 1957.

* * *

"Q. What was your office before that? "A. President.

"Q. And how long had you been president? "A. This company was formed the very end of 1945, and from that time on, I have been president.

"Q. Do you hold any office in any coal association made up of coal operators in the United States? "A. Made up exclusively of coal operators?

"Q. Not exclusively, but largely, the membership consisting large of coal operators?

* * *

"The Witness: I have no connection with National Coal Association, for example. That's the main coal association.

"By Mr. Rowntree:

1025 "Q. Does Consolidation Coal Company have a membership in National Coal Association? "A. Yes.

* * *

"By Mr. Rowntree:

"Q. Mr. Love, I show you Consolidation Coal Company statement found in Moody's Industrial Manual for 1960, and I would like to ask that you have that checked, and any corrections that are to be made to that statement, that they be submitted to the court reporter."

Mr. Rowntree: That statement was exhibited as Exhibit One and we would like to read excerpts from that statement.

Mr. Kramer: Now, Your Honor, there was an objection made at the time, and I want to repeat the objection.

* * * * * * * * * *

Mr. Rowntree:

* * * * * * * * * *

The list of corrections was submitted to the court reporter and is attached to the original exhibit, original deposition.

1034 The Court: All right. So long as you follow the check list which the witness filed, or caused to be filed with the court reporter, and which he verified, I hold
1035 it is competent. But I hold that any information that

has not been checked or approved by him is not competent at this time.

Mr. Rowntree: And we will confine it to the period prior to 1959.

The Court: All right.

Mr. Rowntree: Incorporated in Pennsylvania January 12, 1916 as Pittsburgh Coal Company, by merger of Pittsburgh Coal Company of Pennsylvania and The Monongahela River Consolidated Coal & Coke Company. Name changed to Pittsburgh Consolidation Coal Company, November 23, 1945, present name adopted in April, 1958.

Skipping to: In 1952 acquired the remaining 51 per cent interest in Jefferson Coal Company, which company was then liquidated and its mines and properties located in Ohio are operated as part of Hanna Coal Company Division.

* * * * * * * * * * *

1036 The Court: Mr. Rowntree, what coal company are you talking about?

Mr. Rowntree: Consolidation Coal Company.

The Court: All right.

Mr. Rowntree: On September 30, 1954 company acquired entire capital stock of — and that is corrected. That is corrected, Jamison Coal and Coke Company.

On December 3, 1956, acquisition of Pocahontas Fuel Company was declared effective. Pocahontas was liquidated, now operated as a division.

Consolidation Coal Company merged — that is outside the period.

Affiliates: I am just reading what we can put into the period here, your Honor.

The Court: That is right.

Mr. Rowntree: Mathies Coal Company organized in 1951 and purchased from Pittsburgh Consolidation Coal — Mathies Coal Company organized in 1951 and purchased from Pittsburgh Consolidation Coal. Its Mathies mine together with certain coal and surface lands, including 3,675 acres of Pittsburgh Seam coal for $15,000,000 cash and

$4,300,000 mortgage payable over 15-year period, and
1037 also leases 19,000 acres Pittsburgh Seam coal land from Pittsburgh Consolidation Coal.

Harmar Coal Company: Formed in June, 1952 and purchased the Harmar and Oakmont mines. Also leased 7,000 acres. Properties are supervised by Consolidation Coal Company which owns 25 per cent interest.

Well now counsel has raised the question about the period of 1959 being beyond the period of the case, so that would technically eliminate the statement of the business and products which necessarily was made as of 1959, and actually, that was the main purpose of our putting it in.

There is left, however, the schedule of production over the years which are designated.

Net tons production; total coal sold.

1955, 40,877,000 tons; 1956, 47,068,000 tons; 1957, 48,549,000 tons; 1958, 34,299,000 tons.

The net sales: 1953, or 1954, $149,181,620; 1955, $168,572,075; 1956, $335,586,582; 1957, $375,633,935; 1958, $282,233,537.

That is all we care to read.

Page 6, at the bottom.

(The reading of the deposition was continued.)

1038 "Q. Mr. Love, was Consolidation Coal Company the largest commercial coal producer in the period 1954 through 1958 in the United States? "A. I think it was. I think it produced more coal than any other single company.

"Q. Mr. Love, have you held positions in the years 1947 through 1950 as a representative of coal operators in dealing with the United Mine Workers? "A. Yes. In various negotiations I represented a district or several districts in negotiations with the United Mine Workers, and culminating in the 1949 negotiations when I represented a group of northern coal operators extending to West Virginia, Northern West Virginia, Pennsylvania, Ohio.

"Q. And was that called the Northern Conference at that time in the 1949-50 negotiations? "A. I think it was.

1039 "Q. In that particular conference, during the latter part of it, were you the principal operators' spokesman in the conference?

"A. I was known as the spokesman for the operators in that conference.

"Q. In that period of time, Mr. Love, did the Union conduct more than one conference over the country, to your knowledge? "A. As I recall, there was a conference going on at the same time in some other part of the country; Bluefield, I think."

The Court: What year was this?

Mr. Rowntree: 1949-50 negotiations

(The reading of the deposition was continued.)

"Q. Was that with the Southern Coal Producers Association? "A. Yes.

"Q. And did the Union conduct from time to time negotiations with the Captive Mine Operators separately from the other conferences?

the other conferences? "A. I don't recall.

"Q. Well, let me ask this: The Northern Conference which you attended represented the largest production of coal of any of the conferences? "A. I think that's

1040 correct.

"Q. Before that 1949 through 1950 conference, had you represented operators in previous negotiations with the United Mine Workers? "A. I had.

"Q. Mr. Love, you had some pretty bad fights with the Union in these negotiations; is that right? "A. That is correct."

* * *

"Q. Will you state whether or not the United Mine Workers has exercised tremendous economic force in the coal industry in the period of your experience in dealing with them? "A. My answer is that they did exert a strong economic force."

Mr. Rowntree: To the next page, first question.

(The reading of the deposition was continued.)

"Q. Mr. Love, will you state whether or not in your experience as a representative of operators, particularly as a representative of Consolidation Coal Company, the Union exercised such strong economic force in the industry that ultimately the Union was able to specify and control the policies of Consolidation Coal Company with respect to labor matters and with respect to its relationship and dealings with non-union coal companies, and small coal companies with which Consolidation dealt?

1041 * * *

"The Witness: That's a pretty tough question."

Mr. Rowntree: I think Mr. Corcoran's comment on page 10 should be read.

Mr. Kramer: Your Honor understands Mr. Corcoran does not represent the parties to this lawsuit. He was the attorney for the Pittsburgh Consolidation Company. He is making this statement. He was present when the deposition was taken, representing the deponent. He was counsel for them.

Mr. Rowntree: The middle of the second paragraph of that comment.

(The reading of the deposition continued.)

"Mr. Corcoran: * * * If I understand the question, you are asking Mr. Love if the Mine Workers dictate the policies of the Consolidation Coal Company. Of course they don't."

* * *

"The Witness: I will answer the question, if that is what the interrogator means. The United Mine Workers certainly doesn't."

* * * * * * * * * * *

By Mr. Rowntree:

1042 "Q. Well, has it in any of the periods of time that you have acted as a representative in dealing with the Union? "A. We negotiated with the Union; we have come to agreements, parts of which are unpleasant to us, ones that we resisted. But we finally came to an agreement, and the decision to come to an agreement rested with us.

"Q. Were you connected with the predecessor company of the Consolidation Coal Company during the period of World War II? "A. I think I came with Consolidation Coal Company before the merger with Pittsburgh Coal in 1945. I came with the original company in 1943.

"You were familiar with the coal strikes during World War II? "A. Yes.

"Q. Were those strikes in which the United Mine Workers members struck? "A. Yes.

"Q. Do you recall how many of those strikes occurred in World War II? "A. No. I think the industry was taken over some five times in the 40's by Government.

"Q. Because of these strikes? "A. As far as I recall."

* * * * * * * * * * *

1043 By Mr. Rowntree:

"Q. Do you recall, Mr. Love, whether or not Mr. Van Horn was named as the operators' representative or trustee on the welfare fund?

"Q. Mr. Van Horn served as the operators' trustee of the welfare fund for a certain period before his resignation in the latter part of the '40's.

"Q. And do you recall that he had some differences
1044 with Mr. John L. Lewis with respect to the operation of that fund? "A. I understand he did.

"Q. And do you recall that a strike ensued with respect to those differences in 1948? "A. I seem to recall a strike over it, yes.

"Q. I now refer, Mr. Love, to minutes of the United Mine Workers of America convention held in October, 1958, pages 80 and 81, to a letter of Mr. George M. Humphrey to Mr. John L. Lewis, in which Mr. Humphrey states, and I quote:

" 'I am advised that Mr. Van Horn, your co-trustee has been most diligent in his studies as to what uses may properly be made of the welfare and retirement fund and is prepared to discuss further with you his suggestions as to definite terms for a pension plan.'

"He further stated:

"'George Love, president of our company, met with you yesterday and expects to see you again before the end of the week in an effort on our part to explore possibilities of solving this problem within the limits of the law and the agreement.'

"Mr. Love, is it your recollection that Mr. Van Horn had given close study to the questions at issue between him and Mr. Lewis?

"A. I believe he did. I believe that's a fair state-
1045 ment.

"Q. Did you discuss those matters with Mr. Lewis as stated in this letter? "A. From the letter, I must have, but I don't recall the discussions at all."

* * * * * * * * * *

"Q. You don't have any recollection? "A. No. I don't mean to repudiate any letter or anything else, but I just don't recall.

"Q. I refer to page 81 of those same minutes in which Mr. Lewis wrote a letter to the officers and members of all local unions, and in which he started off the letter stating:

"'For eight months the Bituminous Coal Operators through their trustee, Ezra Van Horn of Cleveland, Ohio, have dishonored the 1947 wage agreement and defaulted under its provisions affecting the welfare fund.'

"Mr. Love, do you recall whether or not the Bituminous Coal Operators in that period of time dishonored the 1947 wage agreement, and did they default under the terms of the welfare fund provisions?

"A. I recollect that there is a period some time in those
particular years when some operators—and I don't
1046 know which ones—did not make payments, welfare
fund payments, to the Union or to the fund. How extensive it was, or whether our own company was one of them, I don't recall. But there was a period when some companies either put the money in escrow or didn't make immediate payment to the fund.

* * * * * * * * * *

1047 "Q. I refer to the minutes of the convention of the United Mine Workers of 1952, pages 65 et seq., a statement of Mr. John L. Lewis at the joint conference, June 23, 1949, where he stated:

" 'There comes up at this conference, we think, this question of some regulation of the working time, some stabilization in the industry. The Mine Workers have gazed to some degree with admitted apprehension at the tendency of the industry to reduce their prices in the face of increasing competition. Frankly, we think the industry has been too hasty.'

"And then further:

" 'There has been much talk lately about a stabilization plan. Mention of it is affecting the Mine Workers and the Operators. It has no basis of fact, and cannot be considered practicable. It is true, however, that we do have a segment of the coal industry operating under the plan that brings about a distribution of working opportunity. (Mr. Lewis then explained the plan that had been worked out in the anthracite industry.)

" 'We would like to talk to you in this conference on some improvements and stabilization which is a question of magnitude in the minds of the men as affecting the investment in the industry.'

"Do you recall, Mr. Love, whether or not this stabi-
1048 lization of the industry was a part of the negotiations?"

Mr. Rowntree: To the middle of page 25.

(The reading of the deposition continued.)

By Mr. Rowntree:

"Q. My question is, do you recall that this stabilization was a matter discussed at these conferences in 1949 and 1950? "A. During the 1949 and 1950 conferences, a discussion of shorter work weeks—because obviously there is a greater supply of coal or a greater ability to produce coal than the market—and the operators continued and unrelentingly resisted any interferences with their right to run their

mines as many days as they saw fit. And they were successful when that contract was concluded to have the right to operate their mines as many days as they saw fit.

"Q. During this period of time of these negotiations, were the mines worked a full five days a week? "A. No. There were periods of three-day weeks, no day weeks, when strikes were going on, there were three-day weeks. That's what I recall about it.

"Q. Were these periods of work in the weeks set by the United Mine Workers or by the coal company? "A. Certainly not by the coal companies.

"Q. And the stabilization discussion revolved
1049 around limiting working time in the coal mines during these negotiations? "A. I don't recall stabilization as such, being discussed. I think there was a lot of discussion about limiting the work time.

"Q. But the reference— "A. We are hearing it now in steel; you hear it in all industries.

"Q. But the conference ended up with the signing of a contract which would not limit the production time of the coal companies? "A. That is correct, beyond the limitations we had before, like the number of hours per day, and so forth.

"Q. I believe, Mr. Love, that Mr. Van Horn resigned as trustee of the welfare fund during these conferences? "A. He resigned in that year. I can't recall the exact date.

"Q. I make reference to the minutes of the 1952 convention of the Union, page 71, a letter of Mr. Ezra Van Horn to the signatories of the 1947 and 1948 National Bituminous Coal Wage Agreements, dated September 14, 1949, tendering his resignation. Does that strike you as being the right period of time that he did resign, September, 1949? "A. That would be my recollection.

"Q. Who was chosen to succeed Mr. Van Horn as
1050 trustee? "A. I don't recall.

"Q. Does the name of Mr. Charles I. Dawson strike

you as being the one who succeeded him? "A. I recall Judge Dawson being suggested to serve as a trustee.

"Q. Did he actually serve? "A. I can't tell you that.

"Q. Did he have discussions with you concerning conferences with Mr. Lewis? "A. I met Judge Dawson. I can't recall anything about any of the conversation.

"Q. Did you advise with him as to what he should do as trustee, or counsel him with respect to the position of the operators under the welfare fund? "A. I don't recall. I think that is the best answer to that. I mean, that's the right answer to that. I am sure, however, if I met with him, he met with other operators, and together we may have offered suggestions to him. Certainly I didn't take it on myself to advise him.

"Q. Do you recall if he had disputes with Mr. Lewis over the interpretation of the welfare fund provisions? "A. I recall some disagreements, but the details of which I have no recollection.

* * * * * * * * * *

1051 "Q. I refer to the minutes of the 1952 convention of the Union, pages 96 and 97, a statement from Mr. George Love, December 28, 1949, at Pittsburgh:

"'The operators have also signified their willingness to put into effect a sound businesslike pension and welfare plan providing for pensions, accident and health insurance, hospitalization, group insurance equal to the program which settled the recent steel strike. The operators who will bear the entire cost ask only that the benefits be restricted to employees and immediate dependents, and that the fund be administered according to law and sound actuarial principles, so that our employees will actually have real protection.'

"And, 'We understand that the Southern Coal Producers Association today filed charges before the National Labor Relations Board to prevent Lewis from continuing the three-day week in an effort to force operators to sign an
1052 illegal contract. We are in complete accord with this

action, and our attorneys are preparing similar charges which will be filed at the earliest possible moment.'

"Does that refresh your recollection that some of the dispute related to the welfare fund provisions?" "A. Yes, I recall the statement.

"Q. And do you recall that National Labor Relations Board cases were filed? "A. I don't recall that. I recall the statement and, therefore, I assume that they were
1053 filed."

"By Mr. Rowntree:

"Q. In that same statement, Mr. Love, I quote: "The blank check contract Mr. Lewis is trying to force on the industry would increase the already high wage rates of the miners and give Lewis and two stooges of his own selection theoretically representing the operators and the public, some one hundred and fifty million per year to distribute haphazardly to anybody he chooses.'

"Does that recall to you that the naming of trustees on the welfare fund was also an issue in these negotiations? "A. It was an issue.

"Q. I refer to the minutes of the 1952 convention, pages 81-83, a statement of Mr. George H. Love, October 14, 1949, at White Sulphur Springs, West Virginia —"

* * *

"Q. Before coming to this statement to which I referred, Mr. Love, do you recall that you were trying to represent, and so stated, all of the bituminous coal operators in your various associations, whether they be large or small? "A. Well, I think you owe it to me to tell me what you mean by large and small operators.

"Q. Well, I will ask you what this language means here, and I quote from the statement referred to:
1054 "'We represent many hundreds of commercial operators here, most of them relatively small, who have their backs to the wall because they have to sell their coal before it is mined. Many of them will not be able to open their mines if costs are increased by a new contract

because they know how difficult it will be to have the public pay more even this year after all the strikes, memorial periods, stabilization days, and work weeks we have been forced to endure.'

"And, 'The picture for 1950 is beset with more competitive uncertainties than we have ever seen. Many operators feel the present stubborn demand by the Union for improvements this year may be a parallel situation to the one which existed under the Jacksonville Scale in the 20's, when a similar adamant attitude on the part of the Union leaders practically destroyed both the Union and the industry.'

"And, 'Asked about the industry absorbing the 30-35 cents a ton increase, he said "The industry is lucky to be breaking even. They can't share any increase in cost. Some individual companies can do it, but we represent hundreds of small commercial operators. These fellows haven't got any margin this year to absorb any increase in cost." And
1055 he said that Wetter, Manley and Cartwright all are representing medium-sized mines. He said that he represented many small companies, that he was not speaking just for the Pittsburgh Consolidation Coal Company.'

"And, 'We have a tremendous responsibility here not to do something that Pittsburgh Consolidation can do, but something which these hundreds of other operators can aff[illegible].'"

* * *

"Referring to those statements contained in this statement of October 14, 1949, were these matters things which affected you in your negotiations with the union in that period of time?"

Mr. Kramer: Now, may we have just a moment, please?

Your Honor, as to this statement of Mr. Love, as taken from the minutes of the United Mine Workers Journal of this year, we continue the same running objection we have previously. I think Your Honor has allowed these. But we haven't waived these, we are still objecting, we want to

again call attention to it, because it is the statement attributed to the conspiracy, and you cannot prove the conspiracy by one of the alleged co-conspirators until it has been established aside from the statements, the same conjection we have made before, and we want to con-
1056 tinue it.

The Court: That's correct.

Members of the jury, before these statements are competent as evidence and binding upon any alleged co-conspirator, the jury will have to find that there was a conspiracy and that such statements were made in the furtherance of the conspiracy.

Now with that explanation, the objection is overruled.

(The reading of the deposition was continued.)

"A. Well, let me first explain to you, because you seem to be talking about small operators as opposed to a little larger ones, that for all practical purposes there are no large companies in the coal business.

The single companies in the oil industry, for example, earn three or four times as much as the whole coal industry. This is a fragmentary business, relatively, some mine a little bit more, and some mine a little bit less.

Now, to go on, in being spokesman for the Northern Conference, you were spokesman for all the operators. You weren't spokesman for Western Pennsylvania as opposed to Ohio. You weren't spokesman for companies mining a million tons as opposed to those mining 50,000 tons. You were spokesman for the whole group of operators,
1057 and therefore, you had to have, if you were going to do your job, you had to have the welfare of the group in mind.

"I might add that what is god for a slightly larger company is generally good for the smaller ones. And if you have an industry where the relatively smaller companies are in difficulties, the larger companies will be in trouble, too.

"What are you looking for when you are a negotiator is to actually and honestly represent everybody that's part of

your conference, and that includes operators in thin seams and thick seams, and various geographical districts.

"By Mr. Rowntree:

"Q. Will you state whether or not you had in mind that it would be more difficult for the small operators, as you refer to them here, to pay any increase in the scale, in the welfare fund, than it would be for the large operators, such as Pittsburgh Consolidation Coal Company? "A. I don't think you can differentiate by size. There were smaller operators who could pay a change in wages a great deal better than a larger company. There were larger companies in trouble, and there were smaller companies in trouble.

"To be perfectly honest, I think that the smaller company with tight management that has flexibility without the
1058 overhead of the large ones, could in many instances be in many instances be in better shape to pay a wage increase than so-called larger companies.

"There are all sorts of gradations when you have an industry as competitive and as fragmentary as we are. Poverty wasn't restricted to the smaller ones."

* * * * * * * * * *

"Q. Will you state whether or not that was a problem in your mind? "A. Regardless of the statement, I feel that my interest was the ability of any coal operator to pay any wage increase in the year 1950, any operator.

"Q. But the contract of 1950 was signed with the increases in it? "A. That's right.

"Q. Will you state whether or not you had in your mind a concern for the growth of non-union coal operations at that time? "A. I think that all of us, and particularly Consolidation Coal or any other operator, has concern for the possibility of his neighbor or someone paying a smaller wage scale, a lower wage scale. I don't think it's con-
1059 trolling in this particular negotiations.

"Q. There was a growth in the production of non-union mines in this period? "A. I don't recall."

* * *

"Q. I will quote from this statement which I have just quoted from before:

'He was asked about the volume of non-union coal. He said it was about twenty-five per cent of production in the northern districts, and added that there was a big volume of non-union coal in the midwest. He said the progressive miners and non-union mines in Western Kentucky mined about two million tons of coal a year.'

"Does that recall to you that you were concerned about that production at that time? "A. I should think running a coal company we would always be concerned about some competitors that could pay a lower wage scale than you could. I think that is a perfectly proper concern."

* * *

"Q. Mr. Love, the contract was signed naming Mr. Charles Owens as trustee for the operators? "A. Correct.

"Q. Did you discuss his nomination and selection
1060 as trustee with Judge Dawson before it was done?
"A. I don't recollect."

* * *

"Q. Will you state whether or not Josephine Roche was named as neutral trustee in the 1950 contract? "A. She was named as one of the three trustees.

"Q. Were you familiar with the relationship of Miss Roche to the United Mine Workers of America in previous years? "A. No.

"Q. Do you recall how the operators came to sign that 1950 contract? Was there an incident that prompted them to sign more than anything else? And I will ask you whether or not you recall a decision of the District Court in Washington concerning a contempt charge brought against the union?

"A. I don't recall. As I do remember is that there was finally willingness on the union to negotiate the economic part of a contract, and it was our best judgment to conclude the contract and stop losing coal business to other fuels.

"Q. And the thing that the union gave up, will you state

whether or not that was the policy of dictating the working time in the industry?

1061 "Q. They gave us the right to run our own mines, and that was a very important economic consideration, along with other things which I can't recall.

"Q. I refer to a statement in the 1952 convention minutes of the Union, pages 125 and 126 of Mr. George H. Love, following the signing of the National Bituminous Coal Wage Agreement in 1950, March 5, 1950, among other things quoting: —"

Mr. Kramer: Objection.

(The reading of the deposition was continued.)

" 'The union asked for a co-operative administration of the welfare fund, and we are giving it to them. We will help every way possible to make this huge fund a definite credit and benefit to the industry. However, the responsibility —"

* * * * * * * * * * *

Mr. Kramer: Your Honor, we want to object again.

1062 Your Honor, this is a statement of an alleged representative—of a representative of one of the alleged conspirators, and it is found in the United Mine Workers Journal, and they are quoting from that. That is what they have, and we object to that, Your Honor, again for the reason you cannot prove a conspiracy in this manner.

The Court: You cannot prove a conspiracy by a statement of an alleged conspirator, but if the conspiracy is found by the jury to have existed, and if a statement was made by an alleged conspirator in furtherance of a conspiracy, then the statement made by the alleged conspirator is binding upon all the conspirators.

Mr. Kramer: And it is our position, further, Your Honor, that the conspiracy has not been established prima facie, and until it's established, even this type of evidence is not admissible. It might be afterwards.

The Court: But it is the holding of the Court that if the

matter goes to the jury, that that is a question of fact for the jury, after the jury hears all of the evidence.

* * * * * * * * * *

1063 "'The union asked for a co-operative administration of the welfare fund, and we are giving it to them. We will help every way possible to make this huge fund a definite credit and benefit to the industry. However, the responsibility is squarely on the shoulders of the union, and if it fails, the public and ourselves will look directly at the union.'

"Do you recall that statement, Mr. Love?"

* * * * * * * * * *

Mr. Combs: May it please the Court, may I point out, Your Honor, that this was made in a press statement by Mr. Love, probably in Washington, after the signing of the contract, and since counsel has read only part of one paragraph, may I read the entire paragraph? It is short.

The Court: Yes, sir.

* * * * * * * * * *

Mr. Combs: This is a statement of Love made at a press conference after the signing of the 1950 contract.

"We have had a good fight, but we are all glad it is over. This two and a half year contract gives the industry its first real opportunity for stability in the last decade.

1064 "Both the union and the operators made concessions. The operators definitely established the right to control their production in their mining facilities.

"The union asked for a cooperative administration of the welfare fund, and we are giving it to them. We will help every way possible to make this huge fund a definite credit and benefit to the industry, however the responsibility is squarely on the shoulders of the union, and if it fails, the public and ourselves will look directly at the union."

And then he goes ahead to say that:

"This country is one of the very few where coal mining is still in private hands operating under a free enterprise

system. It carried the country's enormous needs during the war and since without Government help or subsidy. It is a modern aggressive industry with three to six times the productivity of the coal industry in any other country, and we are going to do better than that."

That was a public press conference of Mr. Love.

1065 Mr. Kramer: Your Honor, Mr. Love did not attend this convention as this record shows, and it is what someone said he said at a press conference. It is quoted in these minutes, which, of course, is hearsay of the second degree, and we do not think it is competent at all.

Mr. Love was not at the International convention and did not make the statement there.

* * * * * * * * * *

"Q. Do you recall that statement, Mr. Love? "A. Not in detail, but in principal."

* * * * * * * * * *

"The Witness: I never attended a convention of the United Mine Workers in my life."

* * * * * * * * * *

Q. Mr. Love, do you recall an effort after the signing of the 1950 contract to have the National Labor Rela-

1066 tions Board cases brought by the operators dismissed? "A. I do not recall.

"Q. Consolidated Coal Company, has it had any serious strikes since the 1950 contract? "A. Yes, it has had some very serious local strikes in the last 10 years.

"Q. I would like to ask you, Mr. Love, if you could file as Exhibit 2 to this deposition the prospectus of Consolidation Coal Company, October 24, 1956, concerning the issuance of 2,678,897 shares of common stock for the Pocahontas Fuel Company Exchange."

* * * * * * * * * *

1067 "Q. I am quoting from that prospectus:

" 'There has been no general strike in the bituminous coal industry since March, 1950. The company has experienced no material work stoppages or unusual labor

difficulties since that date, with the exception of unauthorized work stoppages at its mines in northern West Virginia during portions of the months of April, May, and June, 1956, which decreased the company's production by approximately 850,000 tons during that period.

" 'Effective October 1st, 1956, a new wage agreement was signed with the United Mine Workers of America. This agreement provides for an immediate wage increase of $1.20 per day and an additional increase, effective April 1st, 1957, of 80 cents per day, as well as for certain fringe benefits. The new agreement is expressly not subject to termination prior to September 30, 1957, but after that date may be terminated by either party on 60 days' notice to the other. To cover the increased labor costs arising from the October 1st wage increase and the accrued increases in material and supply costs, the company has made increases of ap-
1068 proximately 40 cents per ton in its prices. Other companies have also increased their coal prices. While the increases have been in effect too short a period to permit a definite estimate as to their ultimate effect on the position of the coal industry, the company does not believe that under presently existing conditions they will materially affect its ability to market its product.'

"Mr. Love, is that statement true and correct? "A. If we put it in the prospectus, it must be true and correct. Whether that's an actual quotation of it, I don't know. But whatever is in the prospectus, I will take it as being so."

Mr. Rowntree: And that statement was filed with the prospectus, your Honor.

Bottom of the page.

(The reading of the deposition was continued.)

"Q. The substance of the statement is true; is that correct? "A. I will say what I did, if this is a proper reading of the statement in the prospectus, I know it's correct. Now, whether it is or not, I am not prepared to say. But I repeat that we did have work stoppages during the period, and

continued to have them after that date, of a serious,
1069 local nature.

"Q. And those were unauthorized work stoppages, as you call them? "A. We used that word. And by unauthorized, I don't quite know what that means, whether unauthorized by the local or by the district, or by the national. Perhaps the word is a little unfortunate.

"But we had serious local work stoppages."

* * * * * * * * * * *

Mr. Rowntree: I would like to take up the deposition of Mr. Robert L. Kaiser taken at Cleveland, Ohio, November 11, 1960, on page 4.

"ROBERT L. KAISER

a witness called by the defendants and cross plaintiffs,"

* * * * * * * * * * *

DIRECT EXAMINATION

"By Mr. Rowntree:

1070 "Q. What is your name, sir? "A. Robert Kaiser.

* * * * * * * * * * *

"Q. Are you an officer in Otis & Company? "A. Yes, sir.

"Q. Is the principal office of that company in Cleveland? "A. Yes, sir.

* * * * * * * * * * *

1072 "Q. How many shares of stock does Mr. Daley own in that company?"

Mr. Rowntree: I will just interpolate. The name of Mr. Daley is William R. Daley.

(The reading of the deposition continued.)

"A. All of them.

"Q. Is Mr. William R. Daley associated with Mr. Cyrus S. Eaton in any business connection in this company or any other company? "A. Yes. Over a period of many years, I believe, Mr. Eaton and Mr. Daley have had common interests in a number of business situations."

* * * * * * * * * * *

"Q. What is your official position in Otis & Company? "A. I believe I am a secretary, and I may have some other office, but I want to check that.

"Q. Are you associated with Mr. Cyrus S. Eaton in any corporation in which he is also an officer of a stockholder together with you? "A. Yes.

"Q. And what other corporations are those? "A. Mr. Eaton, I believe, and I are both officers of Portsmouth Corporation.

* * * * * * * * * * *

1073 "Q. Does Otis & Company declare dividends? "A. No, sir, not recently."

* * * * * * * * * * *

"Q. Does Mr. Cyrus S. Eaton hold an office in Otis & Company? "A. I believe not.

"Q. Does Mr. Cyrus S. Eaton, Jr. hold an office? "A. I believe not. I am not sure of that. I would have to check that.

"Q. Does Otis & Company own stock, common or preferred, in West Kentucky Coal Company? "A. I believe not.

"Q. Has it ever? "A. Undoubtedly it has.

"Q. And when it did own that stock, was it owned in its own name outright, or was it owned beneficially for some other party? "A. Well, if Otis owned it, it owned it beneficially.

"Q. For someone else? "A. No. If Otis owned it, it owned it beneficially."

* * * * * * * * * * *

1074 "Q. Are you a director of the West Kentucky Coal Company, Mr. Kaiser? "A. Yes, sir.

"Q. And you are secretary of Portsmouth Corporation? "A. Yes, sir.

"Q. Now, Mr. Kaiser, do you know how many shares of stock are outstanding in Sagamore Summit Corporation? "A. Yes, sir.

"Q. How many shares are outstanding? "A. 195 shares.

"Q. Can you state the names of the owners of those shares? "A. They are all owned by Mr. Cyrus S. Eaton, Jr.

"Q. How many shares are outstanding of Tower Industries, Inc.? "A. There are 210 shares outstanding.

"Q. Who owns those shares? "A. They are owned by 15 individuals, primarily spouses of Mr. Eaton's children, spouses and/or business associates.

"Q. Mr. Kaiser, are you familiar with the trans-
1075 action whereby Chertsey Corporation acquired shares of stock of Chesapeake & Ohio Railway Company? "A. I know that they did acquire such shares.

"Q. Are you connected with Chertsey Corporation? "A. Yes, sir.

"Q. What is your connection? "A. I am secretary and treasurer of Chertsey.

"Q. How many shares of stock are outstanding in Chertsey Corporation? "A. 200 shares.

"Q. And who owns those shares? "A. They are owned by Mr. Eaton and various of his children.

* * * * * * * * * * *

1078 Mr. Rowntree: If your Honor please, the next deposition is that of Mr. Cyrus Eaton, and in order to obtain a proper understanding of this deposition I would like to state a contention with respect to promissory notes executed by Mr. Eaton and certain corporations.

It is our contention that these notes manifest an unusual relationship; that it is not the usual loan transaction. I understand that the other side contends that it is the usual loan transaction.

Our contention is founded upon a provision in each of these notes, and I have not yet read the notes into evidence and I think I should just read a paragraph at the end of one of these notes which is common to all of them.

1079 This particular note is Exhibit 49, executed by Mr. Eaton.

"At any time prior to or at the maturity of this note, I shall have the right to tender to the payee"—

The payee being the United Mine Workers of America.

Mr. Kramer: No, just a moment.

Mr. Rowntree: To the officers of the United Mine Workers.

Mr. Kramer: I think all of these notes—I think it is true of all of these, Thomas Kennedy, W. A. Boyle, John Owens, Trustees, International Union.

Mr. Rowntree: Payees are the International officers, Trustees of the International Union.

"At any time prior to or at the maturity of this note, I shall have the right to tender to the payee the security pledged as collateral for this note in full satisfaction of any amounts due on account of principal or interest. If such tender is made, I shall have no further interest in the collateral or in the excess of the value of the collateral over the amount due under this note, and I shall have no
1080 liability for any deficiency in the value of the collateral below the amount due under this note."

Our viewpoint is based on this circumstance, which is understandable by this illustration.

That if I borrowed money from Mr. Robertson, putting up the collateral stock which I bought with that loan, executing a note with this provision in it, in the event the stock increases in value tremendously, subsequently I can go to Mr. Robertson and say, "Here is the money I borrowed from you. Let me have the stock back."

Now if the stock goes down in value, if it goes down tremendously in value, I can then later on go to Mr. Robertson and say, "With respect to this loan I made from you sometime back, I don't want any more to do with it. I will let you have the collateral. I tender to you the collateral and let me have my note back because the note says I am not liable for any deficiency."

And one step further on, as counsel has pointed out, these notes are executed to trustees in a fidicuary capacity, and

the loan which they made with this type of clause in it, it is our contention, was not made in ignorance of their trustee responsibility, their fiduciary responsibilities as trus-
1081 tees of that money.

In that regard, we would like to point out one answer in Mr. Lewis' deposition which was not clear because we had not put the notes in at that time.

* * * * * * * * * *

1084 Mr. Rowntree: "Q. The International officers of the Union, as Trustees of Union funds, would have an obligation to check upon and to pass upon and to take steps when need be, to preserve the assets in which they had invested Union funds; is that not true? "A. Sir, I have a full appreciation of the obligations of the Trustees acting in a fiduciary capacity.

"It has been my lot to be a Trustee in a number of instances. I have an understanding of the obligations placed upon fiduciary Trustees under the law and the statutes made and provided. And all those things are taken into consideration when the Trustees exercise their judgment.

"The Trustees of the United Mine Workers are satisfied with the investment in the West Kentucky Coal Company and are quite content in the belief that, in the end, it will prove to be immensely profitable to the United Mine Workers of America in a financial sense; a wise investment of the funds."

Mr. Kramer: Your Honor, I want to make one statement. and then Mr. Combs wants to make a statement. I want to point out particularly to your Honor and the jury
1085 that we are talking now about trustees other than the trustees of the Welfare and Retirement Fund. The trustees of the Welfare and Retirement Fund are entirely a separate entity from the trustees that are being talked about here.

These are trustees for certain funds that belong to the United Mine Workers of America and properties of the United Mine Workers and are in no wise connected with the

funds that belong to the Welfare and Retirement Fund.

So we must not get confused that it is the same trustees, because they are separate and distinct entities and separate parties in this lawsuit.

The Court: That is correct.

Mr. Kramer: Now Mr. Combs wants to make an explanation.

Mr. Combs: May it please the Court, ladies and gentlemen of the jury, the notes that counsel is speaking of are promissory notes. They are payable on demand. Mr. Lewis has testified that Mr. Eaton, in regard to these notes, that the particular provision in these notes has no particular significance, except in a commercial transaction. I know that the jury and the Court will bear in mind that in addition to the collateral to these notes was the promise to pay by the individual involved.

1086 This is a series of notes that counsel has introduced and will be commenting upon.

It is the contention of the United Mine Workers that none of these transactions were in any way, shape, form or fashion in connection with any conspiracy. The contention is that these were investments; they were legal investments in every way; that the trustees of the United Mine Workers had the right to make the investments; they made them with full knowledge of their fiduciary relationship, as counsel talks about. They made those with that in mind.

The stocks involved are stocks, as I recall, in the Chesapeake & Ohio Railway, stocks in certain utility companies, and West Kentucky Coal Company. So it is the contention of the Mine Workers, and I think the evidence will show, that these were commercial transactions taken with full legal rights to all parties concerned.

In connection with the ability of the maker of the note to tender the collateral and get his note back, the statement of counsel, it may be pointed out that the testimony of Mr. Lewis, and I think the testimony of Mr. Colton, which has not been read but it will be read here in connection with that

—in reply to counsel's contention asked of the witness did that not mean that the maker of the note had a right
1087 to share in any profits that m. y be made in the transactions; but at the same time to relieve himself of loss in case the stock went down, the reply of both Mr. Eaton and Mr. Lewis was simply this, that if they sold the stock at a loss, of course they would lose money.

There is nothing in the record or the contention that would show that there would be any necessity or desire to sell stock at a loss.

* * * * * * * * * *

Mr. Rowntree: Deposition of Mr. Cyrus S. Eaton, taken at Cleveland, Ohio, November 11, 1960.

(The reading of the deposition was as follows.)

"CYRUS S. EATON

a witness called by the defendants and cross plaintiffs, pursuant to the federal rules of civil procedure, was by me first duly sworn, as hereinafter certified, and deposed and said as follows:

"DIRECT EXAMINATION

By Mr. Rowntree:

"Q. What is your name, sir? "A. Cyrus S. Eaton.

"Q. Where do you live, Mr. Eaton? "A. North-
1088 field, Ohio.

"Q. Is that near Cleveland? "A. That's outside of Cleveland, Ohio.

"Q. Have you always resided in Cleveland or thereabouts? "A. No; for only 60 years.

"Q. You are Chairman of the Board of Chesapeake & Ohio Railway Company? "A. Yes.

"Q. And you have other business interests besides the railroad? "A. Yes.

"Q. I believe that you are Chairman of the Board of Steep Rock Iron Mines? "A. Yes.

"Q. And Portsmouth Corporation? "A. Yes.

"Q. West Kentucky Coal Company? "A. Yes.

"Q. White Sulphur Springs Company? "A. Yes.

"Q. And the Nashville Coal Company? "A. Yes.

"Q. Are you also on the Board of Directors of Sherwin Williams Company? "A. Yes.

1089 "Q. Cleveland Cliffs Iron Company? "A. Yes.

"Q. Kansas City Power and Light Company? "A. Yes.

"Q. And the Cleveland Electric Illuminating Company? "A. Yes.

"Q. Mr. Eaton, United Mine Workers has filed an exhibit in this case, and I refer to Exhibit 1-A"—which is now Exhibit 49—"The first page of the interrogatories propounded to defendants and cross plaintiffs, Set No. 2, a letter or a promissory note signed by Cyrus S. Eaton, February 7, 1958, in the principal amount of $1,793,750, which I show you and ask you, did you sign such a note? "A. Yes.

"Q. Now, the Union has answered that this principal amount shown on that note was part of a loan—was a loan which commenced February 7, 1951. This note is dated February 7, 1958. Can you explain the difference in that date from the commencement of the loan? "A. The notes were renewed annually. So this would be a renewal of the original.

1090 "Q. The first note was payable on or before one year after date, I take it? "A. That's my recollection.

"Q. And as the year approached the termination, there would be a renewal of the note? "A. Yes.

"Q. And this occurred each year until this note was executed? "A. That's my memory.

"Q. A notation at the bottom of that note states that the original was returned to Mr. Eaton — "A. Yes.

"Q. — 6-5-59. Was the original of that note returned to you? "A. Yes.

"Q. Was that because there was another renewal? "A. Yes.

"Q. In other words, there is a replacement note that took the place of this exhibit here?"

Mr. Rowntree: Now we will skip, because a note was later furnished the replacement note, and I would like to put into evidence the two promissory notes furnished as a late filing to this deposition.

The first note is executed by Mr. Cyrus S. Eaton to the international officers of United Mine Workers individual named as trustees of the international union, Janu-
1091 ary 26, 1960, in the amount of $1,815,284.87.

Mr. Kramer: I want to object. He has finished one, and I will comment on the other.

Between the two, I object to these for the reasons given the other day. These do not deal with West Kentucky stock at all. These are dealing with reference to C & O stock under this record here. We say they have no connection, are irrelevant and immaterial, and they are not admissible.

The Court: For what purpose are they introduced?

Mr. Rowntree: We are probing this relationship, your Honor.

The Court: All right. The objection is overruled. They may be introduced solely for the purpose indicated.

Mr. Rowntree: We introduce that note as Exhibit 67.

(Exhibit No. 67 was marked for identification and filed.)

Mr. Rowntree: And we introduce as the next exhibit a note similarly executed to payees by Mr. Cyrus S. Eaton, February 7, 1960, in the amount of $1,793,750.

1092 (Exhibit No. 68 was marked for identification and filed.)

* * * * * * * * * *

By Mr. Rowntree:

"Q. Now, my question is as to the background of this transaction shown on that Exhibit 1-A"—presently Exhibit No. 49—"before you, Mr. Eaton. "A. That would go back to the events which occurred perhaps as long ago as 1951 where I made a loan from the United Mine Workers and

secured that loan by stock of the Chesapeake & Ohio Railway.

"Q. Mr. Eaton, did you ask the Union for this money for the purpose of buying this stock?"

Mr. Kramer: Without continuing the objection, the record may show we continue the objection where
1093 the C & O stock is involved?

The Court: Yes, sir.

(The reading of the deposition continued.)

"A. Whether I had agreed to buy the stock before I spoke to the Union, I don't recall. But I did discuss with the Union their willingness from their unemployed funds to make a loan on C & O stock.

"Q. And it was understood that you would buy this stock with the proceeds of the loan? "A. I probably would already have purchased the stock and asked the Union whether they would care to loan money on that collateral.

"Q. May I ask from whom you purchased the stock in this particular transaction? "A. The stock was purchased from Robert R. Young and Associates. I do not recall just which one of the groups associated with Mr. Young sold the stock.

1094 "Q. Was any of it purchased from Allegheny Corporation? "A. My recollection is that the Allegheny Corporation was an owner of the stock or a part of it.

"Q. When was this stock purchased that was put up as collateral for Exhibit 1-A there? "A. Well, as I say, I can't be sure of just what stock was used at that particular time, but the stock I am referring to was stock purchased in 1951.

"Q. Did you own C&O stock at the time or immediately prior to that purchase? "A. Oh, yes.

"Q. And is it true that you bought one block of 250,000 shares at this time? "A. No.

* * *

"Q. Did you buy at any time one block of 250,000 shares of stock? "A. No.

"Q. In 1951, in connection with the funds furnished by the

Union, did you buy an aggregate amount of 250,000 shares? "A. No.

"Q. Did you purchase stock on behalf of, or acting as agent for United Mine Workers of America, in C&O
1095 Railway stock? "A. No.

"Q. Do you know whether or not the United Mine Workers of America bought stock at that time in C&O? "A. I don't know.

"Q. Are you acquainted with the fact that United Mine Workers of America owns 124,927 shares of C&O Railway Company? "A. No, I am not familiar with their total ownership.

"Q. And you are not acquainted with the fact that the Union carries that stock on its books at a sum of $4,390,009.88? "A. No.

"Do you know the total number of shares of stock which are reflected in these exhibits to interrogatories, Set No. 2 and 3, aggregate 50,000 shares of C&O stock put up as collateral by you under Exhibit 1-A, first page; 52,427 shares under the second page of Exhibit 1-A; and 22,500 shares of C&O stock put up by Chertsey Corporation —

* * *

— under page 1-C, Set No. 3 of the interrogatories on page 2, and that those numbers of shares aggregate 124,927 shares, the same amount of shares as the Union states it owns?

1096 * * *

In other words, Mr. Eaton, these exhibits that I have referred to supplied by the Union show in the loans commencing February 7th, 1951, the number of shares put up as collateral by you and by Chertsey Corporation aggregate 124,927 shares in C&O, which is the same number of shares which the Union carries in its own name on its books."

Mr. Rowntree: An objection by counsel for the witness, Mr. Fortas.

Mr. Kramer: That was not by us, Your Honor. The witness had his own personal counsel, and the instructions

used between that counsel and the witness, we do not think are competent for any purpose in this lawsuit, and the question was not answered, and I think it goes down to the next question.

(The reading of the deposition was continued.)

"Q. In the face of that observation, does that recall to you that the Union purchased stock in the same amount as you and Chertsey bought at approximately the same time and at approximately the same price?"

* * * * * * * * * *

1097 "A. The answer is no.

"Q. Mr. Eaton, do you recall, were your purchases at the time of this Exhibit 1-A, the original note in 1951, made at the quoted figure for purchases on the Exchange? "A. May I have that question again, please?

"(Question read.)

"A. Some were purchases on the Exchange, which would obviously be at the market, and any other purchases made by me would have been at the market."

* * * * * * * * * *

"Q. Mr. Eaton, Exhibit 1-A states in the last paragraph, and I quote, 'At any time prior to or at the maturity of this note, I shall have the right to tender to the payee the security pledged as collateral for the note in full satisfaction of any amounts due on account of principal or interest. If such tender is made, I shall have no further interest in the collateral or in the excess of the value of the collateral over the amount due under this note, and I shall have no liability for any deficiency in the value of the collateral below the amount due under this note.'

1098 "Do you recall if the original note had that provision in it? "A. I believe so."

* * * * * * * * * *

"Q. Did Mr. John L. Lewis show any reluctance in making this loan on these terms? "A. His associates considered

it carefully, and decided that it was a prudent loan for them to make."

* * * * * * * * * *

"Q. Was it not the understanding between you and the officers of the United Mine Workers of America that
1099 this stock would belong to the United Mine Workers of America, and that it would stand the risk of loss by reason of decline in value, and that you would stand and acquire the gain that would be realized by increase in value? Wasn't that the understanding? "A. No.

"Q. Was it the understanding that you would have the gain and the Union would suffer the loss? "A. No.

"Q. So that was not the understanding; is that right? "A. The answer is no to the question.

"Q. I mean, it was not the understanding then that you would have the gain and the Union would suffer the loss? "A. No.

"Q. Now, turning to the second page of Exhibit 1-A of the Set No. 2 interrogatories, the Union has stated that this loan was commenced February 7, 1951. I observe that the date on this note is January 26, 1958. Do you know the reason for that, Mr. Eaton? Was this loan actually started a little before February 7, 1951? "A. I am not sure that this is a continuation of loans made in 1951. There were loans made at other times, some of which have been paid off.

"Q. Now, I note that on the bottom of this exhibit,
1100 the original has been returned to you as of 6-5-59. And the answer with respect to any supplemental notes would be the same as applies on the first note, I take it? "A. Yes, that's right."

Mr. Rowntree: I believe that note was introduced a moment ago as the last exhibit.

* * * * * * * * * *

Mr. Rowntree: This is Exhibit 61.

* * * * * * * * * *

"Q. Now, turning to Set 3, Exhibit 1-C, page 2, the principal amount of this note is $517,484.54. Now, was this part

of the same transaction that was involved in the last two notes that we were looking at?

"Mr. Fortas: Counsel, excuse me. This is a note signed by Chertsey Corporation, isn't it?

"Mr. Rowntree: Yes.

"Mr. Fortas: To which you are presently refer-
1101 ring?

"Mr. Rowntree: That's right."

* * * * * * * * * * *

"A. I don't know that you could characterize it as part of the same transaction. It was a loan from United Mine Workers to Chertsey secured by C&O stock.

"Q. And the Union states that this loan likewise commenced February 7, 1951; is that your recollection? "A. I am not sure of that.

1102 "Q. But anyway, the matter was discussed approximately the same time as the other two notes, by you, with the union officers? "A. Yes. Any loans made by the Union on the Chesapeake & Ohio stock were discussed with me.

"Q. And the proceeds were used to pay for stock either acquired or to be acquired by you or by Chertsey Corporation? "A. Stock already owned or to be acquired by me—either by the company or by me.

"Q. And the collateral on this note was 15,000 shares of C & O Railway. And turning to page 3 of this Exhibit 1-C" —presently Exhibit 51— "of Set 3, the amount of that note of Chertsey Corporation was $263,464.39. The Collateral there is 7,500 shares of C & O Railway stock.

"Now, isn't it true, Mr. Eaton, that the first page of this Exhibit 1-C supplanted and took the place of pages 2 and 3? "A. All three are Chertsey Corporation, are they?

"Q. That's correct. "A. It's a matter of calculation to see whether they are the same amounts. That is a bookkeeper's job, maybe, rather than mine.

"Q. Well, you can see that the amounts and up to the same amount as on the face of the first page?"

1103 "The Witness: They don't seem to be the—"

Mr. Kramer: His answer is, "I think someone with an adding machine better make that."

Pass all that of intervening counsel.

"Mr. Kramer: Dollar-wise, I do admit."

Mr. Kramer: Take an adding machine and added them up. That would be a safe admission.

The Court: That is a pretty safe admission.

Mr. Rowntree: We submit they do add up to the same. In other words, the two older notes add up to the same as the later note on the principal amount.

* * * * * * * * * *

1104 "Q. I am talking about the principal amount of the notes."

Mr. Kramer: We admit that they add up that way. Still back to the adding machine, and I believe the adding machine is right.

* * * * * * * * * *

"Q. That is with respect to the principal amount. Now, the collateral is different. Page 1 has 14,783 shares as opposed to a total of 22,500 shares in the other two pages, the previous notes. Can you explain that difference? "A. Is the collateral more or less?

"Q. The collateral is less on the supplemental note. "A. I think the market of the collateral is several times the size of the obligation, and as is customary in many cases of this kind, the collateral was reduced.

"Q. Because of the increase in value of the stock since the time of the original loan transactions? "A. Yes.

1105 "Q. Did Chertsey Corporation acquire the amount of collateral that was taken down? "A. Yes."

* * * * * * * * * *

"Q. If the C & O stock went down in value after the loan, which is reflected in Exhibit 1-C, at any time you or Chertsey Corporation—Chertsey Corporation could have offered

the stock at its decreased value to the Union, and could have received a release of its liability?

* * * *

"Q. Was that the understanding that you had with the Union? "A. I don't believe that I can attempt to interpret just what you have in mind or the point of your inquiry, nor do I think I could be expected to undertake to deal with some imaginary thing in the past, where all sorts of conditions and circumstances might have surrounded it. I think if I attempted to reconstruct something of that kind, I would have to get into all the history of what was going on in a busy world, and that's too big a job.

"Q. Mr. Eaton, I am referring to the line at the bottom of the note, Exhibit 1-C," — presently Exhibit 51 — "page 2 of Set 3, which states that the maker of the note at any time had the right to tender the security, the C & O 1106 Railway shares, which was the collateral to the payee, and if such tender were made, the maker would have no liability for any deficiency in the value of the collateral below the amount due under the note.

"Now was that the real understanding? Was there any other understanding between you and the Union? "A. This sets it out.

"Q. This is the understanding? "A. Yes."

* * * * * * * * * *

"Q. There was no other understanding; is that right? "A. That's right.

"Q. So at the time of this taking down of some 8,700 shares of C & O stock from the collateral on this note, the shares of stock left being 14,783 shares supported the note of $780,000? "A. Well, the note and the collateral will speak for themselves. I will not undertake to make that calculation.

"Q. But I think you have already testified that the value of the stock went up and that the balance of the shares retained as collateral supported the note? "A. That's right.

"Mr. Fortas: Plus—if we are going into the legal

1107 construction of this document—plus the promise to pay as set forth in the note.

"Mr. Rowntree: Yes.

"Q. So that the shares, the value of the shares that were taken down by Chertsey Corporation was roughly $400,000?"

* * * * * * * * * * *

"A. I wouldn't undertake to calculate that."

Mr. Rowntree: If your Honor please, for explanation I would like to show how we arrive at the $400,000.

14,783 shares were left as collateral supported the loan of $780,000. Each share would have a value of at least $53.00. That is simple division.

Mr. Kramer: We object to that.

The Court: Well, that isn't testimony. He is making an explanation of his position, which he has a right to do, but it is not testimony.

Mr. Kramer: We understand. But, your Honor, that is not factual. Counsel is inaccurate.

The Court: You can make your explanation, Mr. Kramer, in reply to his.

Mr. Kramer: I don't think counsel intends to be inaccurate. I was hoping he would correct it.

1108 The Court: Neither side intends to be inaccurate. I know counsel well enough to know that.

Mr. Kramer: What he is saying is that its total valuation is $780,000. That was the amount of the loan. And there were 14,780 shares of stock put up as collateral for it.

That does not mean that dividing 14,783 and $780,000 you get the value of one share of stock. Counsel said that but did not mean to. If you want to figure it on a pro rata basis, that was it, O. K. But that isn't the value of the stock, the collateral.

I am saying that you can't divide 14,783 into $780,000 and say the ultimate dividend that you get, the result of that division is the value of a share of stock because that is not the value of the shares of stock, and I say that could not be

accurate on that basis. We have no objection stating the facts as they exist.

Mr. Rowntree: I don't understand counsel. If I bought stock like that that is the way I would figure out what each share was worth. That is my contention, anyway.

The Court: All right.

Mr. Rowntree: I don't understand counsel.

The Court: Mr. Kramer, you deny that his conten-
1109 tion is sound?

Mr. Kramer: Yes, we do, your Honor. When you buy a house and lot and use it for collateral for a certain loan, I don't see how splitting off so many feet of that lot and for each foot of that lot say is the equivalent divided by the front footage into the amount of that loan, you wouldn't divide property that way, and I am saying that is not an accurate description of the security. If I have a vacant lot and make a loan, I can't say that every foot of that lot divided into the amount of the loan is the value of it.

Mr. Rowntree: We differ with comparing real estate with shares of stock, and we think there is a definite intrinsic value of each share.

Mr. Combs: May I make an observation.

I think the jury should remember that they are talking about a loan that was made on February 7, 1941—1951.

Now the value of the stock, C & O stock, was reflected on the stock exchange. Mr. Eaton has testified to that. There is nothing in this record that I know of that shows what C & O stock was selling for in 1951 or at the time the collateral was made.

There is testimony that the remaining collateral
1110 was far in excess of the amount loaned. And I think that is the point. Thank you.

Mr. Rowntree: It is our contention that the testimony has clearly shown that the stock went up in value and they took down collateral leaving enough stock in there to support the loan.

Mr. Combs: To that I agree. That is right. That is a

correct statement. But this evaluation of $400,000 has no purpose in here, that I can see.

Mr. Rowntree: To complete our computation, if we multiply the 8,700 shares taken down by the $53.00, which we derived by that previous division—

Mr. Kramer: But you do admit there is nothing in here that shows the listed price of the stock at $53.00 a share?

Mr. Rowntree: The only testimony is, Mr. Eaton testified in this deposition previously read that the shares of stock remained supported the loan.

Mr. Kramer: That is true. And there is nothing to show the value of the stock on the market in this record.

Mr. Rowntree: Second question from the bottom of that page.

(The reading of the deposition was continued.)

1111 "Q. Does Chertsey Corporation still own those shares of stock that were taken down from the collateral? "A. I can't answer that without looking it up.

"Q. Do you recall if you yourself, individually, acquired any of those shares? "A. No.

"Q. Do you recall if any officer of the United Mine Workers of America acquired any of those shares? "A. I am sure that none of them did. If they wanted to buy shares, they could have bought them on the open market. There are plenty of them.

"Q. Has any auditor of the United Mine Workers of America inspected the records of Chertsey Corporation? "A. I don't believe there has been any occasion for that. I don't recall any such occurrence.

"Q. Is it not true that funds derived from the United Mine Workers of America paid for these shares? "A. That is not necessarily the case.

"Q. In the light, Mr. Eaton, of the language of the last paragraph of these notes that we have referred to, is it not true that in the acquisition of these shares of stock you were acting merely as an agent for United Mine Workers of America? "A. No."

. . . . . .

1112 "Q. Is it not true, Mr. Eaton, that these shares of stock that were taken down from the collateral on this occasion that we referred to here in Exhibit 1-C, that this was merely compensation to you or to a company affiliated with you for the handling of the transaction of the acquisition of shares of stock by United Mine Workers of America? "A. No.

"Q. Returning to Exhibit 1-A of Set 3, here we have a note secured by collateral of West Kentucky Coal Company, in the name of Chertsey Corporation in the principal amount of $2,153,279.50, dated January 30th, 1958.

"Now, the Union has answered interrogatories stating that this loan likewise commenced February 7, 1951.

. . . . . .

Do you recall if this transaction represented on this note was involved in the same transactions that we have been talking about before involving C & O Railway stock? "A. They have no relationship of any kind.

1113 "Q. This was an entirely separate transaction? "A. Completely."

. . . . . .

"Q. This note also, Mr. Eaton, states that the original was returned to Mr. Eaton 6-5-59. I would like to examine the papers brought in under the subpoena to see the present supplemental note."

Mr. Kramer: Papers were handed to counsel.

(The reading of the deposition continued.)

By Mr. Rowntree:

"Q. Mr. Eaton, counsel has furnished us a copy of a promissory note dated January 30th, 1960, in the same principal amount as Exhibit 1-A, and I take it that that is a supplemental note to take the place of the exhibit? "A. I assume it is."

Mr. Rowntree: If your Honor please, that was the note I was trying to place the other day and it now comes to me. We will have to introduce that subsequently.

(The reading of the deposition continued.)

"Q. Now, Mr. Eaton, I notice that the shares of stock, collateral for the 1960 note, are the same as in the
1114 1958 note, which is the exhibit. Has that number of shares of stock always remained that number since the loan transaction? "A. Well, unless the loan has been increased. If the loan had been increased, there would be additional shares, but it would be the same if it's the same loan.

"Q. This number of shares of stock shown on Exhibit 1-A would reflect a value to support the note of roughly $25 per share. Do you know if the West Kentucky Coal stock in 1960 had a value of $25 per share? "A. I think it had an intrinsic value substantially above that. On a rather thin quoted market, it would have been lower, but since the loan was made, I think the stock on the market has sold as high as $40 a share, and it has sold lower, but the fluctuations in the market having regard to the long time picture of the property has very little to do with its intrinsic value.

"Q. But this stock is listed on the New York Stock Exchange, the West Kentucky Coal Company stock is listed on the New York Stock Exchange? "A. Yes.

"Q. And what is the value on the New York Stock Exchange, the quoted value on West Kentucky Coal Company stock per share? "A. I don't like to use the word 'value' in referring to fluctuations on the Exchange. If you
1115 mean the current quotation of small numbers of shares, I think it's around $11 now.

"Q. Has the Union made demand for additional collateral on this note? "A. No.

"Q. When the stock represented as collateral in these notes goes up, does the Union permit you to take the stock down as in the case of the C & O stock, and if the value goes down, the Union does not make demand on you for additional shares?"

* * * * * * * * * * *

"Q. Do you understand the question, Mr. Eaton? "A. I am not sure I got all of it."

* * * * * * * * * * *

"The Witness: When the stock went up to around $40 a share, there was no request for reduction of the collateral, and on the market quotations there has been no demands from the Union, because the value of the property is the coal that's in the ground, and that is not affected by fluc-
1116 tuations on the Stock Exchange."

* * *

By Mr. Rowntree:

"Q. Now, Mr. Eaton, this note shows that the original note was returned to you. Were you an officer of Chertsey Corporation? "A. No.

"Q. You were handling the transaction, though? "A. Yes.

"Q. The note recites, this is Exhibit 1-A, recites that the interest shall be equal to one-half of the dividends received on the collateral securities, the West Kentucky Coal Company stock, so the interest would be, then, one-half of the dividends declared and paid by West Kentucky Coal Company? "A. Yes, sir.

"Q. Now, if the Union had bought the stock itself it could have gotten the full amount of the dividends? "A. Well, that's speculating on something—

"Q. Well, that's true, isn't it, Mr. Eaton?"

* * *

By Mr. Rowntree:

"Q. And if this was an ordinary transaction for an investment of funds, the form which it took in ostensi-
1117 bly putting the stock in the name of Chertsey Corporation, by the terms of this note, cuts down the possibility of return on the investment by one-half?"

Mr. Kramer: Now that question wasn't answered.

(The reading of the deposition continued.)

By Mr. Rowntree:

"Q. Isn't that right? "A. I think I wouldn't even need the instruction of counsel on that one."

* * *

"Q. If you as an investor—and I take it that you are one of the most skillful investors in the country—wished to invest substantial amounts of money like this amount, willing to take the risk of a decline in the market value of stock, would you make it in this form? "A. That gets into questions of judgment and experience. I don't believe there is any pattern yet that determines the form of American free enterprise. Men and institutions are still allowed to exercise their best judgment. I would do what my experience and best judgment suggested at the time of the operation."

* * * * * * * * * *

1118 "Q. Has West Kentucky Coal Company paid dividends, Mr. Eaton? "A. Yes, through a good deal of its career, it has.

"Q. And one-half of these dividends on this particular stock were paid over to the Union? "A. When the dividends were paid, yes.

"Q. Do you know how long it has been since dividends were paid? "A. I think it's a matter of two or three years.

"Q. Isn't it true, Mr. Eaton, that the right to receive dividends is a normal incident to ownership of stock? "A. Yes, it is.

"Q. And West Kentucky Coal Company has quite a few mortgages, is that right, some of which restrict its payment of dividends? "A. It has loans from banks that have some restrictions of that character.

"Q. Do you recall what the stock market price—"A. Pardon me.

1119 "Q. Do you recall what the stock market price or quotation on the West Kentucky stock was when the shares were acquired? "A. I think around $25 a share, in that vicinity.

"Q. But it is now something like $11 a share?" "A. Yes.

"Q. Now, turning to Exhibit 1-B of Set 3"—this being Exhibit 56—"this is a note in the principal amount of $2,625,000 secured by 23,000 shares of Class A five per cent preferred stock of Nashville Coal Company."

* * *

"Q. This transaction occurred, did it not, Mr. Eaton, in September, 1955?"

Mr. Rowntree: And I should say there was a correction of that amount of shares to 25,000.

* * * * * * * * * * * *

"A. Yes.

"Q. And this is another case of a renewal note—" A. Was it '55 or '56?

"Q. I believe the Union has answered that it started September 5, 1955. "A. It is not clear on this."

* * *

By Mr. Rowntree:

1120 "Q. And this involved the acquisition of the properties of Nashville Coal Company by West Kentucky Coal Company; is that right? "A. It was in connection with— yes, it occurred in connection with that.

"Q. Now, the interest is stated on here as two and one-half per cent of the amount of the principal. "A. Yes.

"Q. Now, the collateral put up in this instance, Mr. Eaton, is five per cent preferred stock of Nashville Coal Company. "A. That is right.

"Q. And here again the Union could be required to take the collateral in satisfaction of the obligation of Chertsey Corporation? "A. Yes.

* * * * * * * * * * *

By Mr. Rowntree:

"Q. Has interest been paid on this note? "A. It may have in the earlier parts, but laterally, not.

1121 "Q. And why has it not? "A. The Nashville Company, the issuer of the notes, has been making very extensive investments in the extension and improvement of

its properties, and in paying off the obligations it incurred in the acquisition of the properties that Nashville now owns.

"Mr. Fortas: Are you talking about dividends, Mr. Eaton?

"The Witness: I am talking about dividends, that, and cash requirements had been very substantial to meet its capital requirements both for extensions to its property and in paying off the obligations it incurred when it made the purchase."

* * * * * * * * * * *

By Mr. Rowntree:

"Q. Nashville Coal Company has not paid the five per cent of dividends on this stock? "A. No, sir.

"Q. And for that reason, Chertsey Corporation has not paid interest on this note in recent years? "A. That's right. The interest has been accrued.

1122 "Q. So when— "A. The dividends are cumulative, of course.

"Q. So it was then your understanding with the Union that the right of the United Mine Workers to receive the interest would be dependent upon the Nashville Coal Company paying dividends on the stock? "A. Yes, that's right."

Mr. Rowntree: Mr. Kramer objects.

Mr. Kramer: The witness finally makes the statement—

Mr. Rowntree: "Mr. Kramer: I object to this question, because first, it calls for a conclusion—"

Mr. Kramer: Of course, the objection is just to get the witness straightened out. Read the answer of the witness.

(The reading of the deposition continued.)

"The Witness: Then I ought to withdraw my answer.

"Mr. Rowntree: No, I don't want the answer withdrawn, because I think that was the understanding, because that's the way it has been practically construed by the parties.

"The Witness: I think I misspoke in my answer there."

By Mr. Rowntree:

1123 "Q. Let me ask you this, Mr. Eaton, has the Union

made demand upon you for this interest, or upon Chertsey Corporation? "A. No.

"Q. And the second page of that same exhibit, 1-B, that is a replacement note taking the place of the first page, I take it? "A. I assume it is.

"Q. And there the Union has allowed the interest to be carried over as an addition to principal? "A. Yes.

"Q. The unpaid interest, that is? "A. Yes."

* * * * * * * * * *

"Q. Is there any understanding, Mr. Eaton, between you and the Union as to how long this process of replaing notes year by year will continue? "A. No, no understanding.

"Q. And there is no understanding as to how long the United Mine Workers of America may retain this collateral which is represented on the face of these notes? "A. They will retain it until their loans which they secure are
1124 paid, I would assume.

"Q. Or until you surrender the stock to the Union? "A. Yes.

"Q. At any decrease in value that may have been suffered in the interval?

* * * * * * * * * *

"Q. Mr. Eaton, referring to this Exhibit 1-D, I take it that that transaction was part of the transaction involved in Exhibit 1-A"—1-D is Exhibit 58—"of that same set having to do with the acquisition of West Kentucky Coal Company stock by Sagamore Summit Company? "A. Yes.

"Q. Why were two different corporations used there? 1-A is Chertsey Corporation, and 1-D is Sagamore Summit Company? "A. It was done for the convenience of the two companies.

"Q. You negotiated both loans; is that right? "A. Yes.

"Q. And part of the proceeds were put into Saga-
1125 more Summit and part into Chertsey, and both acquired West Kentucky Coal Company stock? "A. Yes.

"Q. And all of these were part of the same transaction?

A. Well, they were made at different times and in different amounts.

"Q. But it resulted from the initial negotiations that you had with United Mine Workers of America? "A. It extended over a considerable period of time, and the different corporations participated at different periods in the acquisition of the stock, which went on over a long period.

"Q. Exhibit 1-A, the next page of Set 3, is a transaction in the name of Sagamore Summit Company, having to do with the acquisition of Nashville Coal Company, the same as was true with Exhibit 1-B, except that 1-B was in Chertsey Corporation; is that right? "A. Yes.

"Q. And that was part of the same transaction? "A. Yes.

"Q. Both of those two notes? "A. Yes.

"Q. Does the Union still retain as collateral the
1126 stock referred to on Exhibit 1-D and 1-E? "A. Yes.

"Q. Exhibit 1-F in Set 3"—being presently Exhibit 59—"that is your personal note secured by West Kentucky Coal Company stock? "A. Yes.

"Q. And was this part of the same transaction as Exhibits 1-A and 1-D, the latter two being in the names of Chertsey Corporation and Sagamore Summit Company respectively?"

* * *

"A. This is a note securing the common stock of West Kentucky Coal Company, and the other is something different.

"Q. This is 1-D here. "A. 1-D?

"Q. Yes, and the other one is 1-A, the first one. "A. Well, they are all secured by West Kentucky stock.

"Q. They all result from initial negotiations with officers of United Mine Workers with respect to the furnishing of funds for acquisition or payment for these shares of stock? "A. No, that would hardly be true, because as amounts of
stock in West Kentucky were acquired, additional
1127 amounts, that occasion different discussions with the United Mine Workers on that particular—

1128 "Q. —block of stock.

"So that you had a number or a series of conversations with the Union Officers over a period of several years? "A. Yes.

"Q. And each time the Union put up funds to pay for this stock? "A. Not always. At times we acquired stock without borrowing anything from the Union.

"Q. And 1-F-A, the next page —"

Mr. Rowntree: That is presently exhibit 61.

(The reading of the deposition was continued.)

"—the same is true for that exhibit?

* * *

"Q. That this results from transactions over a period of time and the negotiations with the United Mine Workers over a period of several years? "A. Yes, that would depend on business conditions, circumstances, so that they would be the subject of negotiation and discussion from time to time.

"Q. And likewise that would be true for Exhibit 1-F-B, the next page."

Mr. Rowntree: That being Exhibit 62.

1129 (The reading of the deposition was continued.)

"A. Yes.

"Q. And also for Exhibit 1-F-C, the next page?

Mr. Rowntree: Which is now Exhibit 63.

(The reading of the deposition was continued.)

"A. Yes.

"Q. And 1-F-D?

Mr. Rowntree: Which is now Exhibit 64.

(The reading of the deposition was continued.)

"A. Yes.

"Q. And the last four pages that we have mentioned are all in Tower Industries, Inc.? "A. Yes.

"Q. Now, Mr. Eaton, with reference to the last page of that series of exhibits, which is exhibit 2, that is a note executed by Chertsey Corporation in the amount of $550,000.

It looks like it's dated September 13, 19 — I just can't make it out.

* * *

"Q. Did the Union furnish a date on that? "A. The one I have here looks like 1955.

"Q. Do you have any recollection of the date of
1130 that? "A. No.

"Q. Do you recall the purpose of that transaction, what was behind it? "A. I have forgotten the business conditions. The Chertsey Corporation is at times active in business things, and probably at a time when money rates were very low, when many institutions have deposits in banks on which they are getting very little interest, at times of cheap money, and the Chertsey Corporation was a company with good credit, and I suppose it was just a normal transaction, or in the nature of one.

"Q. But on this note the interest is at four per cent rather than the two and a half, as some of these other notes. "A. The interest rate is four per cent. Those rates would vary from time to time with whether we had a cheap money administration or a dear money one.

"Q. Well, we can't make out the date of that note, so that we don't know what particular time we are talking about there.

* * *

"Q. Going to the matter of the purchase of Cleveland Electric Illuminating Company, Kansas City Power and Light Company stock, Union Electric Company stock, and Hevi-Duty stock, did the Union advance funds to you, Mr. Eaton, with a view to your purchasing shares of stock
1131 in those four companies? "A. Yes."

Mr. Rowntree: This is Set 2 interrogatory 1-F, which I refer to at that point.

Mr. Kramer: Now, Your Honor, we are going to renew an objection, or make a new objection, because they are now dealing with the placing of collateral for loans of certain stock which the corporation issuing such stock, on which it

was issued, is not claimed to be in the conspiracy at all and has no relationship to the conspiracy here. The Kansas Power and Light Company stock and others, none of which are listed or claimed to be in the conspiracy, and we object to any reference to that.

The Court: For what purpose is the testimony to be used? The same purpose?

Mr. Rowntree: Yes, sir, the scope of the conspiracy. These electric utility companies are the principal markets for coal. It is considered the nature of the conspiracy, the controls potentially exercised over the market, and this shows the purchase by the union of blocks of stocks in the utilities that constitute the market for coal.

The Court: You mean Mr. Eaton was buying this stock for the union?

1132 Mr. Rowntree: Yes, sir.

Mr. Kramer: Your Honor, may I state it is not claimed—there are some charges made that certain utilities were within the field in which these companies in this particular area could sell coal, but it is not claimed that these particular utilities who are far removed—Kansas City, etcetera — are far removed from this field, Your Honor, in which these people were possible suppliers of coal. So because somebody bought some stock and put some stock up as collateral is so far afield, wholly disconnected and far from this, we object to it for that reason, Your Honor.

The Court: Overruled.

Mr. Rowntree: The second question, the answer to that first one?

Mr. Robertson: Well, you are ready for the question there, the first question on page 66.

Mr. Rowntree: Does the record show an answer? Go ahead and answer that question Mr. Kramer raised an objection to at the top of the page.

(The reading of the deposition was continued.)

"A. Yes.

1133 "Q. And on that transaction, Mr. Eaton, there was no reduction of the understandings between you and the Union into the form of a separate writing such as a promissory note? "A. That's right."

. . . . . .

"Q. What was the understanding you had with the Union with respect to those advancements or loans? "A. Those transactions were in the nature of a joint undertaking, a joint participation, a case where the Union had again idle funds they wanted to put to work, and consideration of where was a good place to employ it. And the purchase of utility stocks seems a safe and desirable place to put money.

"And the Union and I collaborated in that. I was using my knowledge of the business and business opportunities, and I thought it would be mutually advantageous to do it from the standpoint of profit and interest."

Mr. Kramer: Still talking about these same stocks, and the record shows, I take it, my continuing objection, Your Honor?

1134 The Court: Yes.

(The reading of the deposition was continued.)

"Q. What was the Hevi-Duty Company? What kind of equipment did they make? "A. That was a company owned by Union Electric, and none of that stock was purchased directly, but it came as a dividend. The Union Electric, I think, was required to divest itself of that company, and it's a wholly-owned subsidiary of theirs, and they just distributed the stock to their stockholders.

"Q. And the stock which you purchased with the funds was the stock of these three utility companies which I mentioned, Cleveland Electric Illuminating, Kansas City, and Union, and these are large coal consumers? "A. Companies, yes.

"Q. They generate electricity by consuming coal? "A. That's right.

"Q. The Cleveland company, is that a large utility company? "A. Yes.

"Q. Does it supply electricity in Cleveland and vicinity? "A. Yes.

"Q. And the same is true for the Kansas City
1135 company? "A. Yes.

"Q. In the Kansas City area? "A. Yes.

"Q. Where is Upion? "A. St. Louis.

"Q. And it supplies electricity in the vicinity of St. Louis? "A. That's right.

"Q. This agreement, did it provide that the United Mine Workers of America was to receive half of the dividends paid on the stock and half of any increase in value of the stock with an option to purchase such stock? "A. That's right.

"Q. And pursuant to that understanding— "A. The option to purchase half the stock.

"Q. All right. And pursuant to that understanding, we refer to Exhibit 2 of Set 2 — before coming to that Exhibit, when were these loans or this loan that we have been talking about with reference to the utility stocks, when was that made, if you recall? "A. I wouldn't be sure of the dates. Maybe in '56 or '57.

"Q. Now is Exhibit 2 —"

* * * * * * * * * * *

1136 "— is Exhibit 2 a terminal paper with respect to that transaction? "A. Yes.

"Q. And this is a letter dated March 14, 1960, from you to Mr. Lewis and the other individual officers as trustees of the Union? "A. Yes.

"Q. I notice, Mr. Eaton, that in addition to Cleveland, Kansas City and Union Utility companies, Tampa Electric Company is included to the extent of 10,400 shares of Tampa Electric Company. "A. 5,200.

"Q. 5,200 in the first paragraph plus 5,200 in the second paragraph? "A. Yes, that's right.

"Q. And combined together in the third paragraph is 10,400; is that right? "A. That's right.

"Q. And Tampa Electric Company is a utility in the vicinity of Tampa, Florida? "A. That's right.

1137 "Q. And Tampa Electric Company is a utility in the vicinity of Tampa, Florida? "A. That's right.

"Q. Now, under the understanding you had with the Union with respect to this loan, the Union apparently exercised its option to purchase all of the stock? "A. Well, I think they didn't have an option to purchase more than half, but these stocks are readily marketable. They can be distributed over the Stock Exchange or in an hour's time, and it seemed expedient to me to sell these stocks at that time. And it was a question of whether the Union desired to purchase them. They would have the first opportunity, and they elected to take all the stock.

"But it's securities that are instantly marketable, highly liquid, and it was just a matter of preference on their part whether they purchased the stock, or—from my standpoint, it seemed to be an opportune time to do this.

"Q. Doesn't this Exhibit 2 reflect the exercise of the rights of the parties under the understanding you had with the Union? "A. That's right, only as to half of the stock.

"Q. In the first paragraph, they have purchased there one half of the stock at cost? "A. That's right.

"Q. And in the second paragraph they have pur-

1138 chased there one-half of the stock at cost? "A. That's right.

"Q. And in the second paragraph they have purchased one half of the stock at the market value at the time of their purchase? "A. That's right.

"Mr. Fortas: I don't understand your reference to one-half of the stock would expect to be purchased at market value.

"Mr. Rowntree: The market value concerns the second paragraph —

"Mr. Fortas: Yes, but I don't understand your reference to one half of the stock in connection with the second paragraph.

"Mr. Rowntree: This one-half there is equivalent to the one-half in number of shares contained in the first paragraph.

"Mr. Fortas: I beg your pardon, it is not. If you will look at Cleveland Electric Illuminating Company, for example, it's 6,000 in the second paragraph and 10,000 in the first.

"Mr. Rowntree: I see the difference there.

"Mr. Fortas: Yes."

* * * * * * * * * * *

1139 "Q. Now, isn't it true that those shares of stock which you retained were merely the compensation which you acquired under the understanding with the Union for negotiating the transactions? "A. No. no, no.

"Q. Isn't it true, Mr. Eaton, that this transaction which was entered into without any written understanding between you and the Union, really reflects the understanding which you had with the Union with respect to these transactions that had to do with the West Kentucky Coal Company stock and the C&O Railway Company stock? "A. No, they are entirely separate and distinct things. One has no relation to the other.

"Q. And isn't it true, Mr. Eaton, that the results of those transactions have come out the same as this last transaction which relates to the Utility Company stocks? "A.

1140 No.

"Q. Except that the Union has not yet told you that it will buy outright in its own name these shares of stock in C&O Railway and West Kentucky Coal Company? "A. That is a complete misstatement of the fact. There is not a vestige of truth or reality in it.

"Q. And isn't it true, Mr. Eaton, that the Union will continue to hold these shares of stock in C&O Railway and in West Kentucky Coal Company as so-called collateral until it decides that it is time to exercise its right to purchase?"

* * *

"A. I don't know what the union will have in mind, but your construction of it hasn't the vestige of truth in it.

"Q. Isn't it your understanding which you have with the Union? "A. No.

1141 "Q. The transactions which you have had with the union with respect to the C & O stock have been of benefit to you and to your companies which we have talked about here? "A. The transactions have been constructive. They have been mutually advantageous. But in these instances I have contributed my know-how and that of my associates. The Union have loaned money when they thought it was advantageous from a monetary standpoint to do so. And they are all highly constructive and good business for the Union. And I think that the mutual contribution from a financial standpoint has been constructive and sound."

* * * * * * * * * * *

"Q. The United Mine Workers of America, Mr. Eaton, has a very strong interest in the management—in how the management of West Kentucky Coal Company carries on?

* * *

"Q. Will you answer, Mr. Eaton? "A. I think my

1142 answer is, I don't know.

"Q. Well, isn't it true, Mr. Eaton, that the United Mine Workers has many millions of dollars invested secured by this West Kentucky Coal Company stock? "A. That's right.

* * * * * * * * * * *

"Q. And isn't it true, Mr. Eaton, that the United Mine Workers of America have supplied several million dollars of assets to secure a bank loan to the West Kentucky Coal Company? "A. I don't know.

"Q. You are chairman of the Board of the West Kentucky Coal Company? "A. Yes.

"Q. And if such a loan has been made, would not the chairman of the Board know about it? "A. Well, I know all about the loans of West Kentucky, but I don't know about what you are talking about.

1143 "Q. If such a loan has been made secured by a pledge of Union assets, and in the light of these other numerous transactions relating to West Kentucky Coal Company stock, is it not true, Mr. Eaton, that the policies of the Union would be abided by by the management of West Kentucky Coal Company? "A. Not at all.

"Q. You mean that the management of West Kentucky Coal Company would pay no attention whatsoever to suggestions or instructions from the United Mine Workers of America? "A. They have never offered anything. That would be a question that would arise if any suggestion were made."

* * * * * * * * * * *

"Q. You don't know about the intimate details of the management of the West Kentucky Coal Company? "A. Yes, I do.

* * *

"Q. You are not familiar with all the transactions that West Kentucky Coal Company has had with the United Mine Workers of America? "A. Well, I suppose in a sense that is true, because they have frequent contacts be-
1144 tween the active management and the Union relating to ordinary questions that arise between management and labor unions. Those are handled under Mr. Easton's direction, who is on the job. But I am familiar with the financial position of West Kentucky, and with its bank loans and who has participated in them.

"Q. And the United Mine Workers of America have made no suggestions nor stated any proposed policies with respect to West Kentucky Coal Company, even though it has all of these funds invested in that company? "A. That's right."

Mr. Rowntree: That is all of the deposition that we will read.

Mr. Kramer: Just a moment. At the last point counsel asked a number of questions of this witness on whether or not he was interested in certain companies, and I want to refer to some of those only. Not the whole page.

"Mr. Eaton, are you interested in any of these companies"—and he lists them. Pittston Company. Answer is no.

Consolidated Coal Company. His answer is no.

There are others but I don't think they have been referred to in this record. I am trying to refer to the ones shown in this record.

Mr. Rowntree: Peabody.

1145 "Do you or any of your companies have any interest in Peabody Coal Company?

"No.

"Do you or any of your companies have any interest in Pittsburgh & Midway Coal Company?

"No.

Next is the deposition of Mark Eastin taken at the offices of West Kentucky Coal Company, Madisonville, Kentucky, October 13, 1960.

* * * * * * * * * *

"MARK EASTIN

the witness, after being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Rowntree:

"Q. Mr. Eastin, where do you reside? "A. 134 Union Street, Madisonville, Kentucky.

"Q. That is more than 100 miles from Knoxville, Tennessee? "A. Well, about 300, I think.

"Q. What is your official position? "A. President of the company and I am a director of the company.

"Q. And how long have you held each of those
1146 positions? "A. Well, I was elected president of the company on March 16, 1956, and was elected a director before that, which was December 11, 1951.

"Q. Mr. Eastin, do you recall what was the first date that West Kentucky Coal Company signed the National

Bituminous Coal Wage Agreement with United Mine Workers? "A. March, 1954; March 1, 1954.

"Q. Has West Kentucky Coal Company been a signatory to the National Bituminous Coal Wage Agreement since that time? "A. Yes.

"Q. Continuously? "A. Yes.

"Q. Do you sign for the company one contract with the union or do you sign one for each of the mines? "A. Well, Mr. Love, who is now deceased, who was president of the company, signed the first contract and that was signed by the West Kentucky Coal Company. I later signed a contract; that was at the time of extension of this contract when a new contract was negotiated; for all companies. We now are members—for all mines I should have said instead of companies. We are now members of the Western Kentucky Coal Producers Association, which is a local coal operators association here, and they signed for us the last time.

1147 "Q. Does Nashville Coal Company, Inc. also sign a contract with the Union? "A. Yes, we sign Nashville Coal Company to a contract.

"Q. Does West Kentucky Coal Company have any other operating subsidiary corporations? "A. Yes, we operate what is known as River and Gulf, which is a river transportation company, and we have a dock near New Orleans.

"Q. That is in the transportation business rather than the coal mining business? "A. That is right.

"By Mr. Wheeler: River and Gulf Transfer Co. is its corporate name. "A. We do still have St. Bernard Coal Company, but it is not active. We use it in sales some but it doesn't produce any coal.

"Q. Does River and Gulf Transfer Co. sign a contract with United Mine Workers? "A. No.

"Q. When did West Kentucky Coal Company acquire the stock, the common stock, of Nashville Coal Company, Inc.? "A. Well, they actually acquired the stock in Nashville Coal Company and then we organized Inc. to hold it.

Isn't that right? (to Mr. Wheeler)

1148 "By Mr. Wheeler: No, sir. May I tell him?

"By Mr. Rowntree: Yes, sir.

"By Mr. Wheeler: The West Kentucky Coal Company organized Nashville Coal, Inc., a subsidiary, a Kentucky corporation, which acquired all of the capital stock of Nashville Coal Company and thereafter dissolved Nashville Coal Company.

"A. That is what I said or what I thought I said. Those negotiations were terminated or concluded, or completed I should say, completed on the 13th of September, 1955, and we took over the properties on October 1, 1955.

"Q. I have here copy of West Kentucky Coal Company's Annual Report in 1958. Would you look at that Mr. Eastin, and see if that is a copy of the company's annual report for that year. "A. That is right.

"Q. And the statements contained in here are true, of course? "A. To the best of my belief and knowledge, yes, sir."

Mr. Rowntree: I would like to file that as the next exhibit, the West Kentucky Coal Company Annual Report of 1958.

(Exhibit No. 69 was market for identification and filed.)

Mr. Rowntree: And I would like to pass that to

1149 the jury. It has got a little map in here that might be of interest.

Mr. Kramer: You are referring particularly to some particular page in it?

Mr. Rowntree: Inside of the cover page. And I would like to refer to small extracts from that report.

The Board of Directors listed on page 1. Hugh B. Baker, Wm. R. Daley, Mark E. Eastin, Jr., Cyrus S. Eaton, Cyrus S. Eaton, Jr., R. L. Kaiser, Fay A. LeFevre.

Page 2, statement of the Chairman of the Board, Mr. Cyrus S. Eaton and the President, Mr. Mark E. Eastin, Jr.

"The general business recession of 1958 affected the coal industry with especial severity. National production de-

clined 18.8% from the previous year, while national sales decreased 19.45%. The corresponding percentages for your Company were 9.5% and 14%, significantly better than the national average. All indications for 1959 point to improved activity for business generally, and for the coal industry and your Company particularly.

"Cash income of West Kentucky Coal Company
1150 and its wholly owned subsidiaries, Nashville Coal, Inc., and River and Gulf Transfer Co., totaled $2,518,999 in 1958. Net loss amounted to $204,516.

"A dividend of 25¢ pef share was paid on West Kentucky s common stock in 1958, and two dividends were paid on the preferred stock, one on January 1 and the other on April 1, 1958. In the light of business conditions, payment of further dividends was deferred.

1151 "During the year total long-term debt was reduced $3,441,303. Net addition to property, plant and equipment amounted to $1,664,711, while depreciation and depletion totaled $2,723,515.

"Production from the properties and leases of your Company and its subsidiaries totaled 6,984,695 tons. Sales of coal of our own production and from mines operated by others, after eliminating inter-company sales, amounted to 7,554,539 tons.

"During the year 15 jumbo barges were delivered to River and Gulf Transfer Co., a wholly owned subsidiary. This gives our river transportation department a modern fleet of three towboats (one 5400 h.p. and two 3200 h.p.), 13 mammoth steel barges and 31 jumbo steel barges, for use in our transportation program on the Mississippi, Ohio, Tennessee and Cumberland Rivers."

On page 4:

"Your Company owns 6 modern coal mines, with an annual capacity of 7,200,000 tons. At today's cost of $7 per ton for developing a mine, including the installation of machinery and equipment, this represents a value of more than $50,000,000. Your Company possesses proven reserves

in excess of 1,000,000,000 tons, more than half of which is strategically located on or near the Ohio and
1152 Green Rivers. In the 89 years since West Kentucky and its predecessor company started business, your Company has built up an impressive and diversified roster of customers, which now includes leading Middle Western electric utilities; chemical, cement and other industrial users; an important Canadian clientele; and a strong group of retail and wholesale distributors to the commercial and domestic markets in the Great Lakes area, as well as the South. Thus, from the vital standpoints of production, reserves, transportation and marketing, your Company stands well prepared to take full advantage of improving and expanding business."

The statement of the consolidated balance sheets, particularly on page 7:

Loss before taxes in income or income tax credit, 1958, $367,516.

The federal income tax carry-back, loss carry-back credit amounted to $163,000.

Loss before cumulative unpaid dividends on preferred stock of subsidiary was $204,516, in 1958.

That is all we desire to read from that exhibit.

(The reading of the deposition continued.)

"Q. I show you, Mr. Eastin, a copy of West Ken-
1153 Kentucky Coal Company Notice of Annual Meeting of Stockholders and Proxy Statement, pertaining to the Annual Meeting of Stockholders, May 12, 1959, and ask you if that is a copy of those statements? "A. That is correct."

Mr. Kramer: Your Honor, we are going to object. We do not object to '58, which was in the period of course, but we do object to '59 statements, because it is beyond the period of the alleged conspiracy.

The Court: Whatever bearing it may have on the status of the company during the period involved in this suit, the

Court permits it as evidence. Any other period will not be considered.

Mr. Rowntree: I should have read in connection with the last exhibit, your Honor, on page 6:

"Common stock outstanding, 857,264."

We offer as the next exhibit this proxy statement for the 1959 meeting, as Exhibit 70.

Mr. Kramer: That is the exhibit to which I referred a moment ago, which I objected to and to which I continue to object. He dropped back to the other exhibit, to which there was no objection. Is that correct?

Mr. Rowntree: That is correct.

Mr. Kramer: Your Honor has ruled on this.

1154 (Exhibit No. 70 was marked for identification and filed.)

Mr. Rowntree: I will read an excerpt from that, on page one, last paragraph:

"The outstanding voting securities of the Company consist of 50,000 shares of 5½% Cumulative Preferred Stock and 857,264 shares of Common Stock, par value $4.00 per share, each of which shares is entitled to one vote. Holders of Preferred and Common Stock of the Company of record at the close of business on April 21, 1959, will be entitled to vote at the meeting."

The officers, the directors of the company begin on page two and their proportionate holding.

Hugh B. Baker, 1,000 shares.

William R. Daley, 1,000 shares.

Mark E. Eastin, Jr., president of the company, 100 shares.

Cyrus S. Eaton, 87,600 shares.

Cyrus S. Eaton, Jr., 1,000 shares.

R. L. Kaiser, 100 shares.

Fay A. LeFevre, 1,000 shares.

There are notes after the name of Mr. Eaton.

"Note (a). Represents 10.22% of the Company's Common Stock; Mr. Eaton also owns of record, but not

1155 beneficially, 27,142 shares, or 3.17%, of the Company's Common Stock."

There are notes after the names of Mr. Daley, Mr. Eaton, Mr. Eaton, Jr., Mr. Kaiser and Mr. LeFevre to this effect:

"(b) In addition, Chertsey Corporation, which under the proxy regulations of the Securities and Exchange Commission is an associate of Messrs. Eaton, Eaton, Jr., Kaiser, and LeFevre, own, respectively, 84,912 shares and 59,928 shares of the Company's Common Stock; Otis & Co., which under the aforementioned regulations is an associate of Messrs. Daley and Kaiser, owns of record, but not beneficially, 50,000 shares of the Company's 5½% Cumulative Preferred Stock, being all the issued and outstanding Preferred Stock of the Company."

Mr. Kramer: Your Honor, in order that you may understand my objection, the statement is made that this was true as of the date in April—I have forgotten the exact date—April 21, 1959. It does not disclose stock ownership in '58 or any of the previous years. Of course, it is our position that allocation of stock ownership in 1959 could have no bearing on this lawsuit.

The Court: No, unless the status existed—sub-
1156 stantial status existed during periods involved during period involved in this suit. What does the record show about that or what do you propose to show in the record? Was there any substantial change from December 31, 1957 to April of 1959?

Mr. Rowntree: The only changes, something was done with respect to the union's preferred stock.

Mr. Kramer: Just a moment. I know counsel doesn't intend to be incorrect, but the ownership of shares by individuals was not the same, and there is no showing here that the ownership of the number of shares—counsel has read number of shares owned by different individuals as of April 21. What he has said, he is correct with reference to loans of United Mine Workers. I don't dispute that. There was some change there as already indicated, but the number of

shares owned by different stockholders was not identical.

Mr. Rowntree: The deposition goes into that. It is some relative change between the Chertsey Corporation and Sagamore Summit or something like that. It ends up with the same total number of shares.

Mr. Kramer: It ends with the same, the corporation had the same number of shares outstanding, that we do not deny, but we do say the division of ownership is not compe-
1157 tent as of April 1959.

The Court: No, not unless it existed on December 31, 1958. That is the date, the terminal date of this lawsuit insofar as the question of damages is concerned. The beginning date was February 14, 1954, insofar as the question of damages, if you get to that subject, is involved.

Mr. Rowntree: One last paragraph here, there are footnotes after the names of these board of directors, Eaton, Eaton, Jr., Kaiser and LeFevre:

"(c) In addition, Chertsey Corporation, as aforementioned associate of Messrs. Eaton, Eaton, Jr., Kaiser, and LeFevre, holder of 25,000 shares, Sagamore-Summit Co. and Tower Industries, Inc., as aforementioned associates of Messrs. Eaton, Jr., Kaiser, and LeFevre, holders of 10,000 shares each, own all the issued and outstanding Preferred Stock of Nashville Coal, Inc., a subsidiary."

That is all we desire to read from that exhibit.

(The reading of the deposition continued.)

"Q. And what is contained in here is true, of course?

"A It was true to the best of our knowledge at the time. Now the information in there is furnished, part of the information, by the directors, and there is a slight in-
1158 consistency in the record. I don't believe it has any consequence. If you would like to know what it is, I can outline it for you.

"Q Go ahead and explain it.

"A Well, Cyrus Eaton, Fay A. LeFevre and R. L. Kaiser reported preferred stock of Nashville Coal Company owned by their associates as follows: That was Chertsey

Corporation 25,000 shares; Sagamore-Summit Co. 10,000 shares; Tower Industries, Inc. 10,000 shares. The stock records show—

"Q Is that stock of West Kentucky or Nashville Coal, Inc.?"

1159 Mr. Kramer: Your Honor, of course, our objection is continuing, because again we are talking about April, 1959, for the reasons heretofore given, object to even listing them.

(The reading of the deposition was continued.)

"Q I would like to mark this as Exhibit 2 of the deposition."

* * * * * * * * * *

Mr. Kramer: That is Exhibit 70, is what you had Exhibit 2.

Mr. Rowntree: Yes.

(The reading of the deposition was continued.)

"Mr. Eastin, you have referred to this Nashville Coal, Inc., preferred stock. Is that voting stock or not?

"A. Yes, it is voting stock.

"Q. Do you know whether or not the voting rules of Nashville Coal, Inc., require for a resolution to be adopted that it requires the majority vote of both classes of stock, preferred and common?

1160 "A. Not off hand, no, I don't know.

"Q. You don't know?

* * * * * * * * * * *

"Mr. Wheeler: There is no such requirement.

"A. Let that be my answer then; there is no such requirement.

"Q. All right. Do you know how many shares of common stock are outstanding of Nashville Coal, Inc.?

* * * * * * * * * * *

"A. Of common stock, we have 262,500 shares of Nashville common stock outstanding.

"Q. And who owns those shares?

"A. Well, let's see.

Mr. Wheeler: West Kentucky Coal Company.

"A. Well, of course, I was thinking about the preferred.

"Q. I should have pointed out the distinction there.

"Mr. Wheeler: I might say, Mr. Rowntree, that under the existing law of Kentucky, it is not necessary for a director to own stock as formerly was required.

* * * * * * * * * *

"Q. Now the common stock of West Kentucky
1161 Coal Company, the common stock, is subject to two mortgages, I believe; one to Mr. Potter and one to Irvin Trust Company as Trustee and the Liberty Bank of Louisville?

"A. That is substantially correct, yes.

"Mr. Wheeler: The question and the answer are not exactly accurate in this; that the assets of West Kentucky Coal Company are converted by the mortgage you refer to under which Irvin Trust Company of New York and Liberty Bank and Trust Company of Louisville are Trustees.

"A. You can let that be my answer if you will accept it.

"Q. Now the Annual Report for '58 of West Kentucky Coal Company, Exhibit 1, recites, just so that we can get the clearest picture, and I will ask you if this is not so, Exhibit 1 on the last past in the first full paragraph at the top of the pabe under Note A in the lefthand column:

'Mortgage notes payable (principal amount of $6,-
1162 436,025) of Nashville Coal, Inc., are secured in part by real and chattel mortgages on properties of Nashville Coal, Inc., and by pledge by the Parent Company of the outstanding Common Stock of Nashville Coal, Inc.'

That statement is true, I believe?

* * *

"A. To the best of my knowledge it is.

"Q. Does that represent a transaction related to the purchase of the company by West Kentucky?

"A. Yeah.

"Q. And so Mr. Jet Potter is the obligee on the obligation referred to there?

"A. That is right; he and his associates.

"Q. Now on the next to last page of the Exhibit 1 at the bottom of the page, it is stated 'The Series A and B and six per cent Secured Promissory Notes' and this refers to, I believe, the Irvin Trust Company mortgage?

"A. That is right.

"Q. 'Are secured under the provisions of a mortgage dated December 30, 1957, by (a) all of the Company's real property, including all of its coal reserves, and substantially all of its structures, machinery, equipment, and fixtures; (b) the pledge of the outstanding Common Stock of its subsidiary, Nashville Coal, Inc., subject to a prior pledge of such stock; and (c) the pledge of notes secured by a
1163 mortgage, issued to the Company by its subsidiary, River and Gulf Transfer Company, in the aggregate principal amount of $7,768,000.'

And it goes on to further describe that mortgage. Those statements are correct?

"A. To the best of my knowledge and belief, yes, sir."

Mr. Kramer: So there will be no misunderstanding, you are saying Exhibit 1, and are really referring to Exhibit 60 in this present record?

Mr. Rowntree: That's correct.

(The reading of the deposition was continued.)

"Q. Mr. Eastin, has the West Kentucky Coal Company of Nashville Coal, Inc., made analysis of the profit of coal sold by those companies to the Tennessee Valley Authority in recent years?

"A. No.

"Q. You have not made an analysis of the profit?

"A. No, sir.

"Q. Going back to the Proxy Statement, Exhibit Two—"

Mr. Rowntree: Which would be 61.

Mr. Kramer: Seventy.

* * * * * * * * * *

1164 "Q. You have not made an analysis of the profit?

"A. No, sir.

"Q. Going back to the Proxy Statement, Exhibit Two, on the books of the Company, does Otis and Company own the five and a half Cumulative Preferred Stock of West Kentucky Coal Company, as shown in Note (b) at the top of page 3?

"A. Otis & Company acquired that 50,000 shares of preferred stock for an undisclosed party. Your question was do they still own it?

"Q. Do the books of the Company show that they own it?

"A. No. On December 15, 1959, Mr. Dooley, who was Trust Officer of the National Bank of Washington, called here—well, before that we had a letter from Mr. Dooley, instructing us to transfer that stock to Mr. John L. Lewis, Tom Kennedy and John Owens, International Officers of UMWA. However, a day or so following that, we had a call from Mr. Dooley, in which he changed those instructions and instructed us to issue those certificates to Hanab Company, in care of the Trust Department, National Bank of Washington, D. C., and those instructions were compiled with and
1165 so Hanab is now the holder of that stock.

"Q. And before these instructions that you have mentioned, Otis and Company was shown as owner?

"A. That is right.

"Q. Did the beneficial interest of some other party also reflect itself on the books?

"A. Not as far as I know of.

"Q. Are you acquainted with the number of shares of common stock of West Kentucky Coal Company that are owned by the United Mine Workers of America or some officer in the United Mine Workers of America?

"A. There is no stock of record in so far as our books are concerned, that is owned by United Mine Workers of America or an officer of United Mine Workers of America.

"Q. Do you know if they own any shares, common shares of West Kentucky beneficially in the name of somebody else?

"A. I have no knowledge of that.

"Q. Now, Mr. Eastin, West Kentucky Coal Company operates mines in West Kentucky?

"A. That is right.

"Q. And Nashville Coal, Inc., also has mines in West Kentucky?

"A. Yes.

1166 "Q. Are the operations of the mines of both of those companies integrated so far as the operating control is concerned?

"A. That is correct.

"Q. Is the coal from these two mines, or from the mines of these two companies sold by a common selling agency?

"A. That is right; separately and we still sell some coal Nashville Coal Company, and we still sell some West Kentucky Coal Company, and sometimes West Kentucky Coal Company sells coal from the Nashville mines and sometimes Nashville Coal Company sells coal from the West Kentucky mines. The offices have been put together. We still have stationery for both companies.

"Q. Now there is a little map here on the second page of Exhibit 1. Is that map substantially true?

"A. Yes, that is a very small scale map, but it is substantially true, and it is — that map right there (indicating a large map on the wall) with the railroads added and so on.

"Q. And you are referring to a large map on the wall here?

"A. Yes.

"Q. Are there any mines that have been opened since the map was prepared, as reflected in Exhibit 1 here?

"A. You mean by our company?

1167 "Q. By either West Kentucky or Nashville Coal.

"A. No.

"Q. Are all of the mines that are on the map still in operation?

"A. No. Let me see what mines are on the map. Atkinson mine is closed and the New Shamrock mine is operated by Badgett Mine Stripping Company on our property. Now

to correct my answer before, that mine opened, well, they had started work on it in '58. That is the only mine that has been closed that is shown on there, Atkinson mine.

"Q. Now are these all deep mines?

"A. Yes, except that New Shamrock mine. It is a strip mine.

"Q. Is that one of those that closed? Did you mention that just a while ago?

"A. Well, it has just been recently opened, and it is a strip mine.

"Q. Oh, I see. And that is located over near Providence?

"A. That is right.

"Q. In your underground mines, are these mechanical mines or which ones are mechanical?

"A. They are all mechanical and have been for years.

"Q. The Uniontown mine is located over on the Ohio river?

1168 "A. Correct.

"Q. Do you have continuous mining machines in any of your mines?

"A. We have one continuous mining machine. It is presently being operated in Fies mine. We have tested and are constantly testing new machinery, and that machine is being operated more or less as a guinea pig.

"Q. Which mine is it in?

"A. Fies mine.

"Q. Fies mine. Now what company puts out that machine?

"A. Goodman; that one.

"Q. Will you describe the operation of that machine; how it gets the coal out?

"A. Well, it eliminates the shooting, drilling and undercutting and just heaves—well, that is not a good word, I don't want to use that; it mines the coal from the face by cutting bits and pressure applied.

"Q. Does it mechanically load the coal itself?

"A. Yes, it comes on back on a conveyor and loads it into a shuttle car.

"Q. How many men are needed to tend that machine at the face?

"A. I don't recall right now, but I would guess about five as compared to about eleven in a crew on a conven-
1169 tional mechanical unit.

"Q. And by conventional mechanical unit, what type of unit would that be? How would it operate?

"A. Most of ours are Joys.

"Q. How does that operate?

"A. Well, you go back to the cycle of drilling, shooting and undercutting and then you gather the coal in with arms and it is conveyed back to the shuttle car.

"Q. Is all that done by a machine?

"A. Oh, yeah.

"Q. I see.

"A. But that is nothing new. It has been in existence in the field for many years.

"Q. How long has this continuous mining machine that you referred to been in?

"A. I would guess we have had it about three years.

"Q. It was not introduced into the industry until recent years?

"A. That is right. Possibly I should point out that that continuous miner will not produce with as small a crew as much coal as coal from a conventional type unit.

"Q. I believe you used the ratio of five to eleven? "A. That would be my guess.

"Q. Number of men tending the new machine as
1170 compared to the old Joy? "A. Yes.

"Q. And what is the ratio of production between the two machines? "A. Well, it might be slightly better on tons produced per man at the face, but to date, only very slightly better.

"Q. Is that because of any peculiar condition in the Fies mine? "A. No. I would say it is principally because the

machine breaks down a lot; down time on that machine. Goodman won't want to hear that. And you do have a problem of getting the coal away from the machine; in other words, you have got to keep that machine running all the time, and you can't keep a shuttle car under the loading boom at all times.

"Q. The Goodman machine, does it have counterparts put out by other companies? "A. Well, their competitors have continuous miners on the market.

"Q. And who are their competitors? "A. Well, chiefly Jeffrey and Joy.

"Q. Have you tried the continuous miners of either of those companies? "A. No; we have been watching them in operation in other mines.

1171 "Q. And what other mines are those? "A. I don't know; You will have to talk to the Operating Department. They are constantly following up. Some of the mines are in Illinois and some of them are over in the East.

"Q. Do all of your mines have mechanically operated conveyor belts to convey the coal from the face? "A. Well, the coal is first loaded in shuttle cars and it conveys it to the conveyor belt, and then the conveyor belt conveys it on out. That is on part of the mines. The other mines, some of our mines are track haulage, part track haulage.

"Q. And what kind of locomotion do you use? "A. Electric locomotives.

"Q. Is that trolley? "A. Yeah.

"Q. Yes, sir. "A. We had the first all-belt mine in the industry, and that goes back to 1940, the first all-belt mine in the industry.

"Q. In which mine? "A. That was North Diamond. It is now closed.

"Q. How many of your mines are located accessible to water transportation? "A. Directly accessible only Uniontown. It has a conveyor that runs out to the river

1172 bank. The other mines are accessible by a rail move-

ment to Grand Rivers, Kentucky, or to some of the other docks that are located on rivers.

"Q. What railroad services? "A. I. C. Railroad. Both the I. C. and L&N service all of our mines except Uniontown. It has no rail connection.

"Q. Exhibit I states, Mr. Eastin, on page 4, that you have an impressive and diversified roster of customers, which now includes leading Middle Western electric utilities; chemical, cement and other industrial users; an important Canadian clientele; and a strong group of retail and wholesale distributors to the commercial and domestic markets in the Great Lakes area, as well as the South.

Who are your Middle Western electric utility customers? "A. I don't think I should reveal that.

"Q. All right, sir. "A. That is confidential information. That is pretty generally known in the trade who we are selling and who we are not selling, but I don't think we should give you a list of our customers.

"Q. This statement is true, though, this general statement? "A. Yes, that is our opinion of the situation.

* * * * * * * * * * *

1174 "Q. Also the Annual Report on page 5 shows the picture of a tug pushing barges down to the Memphis Generating plant. Is that one of your customers, may I ask that? "A. Yes, sir.

"Q. On the West Kentucky preferred stock, that is voting stock, is it not? "A. It becomes voting stock when dividends are in arrears and they are in arrears at the present time, so it is voting stock.

"Q. Do you know how many years the dividends have been in arrears to make it voting stock? "A. Let's see, I think I have that here somewhere. The arrearage at June 30, 1960, on West Kentucky preferred was $309,375.00.

1175 "Q. Was it in arrears at the time of the annual meeting of stockholders in 1959? "A. Yes. That arrearage dates back to April 1, 1958.

"Q. Was the 1958 meeting of stockholders held before

or after April, 1958? "A. It was held on May 12, I think it was. That was May 12, 1959. I can get that. Do you want me to get that checked?

"Q. Yes, if you will. "A. It was Tuesday, May 13, 1958.

"Q. Mr. Eastin, will you tell us what the purpose of the loan transaction was on December 30, 1957, involving the Irvin Trust Company—Liberty Bank of Louisville transaction? "A. What the purpose of it was?

"Q. Yes, sir. "A. Well, we needed the money in connection with our business and the continued pursuit of our business.

"Q. Did you use a substantial part of the proceeds in connection with water transportation development? "A. Yes.

"Q. What was that work that was done wth those proceeds? "A. Well, we have a dock, a transfer facility, located at Wood Park, Louisiana, which is about thirty
1176 or forty miles below New Orleans, and that facility ran several million in itself. We bought barges, steam boats or tow boats, not steam boats; tow boats; and just the natural course of events.

"Q. Was the substantial part of the cost of that construction in Louisiana paid from the proceeds of this loan? "A. Well, I don't know whether it was definitely paid from the proceeds of that loan or not, but that money went into the treasury of the company and it was used as needed.

"Q. This was one of the obligations confronting the company at that time? "A. Well, I would have to check the records; I don't know what the status was at the time.

"Q. At the time of this loan transaction December 30, 1957, the work was in progress on the loading facility in Louisiana and this was part of the obligations confronting the company and its subsidiaries and you needed working capital at that time, resulting from this and other things? "A. I will say that is substantially correct but I don't want to say it is definitely correct unless I check my records and see what the status of all that was at the time.

1177 "Q. All right. Do you know if the work was in progress at that time on the transfer station? "A. I think it was in progress. I don't think it had been completed.

"Q. And what was the purpose of that transfer station? "A. When we bought Nashville Coal Company they had a contract with Tampa Electric Company, Tampa, Florida, for the movement of coal from the Uniontown mine to Tampa. Of course, that coal had to move downstream in barges and then be transferred somewhere down there to ocean going vessels, and the purpose of that transfer facility was primarily to transfer that tonnage of coal.

"Q. Did you also construct unloading facilities at the Tampa Electric Company site? "A. That is correct.

"Q. At approximately the same time? "A. That is correct.

"Q. Did West Kentucky Coal Company ship coal on the contract that you referred to, to Tampa Electric Company? "A. No coal was ever shipped on that contract.

"Q. Was the contract rescinded? "A. It has been cancelled by letter from the Tampa Electric Company.

"Q. What use is being put to the transfer facilities
1178 in Louisiana at the present time? "A. It is presently under lease to Peabody Coal Company, who are moving some coal to Tampa Electric, and they are also handling some outside commodities, the extent of which I don't know.

"Q. Is that leased to Peabody Coal Company itself? "A. Yes, sir.

"Q. Do they have their own water transportation facilities? "A. Yes.

"Q. Did Peabody Coal Company assume any of the obligations of West Kentucky Coal Company when it leased that property? "A. I don't know what you mean by that. They assumed no obligations that I know of. What do you mean by that question?

"Q. West Kentucky Coal Company has certain notes that it is confronted with. "A. Oh, no.

"Q. The Peabody Coal Company did not assume any of those? "A. No. What I referred to there was they have an obligation to return that facility to us in as good a condition as it was when it was leased to them, normal wear and tear excepted. That is an obligation.

1179 "Q. Does Peabody Coal Company pay rental for the facilities? "A. That is correct.

"Q. This is below New Orleans? "A. That is correct.

"Q. Do you know offhand what the rental is that they pay? "A. Not offhand; it is a sliding scale proposition. It is some detail. I could refresh myself on it. However, I think that is confidential information. I don't think it should be made public to the trade, and I see that a lot of this stuff is being put in the papers.

"Q. This sliding scale is based on tonnage that goes through the facilities? "A. Yes, with some minimums.

"Q. Does West Kentucky Coal Company or Nashville Coal Company lease any property to Peabody Coal Company besides the water facility? "A. Yes; we have for many years leased coal lands to Peabody Coal Company. The Homestead mine which was the biggest strip mine and I suppose the biggest mine south of the Ohio river, which is now worked out, was a lease with Peabody. They are in the stripping business. We are in the underground business and consequently we have dealt with them for years, and others.

1180 "Q. Is the Ken mine on West Kentucky property under lease to Peabody? "A. No, the Ken mine is not on West Kentucky.

"Q. What is the production of Uniontown mine? "A. Well, its capacity is supposed to be 1,700,000 tons a year but we have not maintained that rate of production down there. We are still working at it.

"Q. Do you know how close you have gotten to it? "A.

Well, for short periods we have run at that rate of production.

"Q. You are talking about breakdowns and things like that? "A. Yeah, and our tonnage just being off due to conditions in the mines, being more difficult at times than others.

"Q. And I believe that above the Uniontown mine loading point on the Ohio river, in that area, is Lock No. 48, Lock and Dam No. 48, operated by the Corps of Engineers? "A. That is right.

"Q. And below the Uniontown loading point there is Lock and Dam No. 49? "A. That is right.

"Q. Now the coal from Uniontown mine, has it been moved to Tampa on the Peabody coal contract? "A. No, there has been no coal moved from the Uniontown
1181 mine to Tampa on the Peabody contract.

"Q. Has there been any coal mined by West Kentucky or Nashville Coal Company that went to Tampa on the Peabody coal contract? "A. No.

"Q. Did West Kentucky Coal Company or Nashville Coal Company at any time have any arrangement with Peabody Coal Company to ship coal to Tampa Electric Company? "A. Yes, we have an arrangement to participate in that business with them but no coal has moved on it yet.

"Q. Did West Kentucky Coal Company or Nashville Coal Company obtain a contract from the Memphis Generating Plant that was constructed recently, in recent years? "A. That is correct; a right substantial portion of that business.

"Q. May I ask did the Kirkpatrick Coal Company also obtain a contract? "A. Yes, they obtained an order and we are shipping that tonnage for them.

"Q. Did Peabody also, did Peabody Coal Company also obtain an order? "A. They did.

"Q. Is Peabody Coal Company shipping coal to Memphis? "A. They have shipped coal to Memphis off and on, yes.

1182 "Q. Is there any arrangement with Peabody Coal

Company by West Kentucky or Nashville Coal Company for the West Kentucky and Nashville Coal Companies to ship tonnages allocable to Peabody Coal Company for the Memphis Plant? "A. Yes, we are now shipping part of Peabody's tonnage, part of Peabody's order to the Memphis Plant in lieu of movement of coal to Tampa to facilitate matters. That will probably not continue for a long period of time.

* * *

"Q. Mr. Eastin, did you have any conferences with any individuals in connection with the reduction of the rail rate from Kentucky to the Widows Creek Plant of TVA? "A. Yes; we are always after the railroads to reduce freight rates and I have discussed it with some of the L & N officials and our Sales Department has been very active on that. We are constantly trying to get the cost of transportation down and that is no unusual development in our picture.

"Q. Have you discussed the reduction of the rate with Peabody Coal Company? "A. No, we have never discussed it with Peabody Coal Company, frankly, because we wanted to take credit for getting the rate reduced with the buyer.

"Q. You have discussed it then with TVA? "A.
1183 I haven't. I expect our sales people have; I am sure they have talked to them about it because we are trying to sell them some coal at the time on a reduced rate.

"Q. Do you have bids in now to Widows Creek under the reduced rate? "A. We have bids in with Widows Creek. Of course the reduced rate would apply if it is established.

"Q. Have you discussed with anyone reduction of rail rate to Kingston Plant? "A. Yes, I think Kingston was included in the discussion.

"Q. Yes. "A. Those discussions, however, were primarily by our sales people and not by me.

"Q. Well, you have discussed it with your sales people? "A. Oh, yes.

"Q. Mr. Eastin, have you had any discussions with anyone" —

Mr. Kramer: You have finished that other topic and, of course, we are continuing the objection with reference to the allocation of freight rates insisting that we had the right to deal with the TVA as we wanted to, or anybody else did.

Although this wasn't the United Mine Workers but
1184 it was the West Kentucky people. There is nothing illegal or wrongful in them attempting to obtain lower freight rates.

The Court: Not in and of itself there would not be anything wrong with that.

* * * * * * * * * * *

The Court: It may go into the record for whatever probative value, if any, it may have. But as indicated, their efforts to get lower freight rates in and of themselves have no significance, but such efforts, if connected up with any alleged conspiracy on the part of the union and one or more of the coal operators, and/or the trustees, can be considered by the jury for whatever bearing it may have on the ultimate issue in this case.

* * * * * * * * * * *

(The reading of the deposition continued.)

1185 "A. None whatsoever.

"Q. Mr. Eastin, do you have a later annual report?

"A. We have 1959. Do you have a copy of it?

"Q. No, sir. May we mark this Exhibit 3."

Mr. Rowntree: We would like to introduce that as the next exhibit.

Mr. Kramer: Of course, your Honor, the paper referred to this morning, we objected to. It is 1959 and subsequent to the period. We did not object to 1958. And it is not proper for any purpose in this lawsuit.

The Court: Well, the Court has ruled on that previously, members of the jury.

As you know, the material period, insofar as the subject of damages is concerned, is from February 14, 1954 until and including December 31, 1958. And if that exhibit, or the information therein, has any bearing on the issues that

are involved in the case, it may be considered by the jury; but if the conditions as shown in the report and relate to a date subsequent to the period involved in the suit, are substantially different from the conditions that existed during the material period, then the jury will not consider such information.

1186 (Exhibit No. 71 was marked for identification and filed.)

Mr. Rowntree: I would like to read from page seven of that exhibit, your Honor.

This is the consolidated balance sheet, West Kentucky Coal Company and subsidiaries. Loss before taxes on income or income tax credit, that is before income tax credit, 1959, $435,841.

Loss before cumulative unpaid dividends on preferred stock of subsidiary, $410,841.

At page three:

"Production. Total production from your Company's properties and leases in 1959 amounted to 7,451,924 tons, an increase of 467,299 tons over 1958 production; while according to the Bureau of Mines, preliminary estimates of national production amounted to 410,000,000 tons, slightly under the 1958 production figure."

The Court: What is the purpose of that information?

Mr. Rowntree: If your Honor please, we allege a continuing conspiracy. This is not admitted on the purpose of damages. It is admitted or introduced on proving the conspiracy, the continuing conspiracy.

1187 The Court: Is it your contention that a part of that conspiracy was to tie up the coal lands of the coal companies so as to prevent the non-union people from purchasing, receiving any coal coming from those lands, so as to prevent the non-union people from selling any coal to union people? Is that the idea.

Mr. Rowntree: The purpose, your Honor, is to—we intend to prove in this case, your Honor, that this West Kentucky Coal Company and its subsidiary, Nashville Coal

Company, with a huge union investment in it, was operated at a loss and was used as a fighting ship to dump coal at loss prices on the TVA market to depress the TVA market.

The Court: That is during the material period?

Mr. Rowntree: Yes, sir. And it continued on.

The Court: Well, it is competent. That testimony is competent, members of the jury, for that purpose, for whatever bearing it may have on that question.

* * * * * * * * * *

1188 The Court: I understand.

I want to get this question cleared up, if I can, for all parties concerned, about these exhibits and this information that relates to 1959, when we know the material period ended December 31, 1958.

For clarity, will you state your position on that. I think I know, but I am not so sure that the jury is getting the purport of the ruling of the Court on that question.

Mr. Rowntree: Of course, we acknowledge that it can have nothing to do with damages, the amount of damages.

The Court: Yes.

Mr. Rowntree: But we think that later period is material with respect to proving a continuing conspiracy which
1189 started before the period and continued through the period of the damage and continued on after that period.

Now particularly under Section 2 of the Sherman Act dealing with monopoly. For instance, opposing counsel have requested a charge, the phrase "attempt to monopolize" means the employment of methods, means and practices which, if successful, accomplish monopolization and which, though falling short, nevertheless approaching so close as to create a dangerous probability of it, wh[illegible] means and methods are so employed by the members of and pursuant to a combination or conspiracy formed for the purpose of such accomplishment.

In other words, they take the position, and I think it is substantiated in this American Tobacco Company case, that

to prove an attempt to monopolize, you must show that the party charged approaches so close to actual monopoly as to create a dangerous probability of obtaining that monopoly.

Now when a party seeks to obtain a monopoly or attempts to obtain a monopoly by running other people out of business, the only way you can determine how dangerously probable the attainment of that ultimate purpose is, is to
1190 see what happens when he has run the people out of business.

Now our people went out of business December 31, 1958. To determine how dangerously probable this attempt to monopolize is, we have to see what happens when they have run a number of the small companies out of the market, and the only way you can possibly attain this purpose in proving your case is to see what happens when the other people have gone out of business.

1191 A continuing conspiracy, I think is acknowledged by all authorities, Your Honor, it can be proved by proof before the company goes out of business and proof after he has gone out of business, and certainly under this rule which counsel relies on, the attainment of dangerous probability of a monopoly, can only be proved by the period after our people have gone out of business.

The Court: Well, the Court, in its more recent rulings on this subject, has overruled the contentions of counsel, namely that the conspiracy which started in 1950 continued past 1958 and continues even to this day.

Now, the Court holds that this testimony, all of this testimony which relates to a period after December 31, 1958, is competent for whatever bearing it may have, if any, on the question of whether or not, first, there was a conspiracy, second, whether or not that conspiracy continues, and continues to date.

Mr. Kramer: Now, may it please the Court, it is our position that the fact that there was a larger proportion or smaller proportion of coal by one particular company after the period really involved in the conspiracy, that is the

period of damage of this conspiracy, December 31, 1958, is incompetent to show that there was a conspiracy
1192 for the purpose of monopoly. Unless during the period involved in this litigation, there was — and I am talking about the period ending December 31, 1958 — unless there was such a combination unlawfully formed, that these people were damaged during that period time, there could be no recovery in this lawsuit.

The Court: That's right.

Mr. Rowntree: Absolutely correct.

Mr. Kramer: Therefore, Your Honor, what happened in 1959, we most earnestly insist, could not be material so far as this case is concerned.

The Court: That is where the Court respectfully differs. The Court is very sorry that it cannot agree with Mr. Kramer on all of these points, but that is a point that the Court cannot agree with you on.

Mr. Kramer: The Court does agree with the first point?

The Court: This has been ruled to be competent and the Court has directed the jury to consider it for whatever bearing it may have on the issues during this trial.

Mr. Kramer: I do not like to make a specific objection of this type, but I feel I should, Your Honor. When Your Honor directs the jury to consider—as I understand
1193 Your Honor has—for consideration of the jury if it throws light—they are not directed specifically—

The Court: No.

Mr. Kramer: Your Honor did just state that. I think Your Honor did not mean to.

The Court: No.

Mr. Kramer: Your Honor directs the jury to consider, you didn't mean that.

The Court: No, I mean that if it has any bearing on the issues, the jury could consider it. I meant to convey to the jury the idea that the Court has ruled this proof is competent for whatever bearing the jury may think it has on the issues

involved, and that is the only purpose for which it is submitted.

Mr. Kramer: That is what was intended, Your Honor?

The Court: That's right.

* * * * * * * * * * *

1194 "CROSS EXAMINATION

"By Mr. Russell Kramer:

"Q. Mr. Eastin, your testimony would seem to indicate that the capital stock of West Kentucky is listed on one of the stock exchanges, is that right? "A. That is correct; on the New York Stock Exchange.

"Q. Can you tell us how long West Kentucky stock has been so listed? "A. November 1, 1949.

"Q. And continuously since that time? "A. Yes.

"Q. Can you tell us approximately how many stockholders were shown on the books of the Corporation, stock books, as being stockholders in 1953, '54, '55, through that period, just approximately? "A. I can get them in five minutes for you definitely. We keep it right out here, but I would say there was about 36,000 to start with or a little more than 36,000, and it has gradually declined, and we now have about 6,000 or 7,000 stockholders; but if you would like to have those figures to put in the record, I can get them for you.

"Q. That is sufficient for my purpose. And I take it the size of those stockholdings among the different stockholders vary greatly from a small number to a large num-

1195 ber? "A. That is right.

"Q. Has that been true during all this period of time? "A. That is true.

"Q. And, of course, a great deal of that stock is handled, or practically all of the sales are handled through the stock brokers? "A. That is correct.

"Q. It is not an unusual situation for stock to be listed on your books in the name of a stockbroker wherein the name of the actual owner is not shown? "A. That is correct.

"Q. Could you give us the approximate date that West Kentucky Coal Company first went into operation? "A. Yes, I believe it was 1904; I have that right here. No, I don't, but it was around 1904; sometime in the year 1904; the year I was born, and that is the reason I remember it.

"Q. And it has operated continuously since about that time? "A. That is correct.

"Q. You made some reference to the fact that West Kentucky was the first coal company, I believe, that had a mine fully equipped with belt movement of coal. Would you explain just what you mean by that? "A. Well, in
1196 the trend toward mechanization, these trends had been in steps, but there had never been a mine up until we put in North Diamond, what we call North Diamond Number Two, in which the transportation of the coal was in its entirety hauled by belts, or transported by belts is a better word.

Your shuttle car moved the coal from a loading machine a distance not to exceed three or four hundred feet, and dumped it on a belt and then it went all the way out to the top of the tipple by belt; and that was the first mine of that type, all-belt mine.

"Q. Can you recall about the date of that installation? "A. Well, it was in 1940, the later part of 1940 we got finished.

"Q. From your early days of operation, West Kentucky has been mechanized to some extent, has it not? "A. Oh, yes; yes.

"Q. And as mechanization has improved in the mining field or mining industry, you people have tried to keep step with it, have you not? "A. Well, certainly. If you are going to stay competitive, you have got to.

"Q. And, of course, as you have already indicated that was taking place long before 1950? "A. Oh, yes,
1197 definitely.

"Q. How long have you been connected in one way or another with West Kentucky? "A. Well, I worked for

them in the mines and on the coal tipple and with the Engineering Department in my high school vacation days, and then when I graduated from college I went to work for them in the fall of 1929, and have worked for them continuously since.

"Q. What field or department of this company were you with in 1929? "A. Well, I started as what we termed a billing clerk, which was really an invoicing clerk, making invoices on coal sales with a typewriter, and I proceeded from that job to the job on accounts receivable ledger, and then was moved to Louisville, Kentucky, and was made manager of the wholesale and retail branch of the company there, the original employment having been in Paducah where our sales office was.

And then I moved back to Paducah as assistant vice-president in charge of sales and sales manager and then I was moved over to Earlington, Kentucky, as assistant sales manager of the sample and art division, and then I was later made sales manager of the West Kentucky Coal Company and then made assistant to the president and then vice-president and then executive vice-president and then president.

1198 "Q. So that you are rather thoroughly familiar with this company and its growth and development over these years since '29? "A. I feel that I am, yes.

"Q. Can you tell us approximately without going into your records, the number of miners that West Kentucky has employed at the present time? "A. We have about 2500 people on our total payroll of which I would say about around three hundred are salaried people and the balance are hourly people working in the mines; that is taking both Nashville and West Kentucky; so that would be two thousand to twenty-two hundred, something like that. I can get those figures accurately.

"Q. That is near enough for my purpose. Going back over the years, have there been more men employed in the years gone by and if so, what about the maximum number

and about when? Just approximation. "A. Well, before mechanization was generally adopted the coal was loaded by hand, and we had over five thousand men working in our mines.

"Q. Has that number gradually reduced as mechanization has gone forward? "A. That is true.

"Q. When were all of your mines mechanized, or your entire operation mechanized, about what year? "A.
1199 I would say that we were, and I can get this definitely if you want it, but I would say that our mechanization program had been pretty well completed by 1943 or '4; the transition has been completed by that time.

1200 "Q. Prior to that it had been gradual over a period of years? "A. That is right.

"Q. Of course, since that time mechanization has changed as new mining equipment has been developed? "A. That is correct.

"Q. Something has been said in your testimony this morning about leasing arrangements between Peabody and West Kentucky. Do you know how far back there have been leases on which Peabody has operated on certain properties owned by West Kentucky? "A. Well, early forties; and we, of course, have had leases with others and still do.

"Q. So that Peabody is not the only other coal producer to whom you have made leases? "A. Oh, no.

"Q. You do not, and when I say you I mean West Kentucky, does not do any strip mining do you? "A. No.

"Q. Do any of the companies to whom you have leased do deep mining? "A. Right now there is one small lease to a deep mine that is in existence where the small area was isolated and we couldn't mine it, and they were working along close to it and they are working that area. Otherwise, the coal would be left. Other than that, all of our
1201 present leases are on strip mine basis.

"Q. On the question of freight rates, of course, as a user, rather large user, of transportation facilities,

West Kentucky has always been interested in getting the best rate you could? "A. Oh, certainly. We are always trying to get freight rates reduced. That is a part of selling. We are in competition continually with water borne coal, with gas, with oil in spots, and it behooves us to get the rates as low as possible and they are entirely too high because after all, sales are made on a delivered basis; and right now we are working with the railroads in an effort to get, in fact, have been assured that they will be reduced in other directions, and we will get credit for it with the buyer and, I hope, be awarded with a nice tonnage of coal.

"Q. That same practice and procedure has been followed by West Kentucky in dealing with the freight rate question for many, many years, has it not? "A. Yes, sir; I have heard about freight rates ever since I first came into this office and it has always been a bone of contention that we had certain disadvantages against us, which we were trying to overcome.

"Q. I take it that is not really novel though to West Kentucky. You have heard and have knowledge that
1202 practically everybody in the coal industry is making the same kind of a fight, have you not? "A. That is correct.

"Q. Yes, sir. "A. And even the Associations have generally resisted the freight increases and have tried to persuade the people who are transporting coal to reduce their rates.

"Q. Has there been a number of reductions of freight rates as a result of these efforts during recent years? "A. Of course, the general trend has been for rates upward and we have had a half a dozen or so freight increases in the last few years, too many and too much; but in specific cases where the railroads can develop some tonnage that they can move in volume they have been inclined to work with the producer and the buyer in reduced rates, and that is not abnormal, we have had a lot of those, a number of them.

"Q. Mr. Eastin if you do not feel you should answer this

question I will not press it but if you feel it would not be giving an advantage to competitors that shouldn't be given to public, I wonder if you would give us your total tonnage sales over the past decade or so that West Kentucky has made? "A. Yes, sir. You are interested in tonnage?

1203 "Q. I am. "A. Well, 1948, 6,394,529; 1949, 6,056,139; 1950, 6,465,136; 1951, 5,513,890; 1952, 5,738,617; 1953, 5,080,565; 1954, 4,849,854; 1955, 6,356,620; 1956, 7,714,646; 1957, 7,724,999; 1958, 5,723,692; 1959, 5,932,869.

Now that is tonnage produced by us. That does not include some small tonnages purchased, well, for instance from West Virginia or from Eastern Kentucky or somewhere where we don't operate. That is produced tonnage.

"Q. Do those figures you have given for the recent years include tonnage produced by the Nashville Coal? "A. That is right, West Kentucky and Nashville.

"Q. When did you acquire Nashville properties? "A. October 1, 1955.

"Q. Prior to the signing of the first collective bargaining agreement by West Kentucky with the United Mine Workers of America, during the years previous thereto, did West Kentucky maintain a welfare and retirement fund? "A. They did.

"Q. Do you recall what amount of royalty you placed in or what amount per ton if you didn't call it royalty, you placed into that fund? "A. The same as the UMW of A welfare payment.

"Q. In other words, if that was .30¢ per ton you set that amount and if it was .40¢ you set that amount? "A.

1204 That is correct.

"Q. Now on the wage scale that you maintained for West Kentucky, can you tell us how that compared with the Union wage scale that was required by the collective bargaining agreements that the UMW had with other operators? "A. During the period that I have had knowledge of it, it has been comparable or in some instances slightly higher than the UMWA scale.

"Q. I overlooked a moment ago when I was talking about transportation to ask you how long West Kentucky has used water transportation as a part of its delivery of the sales? "A. Well, when you go back to the early operations of the company we were in the water borne transportation business in a right substantial way, and then we started having the transportation done by others, and then after the Poplar Ridge property was divorced from us, which was our river end of the property, we had no river coal and we got out of the river transportation business and were out for a few years; and we felt the need of being back on the river for the effect that it has, frankly, on the railroad freight rates and serving certain customers to advantage, and that was one of the considerations in the acquisition of Nashville Coal Company, was that they had a river department and they had barges and boats and part of their property was adjacent to the river, and that is how
1205 we got back into the river business."

* * * * * * * * * * *

REDIRECT EXAMINATION

By Mr. Rowntree:

"Q. Mr. Eastin, Mr. Kramer asked you a while ago about the stock of West Kentucky Coal Company, common stock, being traded on New York Stock Exchange. Could you give us the approximate price that stock is bringing on the Exchange at the present time? "A. I haven't looked this morning but it has been between 10 and 11 the last few days.

"Q. Do you know of any other large holder of the common stock of West Kentucky Coal Company besides those mentioned on the Proxy Statements which have been exhibited here? "A. Well, I think that would depend on what you mean by large.

"Q. Say anything over 25,000 shares. "A. Well, Mr. Colton has over 25,000; Barnum Colton.

1206 "Q. He is the president of the National Bank of Washington? "A. That is correct.

"Q. Do you recall anybody else? "A. I can go in there and look in my drawer and tell you in a minute. Offhanded, I don't right now.

"Q. I would like to know. Would you confirm it if there are no others. "A. No, there are no other holders of 25,000 shares or more to my knowledge. We have some brokerage accounts that run in excess of those figures, but we don't know whether those are collective figures or for single individuals.

"Q. Mr. Eastin, approximately how many Joy machines do you have in your mines? "A. Well, we have, not including spares, eight at East Diamond, nine at Pleasant View, five or six at Uniontown. We also have some Goodmans at Uniontown. Three or four at Williams and five or six at Crescent and there would be eight at Fies. Now we have some spares that are not operating, that when you have a breakdown you slip them in, but that is approximately the number operating.

"Q. Do you know when you purchased the first one of the Joys? "A. Well, this is hearsay but one of the
1207 first Joys ever produced was tried out in our No. 8 mine at Sturgis, and I understand that the Company bought two of those back to, oh, 1923 or '4 or '5.

"Q. Is that the same type of machine? "A. Well, it has been improved.

"Q. Been improved? "A. Yes, sir.

"Q. Do you recall the numbers of these machines that you had in 1950, roughly, in comparison with the numbers you have today? "A. Well, it would be approximately the same except that we had more mines going of our own at that time and some of those mines worked out or were closed, and then when the Nashville mines were purchased then the numbers are approximately the same.

"Q. Do you recall how many employees you had, approximately, in 1950; miners? "A. I would want to check

that record. If I were going to guess I would guess about 3000.

"Q. The coal industry has suffered inroads competition since 1948? "A. That is correct.

"Q. Many of the railroads bought coal for locomotion in 1948? "A. Yes.

1208 "Q. Did you sell to railroads? "A. Yes, we sold substantial tonnage to railroads.

"Q. Has the domestic market declined since 1948? "A. It has declined.

"Q. What is the principal consumption now of coal, is it in the utility field? "A. That is the brightest picture in our coal horizon is the utility field.

"Q. Has West Kentucky Coal Company sold coal to Peabody Coal Company? "A. Oh, yes, we have sold coal and bought coal from them and many other companies over the years.

"Q. Has Peabody Coal Company purchased more than any other coal producing company? "A. From us?

"Q. From you. "A. No.

"Q. Who is the biggest purchaser among the producers? "A. Well, you would have to give me a specified time and then I would have to look that up, but there have been times when we would sell substantial coal to others; and that changes with respect to the market; what the demand is. We had a large capacity of mines and when the market was good if we had more tonnage than we needed, why we

1209 sold it to others who didn't have the capacity we had.

"Q. Peabody has purchased from time to time substantial tonnage from West Kentucky Coal Company? "A. That is right, yes. It all, again, depends on what you mean by substantial but we have sold Peabody a right substantial amount of coal way back; nothing lately.

"Q. You spoke of some disadvantages a while ago with respect to freight rates. Would the disadvantage you are speaking of be the disadvantage of distance from a particular market? "A. Well, I am not an expert on freight rates;

we have got a man that is, and he has been working for this company longer than I have, but it is my opinion that distance does not always enter into the freight rate. It goes back, there is an old history in which there was certain basis established and those relations have prevailed to a substantial degree.

"Q. Now with respect to the Widows Creek market of the TVA, would the disadvantage there relate to the distance from the West Kentucky mines to the Widows Creek plant? "A. Well, to deliver coal from Western Kentucky to Widows Creek on the old rates, to be competitive you would have to move it by water and bearing in mind that we have only one mine located on the river, it is to our advantage to get a rail rate in there which will permit us to move coal
1210 from these inland mines to Widows Creek.

"Q. Has Peabody Coal Company's tows moved West Kentucky or Nashville Coal Company coal on the Ohio? "A. I don't recall of any such movement. I don't recall any such movement.

"Q. Does anyone else move the West Kentucky or Nashville Coal Company coal on the water besides River and Gulf Transfer Co." "A. Well, at times you might have somebody passing that you had a barge you wanted moved, they would pick it up. Not substantially speaking, but there may have been some movement; I am sure there have been.

"Q. You have just told us that Nashville Coal Company, Inc. also has river towing equipment which also moves West Kentucky and Nashville Coal Company coal on the water? "A. That is correct.

"Q. In addition to River and Gulf Transfer Co.? "A. That is correct.

"Q. Is the water towing equipment of Nashville Coal Company, Inc. directly owned by that company? It does not have a subsidiary? "A. No, it is part of Nashville Coal Company, Inc."

Mr. Rowntree: That is all.

1211 Mr. Robertson: May it please the Court and ladies

and gentlemen of the jury, this is the deposition of Barnum L. Colton, taken October 31, 1960 in Washington, D. C.

* * * * * * * * * * *

"BARNUM L. COLTON

was called as a witness,

* * * * * * * * * * *

DIRECT EXAMINATION

By Mr. Rowntree:

"What is your name, please? "A. Barnum L. Colton.

"Q. Where do you reside? "A. 111 Oxford Street, Chevy Chase, Md.

"Q. I believe you are President of the National Bank of Washington? "A. That is correct.

"Q. How long have you held that position? "A. Well, I was elected, I think, in 1949. I think I resigned the latter part of 1953 or some part of 1954. I was out for several months as President of the Hamilton National Bank. Then I was re-elected President of the National Bank of Washington, the latter part of 1954 or first part of 1955. I have continued in that position ever since.

1212 "Q. Do you have the last statement of the National Bank of Washington? "A. The statement of condition, October 3, 1960, subject to the call of the Comptroller of the Currency."

Mr. Robertson: Here we marked that as Exhibit 1 to the deposition. We wish to introduce this statement as Exhibit 72 in this record.

Mr. Kramer: The date again involved is down in October 1960, back of the period, and for the reasons given we object.

The Court: Same ruling.

(Exhibit No. 72 was marked for identification and filed.)

Mr. Robertson: We point out from this statement on the back, where it lists the board of directors, there is listed the names of Welly K. Hopkins, general counsel of the

United Mine Workers of America, and A. D. Lewis, executive, United Mine Workers of America, both of whom are on the board of directors.

We might point out, I suppose you might call that the third page, where the advisory board is listed, on that board is Thomas F. Ryan, Jr., comptroller, United Mine Workers of America, Welfare and Retirement Fund.

* * * * * * * * * * *

1213 Mr. Robertson: Just one other item, Mr. Combs.

On the condensed statement of condition, the loans of the bank are listed there in the amount of $114,488,711.94.

That is all I wish to bring out on that statement.

Mr. Combs: May I point out at this time, your Honor and ladies and gentlemen of the jury, the National Bank of Washington shows on this report that it made, it is a member of the Federal Reserve System and it is a member of the Federal Deposit Insurance Corporation. It was chartered by an act of Congress.

The board of directors, from which Mr. Robertson
1214 read, contains in addition to Mr. Hopkins and Mr. Lewis, some 24 members of the board of directors, including Mr. Hopkins and Mr. A. D. Lewis. The advisory board to which counsel makes reference, contains 27 members of the advisory board, including Mr. Thomas F. Ryan, Jr., with the trustees of the Welfare Fund.

(The reading of the deposition continued.)

"Q. About October, 1957, did the National Bank of Washington acquire the Liberty National Bank of Washington? "A. That is correct.

"Q. It was made a branch of the National Bank of Washington? "A. Yes.

"Q. How many branches does the National Bank of Washington have? "A. We have one main office and 11 branches.

* * * * * * * * * * *

"Q. Are they all located in the District of Columbia? "A. Yes.

1215 "Q. Is the National Bank of Washington the second largest bank in the City of Washington? "A. The third.

"Q. We asked you to bring in papers concerning the loan transaction to you from the United Mine Workers of America, in the amount of $12,428,241.99? "A. I don't have any papers in connection with that transaction. I would be very glad to answer any questions or give you any information that you like in connection with it.

"Q. All right, sir. How many shares of stock does National Bank of Washington have outstanding now? "A. 725,000.

"Q. That would appear on this Exhibit 1?"

Mr. Robertson: That is now Exhibit 72.

(The reading of the deposition continued.)

"A. Yes, sir.

"Q. Do you know when the United Mine Workers of America acquired the 287,884 shares that they had at the end of 1958? "A. Well, I think that first acquisition was in 1949. I think that they have been buying the stock from time to time when it was offered for sale by brokers.

"Q. Since 1949? "A. Yes, sir.

"Q. Do you recall how substantial a block of stock
1216 they had in March of 1954, was it large or not? "A. Just speaking from memory, I would say they controlled 75 to 80 per cent of the then outstanding stock of the old National Bank of Washington prior to the acquisition—I think they owned 75 to 80 per cent of the stock prior to its consolidation with the Hamilton National Bank.

"Q. The Union has exhibited a note, dated March 15, 1954, in the principal amount of ..." I believe that should be $1,320,750 — "$1,320,750, signed by you, which I show you? "A. Yes, sir.

"Q. Do you recognize that as the note which you signed?"

* * *

"Q. I would like to get a statement from you, Mr. Colton, as to how this transaction came about. What was your first

knowledge of it? "A. The Hamilton National Bank was a very active organization. They had several branch locations in Washington. The old Bank of Washington had one, down at 7th and Pennsylvania, in an area that was, in our opinion, not getting any better. They had another branch down in the Southwest, which the Government would take in its redevelopment program.

1217 "I felt that, insofar as I was concerned personally, the Bank would have a very hard time to progress and get anywhere unless we were in position to consolidate with some other bank and expand our operations throughout the city.

"So in our talks with Mr. James N. Johnston of Johnston Lemon & Company, he felt, he was of the opinion, if I tried to negotiate on the acquisition of the Hamilton Bank that it might be that we would be successful in acquiring sufficient stock in that bank to be able maybe to have a consolidation."

Mr. Robertson: I point out that the exhibit referred to before the last question as filed as Exhibit 1-C to the deposition and that is now Exhibit 51 in this record.

(The reading of the deposition continued.)

"Q. At that time you were President— "A. Of the National Bank of Washington.

"Q. So this was at the time after you had resigned, then come back to the National Bank of Washington? "A. No, I think this must have been before I left the National Bank of Washington, because I didn't resign from the National Bank of Washington until I had acquired the controlling interest in the Hamilton National Bank. Then they elected me President.

1218 "Q. So what did you do, then, after having these discussions with Johnston Lemon? "A. I went to the Mine Workers and told them I felt I had an opportunity to, perhaps, if I were successful personally, in being able to pick up enough stock, with the friends we had in the Hamilton National Bank, we might be able to work out a consoli-

dation, would they loan me the money to go forward with the deal. They said they would.

"Q. You went to the United Mine Workers of America because they were the controlling stockholders?. "A. That is correct.

"Q. Of the National Bank of Washington, is that right? "A. That is correct. I thought ethically I would have to go to them first.

"Q. Who did you discuss that with? "A. If I recall, I discussed it with Mr. Kennedy and Mr. A. D. Lewis.

"Q. Did they agree? "A. Yes, sir.

"Q. Was the amount involved discussed? "A. The amount involved was discussed, not in specific figures. They agreed that they would loan me money from time to time as I reported to them of acquisitions through Johnston Lemon. I agreed to give them a note from time to time as I needed the money and acquired the stock, on ad-
1219 vances.

"Q. This note which I have referred to above, the note of March 15, 1954, represents advances made up to that time? "A. There might have been other notes than this, but when we ended up, we had two notes, if I recall, covering the acquisition by me of the controlling interest in Hamilton National Bank. I think one note was a million, three hundred-some thousand dollars. Another note was ended up with a balance due, I think, eight million, three hundred-some thousand dollars.

"Q. At the time of this first note, the $1,300,000 note which is in front of you, was that the first note, to the best of your recollection? "A. It could have been. Let me bring the next step down. The next step down, to bring up and develop this item of $12,428,000. After the consolidation had been effected between the Hamilton Bank and the National Bank of Washington, they agreed to increase that stock, give them additional capital fund. They gave the stockholders the right to subscribe to new stock on the basis of one share for every two shares held.

"I borrowed an additional two million, seven hundred-some thousand dollars, which I think makes up three notes that they have of mine, totaling $12,428,000."

1220 Mr. Robertson: Your Honor, I point out at this time that these three notes which he refers to here in this testimony all have provisions similar to those provisions as the notes we took up this morning.

I would like to read one provision from one of these notes which is common to all of these, beginning next to the last paragraph:

"'It is to be distinctly understood and agreed that no personal liability shall attach to the maker of this obligation'"—that is Mr. Colton—"in the event demand be made for payment by the maker and default occurring the recourse to be holder thereof"—United Mine Workers officers—"shall be the collateral pledged hereunder and should there be a deficiency on said note after sale of said collateral, no liability shall attach to the maker of this obligation for claims or charges of any kind of character. In the event of the death of the undersigned, the holder of this obligation reserves the right to take over the collateral immediately and transfer it to their own name or its nominee. In such event no further liability shall exist on this obligation to the maker, his heirs, executors or administrators."

1221 The Court: Now that note is signed by Mr. Colton?

Mr. Robertson: Yes, sir.

The Court: And what was attached to the note as collateral?

Mr. Robertson: The original note, Your Honor, the collateral attached was shares in the Hamilton National Bank in Washington. Then later, after the Hamilton National Bank was merged with the National Bank of Washington, then shares in the National Bank of Washington were substituted as collateral in the place of the old Hamilton National which had gone out of existence.

The Court: Did Colton borrow that money from the UMW?

Mr. Robertson: Yes.

The Court: Over two million dollars?

Mr. Robertson: Advanced by the union and which Mr. Colton said was advanced for the purpose of purchasing Hamilton Bank shares of stock.

The Court: That note is payable to the order of the United Mine Workers?

Mr. Robertson: This is a demand note. Mr. Colton states —the note itself is not made to the UMW—but Mr. Colton states that the note was given to the UMW.

1222 The Court: Well, to whom is it made?

Mr. Robertson: Just to the holder of this note.

The Court: Demand note.

Mr. Robertson: Just a demand note.

The Court: All right, now what do those other notes carry, how much are they?

Mr. Robertson: Well, the first note which we have already spoken of, $1;320,750. Then —

The Court: Who signed that? Mr. Colton?

Mr. Robertson: That's right.

The Court: For the same purpose, to buy stock in the Hamilton National Bank, and the money was borrowed from the UMW?

Mr. Robertson: Yes, Your Honor.

The Court: All right.

Mr. Robertson: The second note which is shares of stock in the Hamilton National Bank were pledged as security, purchased with the money and pledged as security, and also signed by Mr. Colton, was in the amount of $9,170,487;

And the third note which is pledged for shares — I mean the shares of the National Bank of Washington are pledged as security, was in the amount $2,754,105;

1223 And on the first two notes, after the Hamilton National Bank was merged with the National Bank of Washington, then National Bank of Washington shares were substituted as collateral in place of the old Hamilton National Bank shares.

The Court: Well, were those notes paid off by the bank or what was the ultimate result?

Mr. Robertson: It's just been left like this ever since that time, so far as we know.

The Court: Still outstanding?

Mr. Robertson: There's no repayment on the debt, and the stock is still pledged with the union, they are holding the stock.

Mr. Kramer: In the record that was filed the other day in one of the exhibits, Your Honor, there was a showing that as of July 31, 1958, the date we were asked about, these notes were outstanding, and this stock was still collateral. I say "this stock", I mean the National Bank of Washington, because as counsel has well stated, the Hamilton National Bank passed out of the picture, but shares of the stock in the National Bank of Washington, and I think the date was July 31st, 1958, and the report shows that
1124 these were notes owing by Mr. Colton, and they were pledged as collateral for the notes.

The Court: Does he owe that much money personally?

Mr. Kramer: He borrowed the money personally, and it was his loan to buy the stock in his name.

The Court: And he borrowed over twelve million dollars?

Mr. Kramer: He borrowed the money from the United Mine Workers of America, and Mr. Lewis testified to that, which we say, Your Honor, has nothing—it is true that he put up stock which we say was ample security for the loan. United Mine Workers of America made the loan, and he put the stock up as collateral. It has nothing to do with conspiracy.

Mr. Robertson: Your Honor, again reading from the note, it states on its face:

"It is to be distinctly understood and agreed that no personal liability shall attach to the maker of this obligation in the event demand be made for payment by the maker and default occurring, the recourse to the holder thereof shall be the collateral pledged hereunder, and should there be a

deficiency on said note after sale of said collateral,
1225 no liability shall attach to the maker of this obligation for claims or charges of any kind or character.

"In the event of the death of the undersigned, the holder of this obligation reserves the right to take over the collateral immediately and transfer it to their own name or its nominee. In such event, no further liability shall exist on this obligation to the maker, his heirs, executors, or administrators."

Mr. Kramer: That is true, it is limited security only, but it was a straight loan under those terms. They put these collateral up, and it could be paid off by surrendering the collateral, death or in the event of his death, it could be taken in in the conditions, but Your Honor, we say that was not a conspiracy, but was a matter of judgment in making the loan to Mr. Colton who was the president of that bank. He was not the president of the — he was part of the time — the National Bank of Washington. He was with the Hamilton National Bank, and they acquired the Hamilton, and then merged it with the Hamilton Bank of Washington.

* * * * * * * * * * *

1226 Mr. Combs: Without waiving our objections to the admissibility of it, I want to reiterate what I said a while ago, what I said to that exculpatory clause, he is talking about that the note recites that the collateral and the promise of the maker of the note, that the Mine Workers were securing the loan for.

Now it is true, Your Honor, as counsel has said, that the Mine Workers loaned money to Colton to get the stock, it is testified by Colton, there is no question about that in this record.

Now, insofar as the beneficial ownership of this stock is concerned, I want to point out that in the merger of these two banks, the evidence will show that the ownership was gone into about this stock, and the merger was approved by the Federal Reserve System. They had to approve it before they could merge, and after they merged, they

1227 reissued Hamilton stock instead of the Bank of Washington.

Mr. Robertson: We don't contend this is an illegal transaction. We are just saying it is a most peculiar transaction for anybody who wants to acquire shares of stock to acquire it in this fashion through some person who gives a note for it.

The Court: Mr. Rowntree, tell me, according to your contention, what part, if any, do these transactions play in the entire picture of this case?

Mr. Rowntree: We say, Your Honor, that a part of this conspiracy was the exercise of economic power by the union, not only with respect to the National Bituminous Coal Wage Agreement, but also with respect to finances.

We have gone into some detail with respect to the use of the Union's own money in this field, but we say that there is additional economic power in this Union. Now we must acknowledge that we have been unsuccessful in developing the extent of the use of this additional economic power, because questions were not answered.

However, it is our contention that that economic power exists through this addition arm which is made up by this National Bank of Washington, and that that power
1228 does exist. Now, we can't develop the actual use of that power, but the existence of the power is what we are contending for here.

We can't follow through because of practical difficulties affecting a small litigant in the pursuing the ultimate results of an investigation, but we say the power exists, and his part of the conspiracy. The potential of fulfilling this conspiracy that we allege, the economic force that potentially could be used, did exist. That is our purpose, Your Honor.

The Court: All right.

Mr. Combs: May I make this remark in connection with that, Your Honor?

The amounts that are involved here, of course, are large amounts, but I think that we should remember that we are

talking about the assets of over five hundred thousand people that have been accumulated since 1890.

Now the basis of our objection is just simply this: I don't think there is anyone who will argue just because it is a union, they don't have a right to make investments in order to try to increase whatever earnings they have and to lessen the necessity of their members paying dues.

Of course it is economic power if you want to char-
1229 acterize it that way, but relatively speaking, I don't think we have something here just because of the transaction itself, no illegality or immorality or anything involved in that, unless this is tied in with a conspiracy to violate the anti-trust laws."

It is our contention that this has nothing to do with this lawsuit.

The Court: All right.

(The reading of the deposition was continued.)

"Q. I show you the next note, under Exhibit 1-C,—"

Mr. Robertson: Which we have just referred to.

(The reading of the deposition was continued.)

"—that the Union has filed to the interrogatory, Set No. 2"

* * *

"dated April 26, 1954, in the amount of $9,170,487. Is that the second note? "A. Yes, sir.

"Q. A third note under that exhibit to those interrogatories is the note dated September 15, 1955, for $2,754,105. Is that the third note? "A. Yes, sir.

"Q. The reason there were two notes, these first
1230 two notes, is because the Union had advanced so much money up to the date of that first note, and those first transactions were represented in that first note, is that right? "A. Well, if I recall, the first transaction of Johnston Lemon had to commit themselves to options in our behalf to acquire this original block of stock. I think the obligation at that time amounted to around $1,300.00, whatever it was.

"Q. That is the initial block of stock in Hamilton National Bank? "A. That is right.

"Q. You had to have funds to obtain those options at the outset? "A. I had to have funds to buy the stock, take up the options.

"Q. Take up the options? "A. Yes, sir.

"Q. This stock was registered in the name of Johnston Lemon and Company, when it was acquired? "A. Some of it was put in my name. Some of it, I left in his name.

"Q. Johnston Lemon? "A. Yes, sir.

"Q. Is that stock still in the name of Johnston Lemon and Company? "A. Some of it, yes. Some of it is in
1231 my name.

"Q. Johnston Lemon and Company is the agency that solicited the stock, or did you do some yourself? "A. I did some myself.

"Q. The loans that were made by the Union were deposited in the National Bank of Washington? "A. Not to my knowledge. I don't know what they did with them.

"Q. You didn't get the loans yourself? "A. How do you mean?

"Q. The money advanced by the Union? "A. They gave me the money. I put the money to my credit. If Johnston Lemon needed money, I funneled them money as they acquired the stock.

"Q. You put it to your credit in the National Bank of Washington? "A. That is correct.

"Q. You would issue checks for the stock as it was purchased? "A. When Johnston Lemon would tell me they needed money to pick up additional shares, I would give them the money, yes, sir.

"Q. This Exhibit 1-C, the first note, provides for the payment of dividends to the holder of the note. I believe that is contained in the third from the last paragraph there.

Who was the holder of the note? "A. United Mine
1232 Workers.

"Q. Did the holder get the dividends that were

issued on that stock? "A. Yes, sir. As the dividends were paid, they were placed to the credit of my account. I received them.

1233 "Q. You received them from the Hamilton National Bank? "A. And the National Bank of Washington.

"Q. And the National Bank of Washington. "A. Subsequent to acquiring it.

"Q. Then you remitted them to the holder of the note, which was the Union?"

Mr. Kramer: There is some confusion there, I believe.

"Q. The note, Exhibit 1-C, recites, in the next to the last paragraph, that it is to be distinctly understood and agreed that no personal liability shall attach to the maker of this obligation in event demand be made for payment by the maker.

"Do you know what that means?

"A. It means just what it says.

"Q. 'Payment by the maker.' By the maker does not refer to demand, that refers to payment by the maker? "A. Yes, I think the note speaks for itself. It says: 'It is distinctly understood and agreed that no personal liability shall attach to the maker of this obligation, in event demand be made for payment by the maker, and default occurring.' Recourse is only to the collateral.

"Q. It goes on to provide: 'And should there be a deficiency on said note after sale of said collateral, no

1234 liability shall attach to the maker of this obligation for claims or charges of any kind or character."

"So the maximum of your liability would be the surrender of the collateral, which was the shares of stock purchases for these loans? "A. That is right.

"Q. If the stock went up in value, you would obtain the benefit of the gain? "A. If the stock was sold, and I still held it, I would pay off the note and realize the profit.

"Q. But the Union did risk that the stock might go down in value? "A. That is correct.

"Q. If it went down in value, the Union would suffer the loss? "A. If they sold it at a loss.

"Q. Wasn't there an understanding that the Union would actually be the owner of this stock? "A. No. sir.

"Q. In other words, the Union officers were submitting the Union funds to risk, without the hope of capital gain? "A. I wouldn't think so.

"Q. Isn't that it? "A. We have got the finest bank in the city. I think we are going to make a lot of money.
1235 I think the future of this bank is beyond question.

"Q. We have been hearing a lot lately about the economic condition of the country. Some people say one thing, some another. It is a rather uncertain thing, isn't it? "A. Not with this bank stock, in my opinion.

"Q. Of course, that is an opinion that the President of the bank should have, right? "A. Right. I hope we always have it.

"Q. The note provides that if the holder makes demand upon you for payment of the note, that if the demand is not met, the Union can take the stock? "A. Yes, sir.

"Q. A similar provision occurs in the second note? "A. That is correct.

"Q. The $9,000,000 note? "A. That is correct.

"Q. Would it be possible for any man anywhere near in the vicinity of your economic status to pay roughly twelve million dollars on demand? "A. I think I could refinance that note, yes, sir.

"Q. By what means? "A. As the stock stands, I think, around $40, selling around $60, I think I could re-
1236 finance that note. I think I could sell that stock at a profit.

"Q. You could do it today? "A. Not today or maybe tomorrow, but I think with the type of bank that we have, I am sure we could get somebody who would underwrite a very substantial block of that stock.

"Q. But if the economic situation were not as good as it is at the present day, and it is exceptionally good, isn't it?

"A. As far as our bank is concerned, we are making money. We had a fine year. We have no problems.

"Q. But if it had been different, it would have been pretty rough to raise $12,000,000. "A. That is right.

"Q. If you should die today, which we hope won't happen, Mr. Colton, the Union could take this stock? "A. They could take it and my estate maybe would have an estate tax problem that would be very substantial.

"Q. Your estate tax problem? "A. Yes, sir.

"Q. On the face of the note, however, the Union could take the stock? "A. That is correct.

"Q. Both under the first note and the second note, and also the third notes? "A. That is correct?

1237 "Q. That is right? "A. Yes.

"Q. Regardless of the fact that it has gone up in value? "A. That is correct. If I couldn't pay when they demand.

"Q. Regardless of demand, they could take it upon your death? "A. That is correct.

"Q. The Union would not have to pay your death taxes under the terms of that note there? "A. I might not have enough estate to pay the taxes. They might have to, I don't know.

"Q. Have you discussed that with the Union? "A. No, sir.

"Q. The first note has a note in handwriting at the bottom, referring to $13,831 on above received 4-2-54, credited on the balance. What was that transaction? "A. It just must have been excess funds I had in connection with the borrowing at the time I intended to apply on the front of the note.

"Q. There was no specific amount of stock you could buy at the time in connection with the $13,000? "A. I

1238 don't know just what the funds were. They were excess funds, I returned them.

"Q. The note recites, the first note recites, in the last notation on it: On October 13, 1954, by mutual agreement

and the consent of the holder, the Hamilton National Bank stock which was the collateral, I am paraphrasing, was taken down, and there was substituted shares of stock of the National Bank of Washington. I believe the second note has the same notation at the end. "A. That substitution was made by reason of the fact that the Hamilton National Bank went out of existence. The National Bank of Washington was the successor bank.

"Q. Do you recall what percentage of the outstanding shares you held in your name and in the name of Johnston Lemon & Company at the time of that transaction? "A. Percentagewise I can't tell you. I can tell you the last several years, as a result of these transactions, there are pledged for these three loans, 275,410 shares, I think, I have 635 shares unpledged. So the total is 276,045, against 725,000, what would that be?

"Q. The computation can be made later.

"At the time of that transaction, where the banks were consolidated, what percentage of the Hamilton National Bank stock were you holding? "A. I think we picked up around 80 per cent.

1239 "Q. Eighty percent? "A. Maybe a little more.

"Q. So at the time the Union commenced making to you loans to buy Hamilton stock, they held approximately 80 per cent of the National Bank of Washington stock? "A. Yes.

"Q. And at the time that you completed the consolidation of the banks, immediately prior thereto, you held as result of these loans and the $2,000,000 that you borrowed— "A. To cover the increase in stock.

"Q. To cover the increase in stock, approximately 80 per cent of the stock of Hamilton National Bank. "A. At the time I went in as president and acquired the stock through purchases, covering maybe the first two acquisitions, I acquired around 80 per cent of the Hamilton National Bank stock.

"Q. Mr. Colton, has any principal amount been paid on

these loans represented by these notes we are talking about? "A. Only the return of the excess funds which I borrowed which were applied on the account. I think the endorsement shows that. It has been paid in the way of dividends.

"Q. The excess fund, the fund not applied? "A. I think the endorsement, one was an eight hundred-some
1240 thousand dollar credit. I think the item which you mentioned of $13,000 was another. There were a couple of minor adjustments on the notes.

"Q. By excess funds, you mean funds not needed to buy stock? "A. That is correct.

"Q. Has the Union made any demand upon you for payment? "A. No, sir.

"Q. Has the United Mine Workers of America maintained considerable funds on deposit with the National Bank of Washington? "A. Well, now we are getting into an area which I would like to discuss with counsel. I feel that bank balances and transactions by the Bank of Washington are in the nature of privileged transactions. I would rather not discuss them, unless you feel that I should discuss them."

Mr. Robertson: And there, Mr. Wilson, counsel for Mr. Colton, stated, "Mr. Colton, I think counsel for the Union and the Welfare Fund are agreeable to your" —

Mr. Kramer: No objection. We do not object at all, and we told the bank if they wanted to disclose it to disclose it, and they do so, your Honor, on the next page.

1241 (The reading of the deposition was continued.)

"The Witness: I have a memorandum showing the balances in these accounts as of October 27, 1960.

* * * *

"The Witness: It might not be the close of business, but it was the balance we obtained from the bookkeeping department as of that day. I have five in this memorandum.

"1. United Mine Workers of America, Welfare and Retirement Fund, $10,300,259.00.

"2. Welfare and Retirement Fund, 'Pension Account', $8,311,157.88.

"3. Welfare and Retirement, 'Administrative Account', $712,984.37.

"4. United Mine Workers of America, this is the Union, International Union, $13,175,687.15.

"5. United Mine Workers of America, International Union, Savings Account, $4,903,549.40."

Mr. Combs: May it please the Court, that closes the phase of the bank notes that he is inquiring about. I would like to observe that each of the notes that they are talking about, that any and all dividends declared and paid on the stock, was to be paid to the union as interest, and that these amounts he has testified were paid to the union are
1242 dividends received on the notes, and that shows on the notes, and I think that is a clarification they should know about.

Mr. Robertson: I think so too.

* * * * * * * * * *

Mr. Robertson: Your Honor, we have completed the examination of Mr. Colton in this deposition as to the interest of the United Mine Workers in the National Bank of Washington.

We have prepared a chart for the benefit of the jury to point out the interest of the Union as was testified to by Mr. Colton. I will now ask that it be put on the board.

* * * * * * * * * *

1243 Mr. Robertson: I ask that it be marked as an exhibit.

Mr. Combs: Of course, your Honor recognizes that we are not waiving our objection to the entry of the testimony.

The Court: Yes, sir.

(Exhibit No. 73 was marked for identification and filed.)

"Q. We have received from the United Mine Work-
1244 ers of America an exhibit, marked 1-D to interrogatory, Set No. 2, a note dated December 30, 1959, for $750,000 principal amount, a note dated October 28, 1955,

in the principal amount of $631,875. Those two notes were assigned by you to the Union, is that correct? "A. Yes, there were three notes signed by me, representing a balance of $2,256,875, secured by 75,000 shares of West Kentucky Coal Company stock."

Mr. Robertson: Here Mr. Kramer points out:

"Mr. Kramer: Copies of all three of those notes do appear as Exhibit 1-D, with the answer to interrogatory, Set No. 2. You have just overlooked one of them. The third is in this file.

By Mr. Rowntree:

"Q. The third is dated March 1, 1956, for the principal sum of $875,000. Is that right? "A. Yes, sir."

Mr. Robertson: These three notes, all of which are secured by collateral shares of stock of West Kentucky Coal Company, are already in this record as Exhibit No. 52.

We would merely point out at this time that these three notes are like the other three notes, the one secured by the bank shares of stock, in that no personal liability attaches to Mr. Colton and that he can surrender the shares of West Kentucky Company for full satisfaction of debt. Also that the union can take over the collateral in the event of his death.

1245

Mr. Combs: I would also like to add to that, your Honor, that these are demand notes, payable on demand, with the promise to pay, with this collateral hypotheticated to the United Mine Workers.

(The reading of the deposition continued.)

"Q. Mr. Colton, will you tell us what happened in those series of transactions?

"A. If I recall, I was in conference from time to time with Mr. John L. Lewis, and we had discussions of coal and coal operations. We were discussing, if I recall, the West Kentucky Coal Company. I don't know whether he suggested it or I suggested it, that I buy some West Kentucky Coal Company stock.

"He made arrangements for me to acquire, in the first

instance, in 1955, 25,000 shares through Laidlaw & Company, local brokers. The second transaction in 1956—

"Q. That would be the $631,875 note? "A. Yes.

"Q. That is the note which was signed after you talked to Mr. Lewis about the West Kentucky Coal Company
1246 stock? "A. Yes.

"Q. Did Mr. Lewis indicate to you the status of the corporation at that time with respect to the purchase of Nashville Coal Company? "A. No, sir.

"Q. He didn't mention Nashville Coal Company? "A. No, sir.

"Q. Were you advised at that time the company was buying or had bought Nashville Coal Company? "A. No, sir.

"Q. Did you know anything about the West Kentucky Coal Company? "A. We got a lot of information in our services, Standard, Poor's, and I checked it pretty carefully.

"Q. You hadn't heard anything at all about Nashville Coal Company? "A. There might have been something in the reports about Nashville Coal Company. As far as I recall, I don't remember definitely, I don't know definitely.

"Q. You didn't pay any attention about Nashville Coal Company, it didn't mean anything to you? "A. It might have been a company that had enormous reserves of coal. I don't recall just exactly how it was mentioned.

1247 "Q. You weren't informed as to the size of Nashville Coal Company? "A. No, sir.

"Q. Now what about this next attraction, how did that come about, the March 1, 1956? "A. Just about the same way.

"Q. Mr. Lewis came to you again? "A. No, we were discussing it. I don't know just how the discussions came about. But I acquired another 25,000 shares.

"Q. In each of those instances the Union loaned you the money to acquire those shares? "A. They must have paid Laidlaw, because the stock came from Laidlaw. I actually received the stock from Laidlaw, transferred in my name,

and I delivered those shares to the United Mine Workers as collateral for the two loans.

"Q. Laidlaw actually acquired the shares? "A. Yes, sir.

"Q. Do you know if they bought them on the exchange? "A. I don't know.

"Q. Do you know if they were new stock? "A. I don't know. I haven't any idea.

"Q. These two notes we have referred to, being part of Exhibit 1-D"—or Exhibit 52 in this record—"dated
1248 respectively October 28, 1955, and March 1, 1956, are provisions similar to those connected with the National Bank of Washington stock, in other words, the holder of the note is to receive the dividends that are paid on the shares put up as collateral? "A. Yes.

"Q. And it was agreed that you would have no personal liability if the Union took the collateral down as it had a right to do under those two notes? "A. That is correct.

"Q. In other words, if the stock increased in value, you would get the gain? "A. That is correct.

"Q. If the stock went down in value, the Union would suffer the loss? "A. If they sold it.

"Q. Well, the Union would suffer the loss if demand were made and default occurred on these obligations? "A. They would take over the collateral.

"Q. Right. "A. If they sold the collateral, whatever they sold the collateral for would determine whether they made a profit or loss.

"Q. Are you familiar with the price of this stock, the value of this stock on the New York Stock Exchange?
1249 "A. I think it is around $10, $11, or $12 now.

"Q. Are you familiar with how much was paid for this stock at the time you bought it? "A. $35, $30, and $25, as I recall it.

"Q. The stock has gone down quite a bit? "A. Yes.

"Q. So the Union stands to suffer the loss on this stock unless it goes up in value? "A. That is correct.

"Q. If you should die, again we hope it won't happen, the Union would take the stock? "A. That is correct.

"Q. Have you attended any stockholders' meetings of the West Kentucky Coal Company? "A. No, sir.

"Q. Have any amounts been paid on the principal of these obligations? "A. No, sir, just the dividends when they were paid.

"Q. Has the Union made any demand for payment? "A. No, sir.

"Q. None of these notes that we have been talking about, both with respect to the National Bank of Washington stock and the West Kentucky Coal Company stock provide for the payment of any interest except these dividends
1250 that were paid over? "A. That is correct."

* * *

By Mr. Rowntree:

"Q. Mr. Colton, I show you Exhibit 1-B, filed by the Union in answer to interrogatory, Set No. 2, a letter signed by the officers of United Mine Workers of America, as officers and trustees, to the National Bank of Washington, the date is not visible, does anyone have a date on that exhibit?

* * * * * * * * * * *

"Q. It looks like 12-16-57. Do you recognize that letter?"

Mr. Robertson: And I point out here that that is Exhibit 50 in this record. And here, upon advice of counsel, Mr. Colton did not answer.

Mr. Kramer: That was advice of his personal counsel, of his bank, and not of us, your Honor.

Mr. Robertson: This letter, Exhibit 50, is addressed to the National Bank of Washington. It is from the officers of the United Mine Workers of America and is addressed to the attention of Mr. Barnum L. Colton. It states, and I quote—

* * * * * * * * * * *

1251 Mr. Robertson: It states:

"In consideration of your granting a line of credit to the West Kentucky Coal Company, Inc., a corporation

organized under the laws of the State of New Jersey, in the amount of $5,200,000, at our request, authority is hereby given for you to hold $5,200,000 face value United States of America Bonds owned by us as collateral for the repayment of said indebtedness.

"Said indebtedness of the West Kentucky Coal Company, Inc., is to be evidenced by their promissory note or notes and discounted by you under such taxes and conditions as you may direct.

"It being expressly understood and agreed that in case of default of said promissory note or notes all or any part of said bonds may be sold by you without further notice or authority from us to repay said indebtedness in-
1252 cluding interest due thereon.

"Upon payment in full of the obligations of the West Kentucky Coal Company, Inc., you are to return to us the above mentioned bonds."

Signed by the officers of the United Mine Workers of America.

(The reading of the deposition continued.)

"Q. Mr. Colton, our subpoena asks for you to bring in papers relating to loans made by the National Bank of Washington to businesses engaged in the coal mining business, and specifically to coal producing companies in the year 1954 through 1960, or showing loans made for the purpose of investments by anyone in coal producing companies or coal properties.

"Do you have any records with you to conform with that subpoena?"

Mr. Robertson: Here, your Honor, Mr. Wilson, the witness' counsel, states as follows: "There are several—"

Mr. Kramer: Just a moment. Your Honor, we don't think statements made by attorney for the individual himself, not made for the United Mine Workers or trustees of the Welfare and Retirement Fund, are admissible at all. In other words, it is a third—

1253 Mr. Robertson: I will simply state here upon the advice of counsel Mr. Colton did not let us see his papers.

Mr. Kramer: For that, your Honor, we cannot be charged in any way.

(The reading of the deposition continued.)

. . . . . .

1255 "Q. Did you discuss anything in connection with the case? "A. Yes, when all the publicity came out in the newspapers, I communicated with Mr. Whiteford. We went over to the Mine Workers and discussed the situation.

"Q. Did the representative of United Mine Workers suggest that objection be made to disclosure of
1256 transaction of the bank with coal companies? "A. No, sir.

. . . . . .

The deposition of James W. Haley, this deposition was taken on October 31st, 1960, in Washington, D. C.

"JAMES W. HALEY

"was called as a witness.

. . . . . .

"DIRECT EXAMINATION

"By Mr. Rowntree:

"Q. What is your name, sir? "A. James W. Haley.

"Q. Where do you live? "A. 4365 North Twenty-sixth Street, Arlington, Virginia.

"Q. You are an officer of Jewel Ridge Coal Corporation? "A. That's right.

"Q. What office do you hold? "A. Vice-president.

. . . . . .

1257 "Q. Are you an officer of North Fork Coal Company? "A. Yes.

"Q. What office do you hold with that? "A. President and Treasurer.

"Q. Are you a stockholder in that corporation? "A. Yes.

"Q. How many stockholders does North Fork Coal Corporation have? "A. Two.

"Q. Who is the other stockholder? "A. The other is my nominee, who is my secretary. R. R. Magee is her name.

"Q. When did you first become interested in North Fork Coal Company? "A. In 1956.

"Q. Is Mr. Roger Cooper interested in North Fork Coal Company? "A. No.

"Q. Did North Fork Coal Company hold any leases of land from the Kentucky River Coal Company? "A. Yes.

1258 "Q. Does it still hold that lease? "A. Yes.

"Q. Has it subleased that property? "A. Has what subleased?

"Q. North Fork Coal Corporation subleased that property? "A. What property?

"Q. The property which it leased from Kentucky River Coal Company? "A. Some of it, yes. Some of it, no.

"Q. What amount of property is involved in the lease or leases from Kentucky River Coal Company to the North Fork Coal Company? "A. Well, I don't know how to answer that exactly.

"Q. Is it a large acreage? "A. Fairly large, yes.

"Q. This is coal property? "A. Yes.

"Q. Our subpoena asks that you bring in copies of leases of North Fork Coal Company from Kentucky River Coal Company. Did you bring those leases?"

Mr. Kramer: Now, your Honor, this witness was represented by his counsel, and counsel for his company.

1259 We did not participate in the discussion, and we object to reading any portion of the discussion between his personal counsel and counsel for the defendants here.

(The reading of the deposition was continued.)

. . . . . .

"Q. Are you a practicing lawyer, Mr. Haley? "A. Not in the sense that I have, well for the reason that I don't have any time to practice law. But I am an attorney by profession and the Chief Legal Officer of our company.

1260 "Q. Are your leases of North Fork Coal Company from Kentucky River Coal Company of record in the Registrar's Office or Recorder's office of the county wherein the land lies? "A. No.

"Q. You have not recorded those leases? "A. No.

"Q. Are subleases of the property by North Fork Coal Company to any part of record? "A. No.

"Q. Is Kentucky Oak Mining Company mining coal on Kentucky River Coal Company properties?"

* * *

"The Witness: In answer to the question, I don't know.

"By Mr. Rowntree:

"Q. You do not know whether Kentucky Oak Mining Company is mining coal on property owned by Kentucky River Coal Company? "A. No. How would I know

1261 that?

"Q. Mr. Haley, our subpoena asked you to bring in papers showing the loan transaction whereby a bank or banks loaned one million five hundred thousand dollars to North Fork Coal Company on or about May 11, 1959, which loan was secured by assets of United Mine Workers of America, this loan having been disclosed by United Mine Workers of America in the record in this case. Did you bring those papers with you? "A. Yes."

"Q. May I look at them? "A. Yes."

Mr. Kramer: Now, Your Honor will recall, I think — this is in May, 1959, and it is objected to because of the date of the alleged transaction being subsequent to the period involved in the alleged conspiracy. We say, Your Honor, it was incompetent for any purpose in connection with this litigation. It is not claimed that this company was a conspirator, anyway, and it is wholly irrelevant and immaterial for both reasons, Your Honor, and we object to it.

The Court: For what purpose is that testimony offered?

Mr. Robertson: This, Your Honor, it will be developed that the United Mine Workers, in accordance with our con-

tentions—this is an example of pledging Union assets
1262 in a transaction, tying up coal properties in certain companies of their own choosing, keeping the properties out of the hands —

The Court: Objection is overruled.

1268 Mr. Robertson: We have two papers furnished as a late filing as Exhibit No. 1 to this deposition, were filed with the deposition, and on top of page 10 Mr. Rowntree identifies these papers. And the papers are a letter of May 5, 1958, from North Fork Coal Company by James W. Haley, president, to the National Bank of Washington. The other document —

Mr. Combs: I believe counsel is mistaken in the date. It is May 8.

Mr. Robertson: May 8th, 1959. And the other document is a Collateral Security Agreement executed by North Fork Coal Company dated May 7, 1959, referring to stock of North Fork Coal Company, Inc., leases and other documents.

At this time we would like to introduce these two documents as exhibits. The first one is the letter of May 8, 1959.

(Exhibit No. 75 was marked for identification and filed.)

1269 And the Collateral Security Agreement as Exhibit No. 76.

(Exhibit No. 76 was marked for identification and filed.)

Mr. Kramer: Of course, subject to the objection heretofore made, your Honor.

The Court: Yes, sir.

1270 Mr. Robertson: And further referring to papers which the witness had at the time of the taking of the deposition, but which are not offered here as exhibits, Mr. Rowntree's explanation identifying them:

"Customer's copy of deposit to the credit of North Fork Coal Company in the amount of fifty thousand dollars dated May 8, 1959. In the National Bank of Washington, another

deposit credit to North Fork Coal Company in the National Bank of Washington dated May 14, 1959 in the amount of five hundred twenty-five thousand dollars; another deposit to the credit of North Fork Coal Company in the National Bank of Washington dated May 19, 1959, in the amount of two hundred thirty thousand dollars; another deposit credit to North Fork Coal Company in the National Bank of Washington dated May 26, 1959, in the amount of three hundred thousand dollars; another deposit credit to North Fork Coal Company in the National Bank of Washington dated June 4, 1959, in the amount of one hundred thousand dollars; another deposit credit to North Fork Coal Company in the National Bank of Washington, dated June 9, 1959, in the amount of two hundred ninety-five thousand dollars."

1271 "Mr. Rowntree: Those deposit slips, Mr. Haley, as I read them off, are they correct as I read them?

"The Witness: I believe they are."

Mr. Kramer: Can we agree — it may be agreed to be considered as if they were here, but we do object as to relevancy and materiality.

The Court: Yes.

Mr. Kramer: In order to keep from coming in the record, need not produce them here.

The Court: Yes.

Mr. Robertson: I would like to read the letter, Exhibit No. 75, addressed to the National Bank of Washington, from North Fork Coal Company, by James W. Haley, president. It reads as follows:

"North Fork Coal Company hereby applies for a line of credit not to exceed One Million Five Hundred Thousand Dollars ($1,500,000), to be used for the purpose of purchasing coal leases and coal operating units in the Hazard Field of Eastern Kentucky.

"Involved in the proposed acquisition would be coal bearing leases together with tipples (coal loading and prepara-

tion plants), involving approximately 65,000,000 tons mineable coal.

"Kentucky River Coal Corporation is the predomi-
1272 nant land-holding company in the Hazard Field. All of the properties involved herein are under lease from Kentucky River Coal Corporation.

"Applicant does not know exact terms of outstanding leases, but based on general knowledge of the field, is confident that the leases provide for an override ranging from 10¢ to 25¢ per ton. Potential income from the outstanding leases which applicant proposes to acquire could be as much as $350,000 per year. In the relatively poor year of 1958, these lease overrides produced income in excess of $100,000.

"The stock of applicant is closely held, 50% of it being owned by the president of the company and the remaining 50% by a nominee of the company. Of course, applicant would expect to pledge its stock and all leases and other properties subsequently acquired as collateral for the credit.

"Thanking you for your consideration of this application, we are."

The Court: That is the dominant lease-holder of what region, Hazard?

Mr. Robertson: Hazard field, yes, sir.

Reading from the first paragraph of the Collateral Security Agreement, Exhibit 76:

1273 "That the undersigned, in consideration of certain loans —" and the undersigned being North Fork Coal Company, James W. Haley, president — "That the undersigned, in consideration of certain loans, discounts, and other financial accommodations heretofore given or that hereafter may be given to the undersigned by The National Bank of Washington, of Washington, D. C., (hereinafter referred to as the 'Bank'), and for value received, has deposited with the Bank as collateral to secure the full and prompt payment of said loans, discounts and other financial accommodations, the following collateral, which the undersigned warrants that the undersigned has the right to

pledge, hypothecate, transfer, sell or use, to-wit:

"Stock of North Fork Coal Company, Inc., leases and other documents."

* * * * * * * * * * *

1274 "Q. Mr. Haley, this loan to North Fork Coal Company in the amount of one million five hundred thousand dollars was from the National Bank of Washington? "A. That is correct.

"Q. What was the purpose of this transaction? Why did you want this money? "A. As set forth in the application for the purchase of coal properties in eastern Kentucky.

"Q. What person did you discuss it with first outside of your own company? "A. I discussed it, well, I don't recall what person I discussed it with first. In the course of the negotiations I discussed it with practically every important official of the Bank, Mr. Colton, Mr. Sanderson and other members of the bank.

"Q. Did you discuss it with any representative of United Mine Workers of America? "A. I did when it became apparent that I could not make the loan, negotiate it without security, I then discussed it with various officials of the United Mine Workers whom I had known over a period of years.

"Q. Had you done business theretofore with the National Bank of Washington? "A. Yes, on a number of occasions I was Secretary and general counsel of the National Coal Association. We maintained a substantial account
1275 there. I was Treasurer of the Coal Exporters Association of the United States and had that account there. And I was a Vice President of the National Council of Coal Lessors and their resident representative. I recommended that they put that account there, and did.

"Q. So the National Bank of Washington does a lot of business in the coal industry? "A. I don't know about that."

* * * * * * * * * * *

"The Witness: I don't know anything about that. They have done a lot of business with me.

* * * * * * * * * * *

"Q. These associations you have mentioned, they are large associations, aren't they? "A. The National Coal Association is a large one. But the other groups, I would say, are quite small.

1276 "Q. How large is the National Coal Association? What is its membership? "A. I have not been an official of the National Coal Association for more than ten years so I don't know.

"Q. Are you or any of your affiliated companies a member of the National Coal Association? "A. Jewel Ridge Coal Corporation is a member.

"Q. Is it not true that the National Coal Association includes the vast majority of the large coal companies of the United States? "A. I don't know.

"Q. You were an officer of the Association? "A. Yes, and at that time, it did.

"Q. Getting back to this loan, you did discuss it with representatives of United Mine Workers of America? "A. Yes.

"Q. With whom did you discuss it? "A. Well, at various times I discussed it with Mr. John L. Lewis, Mr. Thomas Kennedy, Mr. John Owen.

"Q. At what period of time with reference to the consummation of the loan did these discussions occur? "A. Simultaneously during the time I was negotiating with the bank.

1277 "Q. It didn't take long to consummate the transaction? "A. Well, in a matter of days, it might not look like a long time, but it seemed like a long time to me at the time.

"Q. What assets did North Fork Coal Company have at that time? "A. It had the leases to which you have been alluding.

* * * * * * * * * * *

"Q. Why did North Fork Coal Company want these

leases? "A. North Fork Coal Company wanted the
1278 leases for the not unusual purpose of trying to make money.

"Q. Was the property covered by these leases in operation in coal mining operation at the time the loan was consummated? "A. Some was and some were not.

"Q. How much coal was being extracted from these properties annually, immediately prior to the consummation of this loan ? "A. I don't know.

"Q. Did you divulge to the National Bank of Washington or to United Mine Workers of America anything about the number of operations on those properties? "A. No.

"Q. Did they inquire of that? "A. I don't recall what they did. I don't recall that they did.

"Q. In other words, they didn't know if a single operation was on the property at that time? "A. I don't know what they knew.

"Q. They didn't ask you? "A. I don't believe they did. Of course, they knew there were some operations on the property. I knew that, they knew that, both of them knew it. Both of us knew it.

1279 "Q. What operations were on it? "A. I cannot recall specifically, but I will be glad to state that the principal operation was, on one of the leases I acquired was those operations operated by Mr. Roland Price.

"Q. What company did he operate? "A. Well, he operates four or five. I frankly don't recall the name of them.

"Q. Did his operation continue after the North Fork Coal Company acquired the leases? "A. Continued and enlarged."

* * * * * * * * * *

"Q. Did North Fork Coal Company hold any leases to property prior to the consummation of the loan? "A. Yes.

"Q. Did it acquire leases subsequent to the consummation? "A. Yes.

"Q. Was the proceeds of the loan used in acquiring these

additional leases? "A. Yes.

1280 "Q. Were all the proceeds of the loan used in the acquisition of these leases? "A. With the exception of a small amount that went into these business expenses.

"Q. Business expenses of North Fork Coal Company? "A. Yes.

"Q. You mean office operation expenses? "A. Yes. That is correct, normally.

"Q. What percentage of the proceeds was used for that purpose, roughly? "A. Less than two per cent.

"Q. So all the rest of the proceeds were expended by North Fork Coal Company in payment of leases acquired by North Fork Coal Company? "A. Yes."

* * * * * * * * * * *

"Q. Have you had any conversation in the year 1959 or subsequent thereto with Mr. William Sturgill or Mr.

1281 Richard Kelly? "A. I have had many conversations with them.

"Q. Do you have a close business working relationship with these gentlemen? "A. The business relationship I have with them, I don't know if you would call it close or otherwise, but it is strictly one of lessor and lessee.

"Q. Have you discussed the proceeds of this loan with these two gentlemen? "A. No.

"Q. Have you discussed financial transactions in general with these two gentlemen? "A. No, no other than our financial relationship between each other.

"Q. That relationship is that of lessee and sub-lessee? "A. That is correct.

"Q. Is this one of the parties who seek sublease property from North Fork Coal Company?"

* * * * * * * * * * *

1282 "A. I have admitted that they are lessees of North Fork, yes.

* * * * * * * * * * *

1283 Mr. Combs: On page 1085 the record reads: "Mr. Lewis has testified that Mr. Eaton, in regard to

these notes, that the particular provision in these notes has no particular significance, except in a commercial transaction."

The word "except" should not occur.

It should read: "Has no particular significance in a commercial transaction."

The Court: All right.

Mr. Combs: It does make some difference.

The Court: All right, have the reporter to correct the record on that page.

Mr. Combs: Right. It appears in the fourth line from the bottom on page 1085.

* * * * * * * * * *

1284 Mr. Robertson: If it please the Court and ladies and gentlemen of the jury, we will read the deposition of Mr. William B. Sturgill, taken in Hazard, Kentucky, on the 18th day of November, 1960.

(Thereupon, Mr. Robertson and Mr. Templeton read the following deposition.)

"WILLIAM B. STURGILL

after first being duly sworn, deposed as follows:

DIRECT EXAMINATION

By Mr. Robertson:

"Q. What is your name? "A. William B. Sturgill.

"Q. Where do you reside, Mr. Sturgill? "A. 104 Parkway Avenue, Hazard, Kentucky.

"Q. What is your occupation? "A. I am a coal merchant.

"Q. What company are you presently connected with? "A. I am President of the Kentucky River Coal Sales Company with offices in Hazard, Kentucky.

"Q. Are you connected with any other company in the coal mining industry? "A. Various.

Q. Are you connected with the Kentucky Oak Mining Company? "A. Yes, I am."

* * * * * * * * * *

1285 "Q. Are you one of the owners of that company? "A. I am one of the stockholders of that company.

"Q. That's a corporation? "A. It is.

"Q. What office do you hold in that company? "A. I am Vice President.

"Q. Who are the other officers? "A. R. R. Kelly is President and I function as Secretary-Treasurer.

"Q. Do you know, Mr. Sturgill, how many shares of stock are outstanding in Kentucky Oak? "A. Yes, I do.

"Q. How many? "A. One thousand shares."

* * *

"Q. Is this a closely held corporation? "A. There are no other stockholders in the corporation but R. H. Kelly and myself.

"Q. Do you know who the incorporators of Kentucky Oak were? "A. Yes.

"Q. Would you state who they were? "A. Myself and R. H. Kelly.

1286 "Q. Is Kentucky Oak a fairly new corporation? "A. It is.

"Q. When was it incorporated? "A. It was incorporated in the spring of 1959.

"Q. Do you recall what month in 1959? "A. No, I don't.

"Q. Is that a Kentucky corporation? "A. It is.

"Q. The stock as it was issued originally when the company was first incorporated, is that stock now held according to the way it was in the original issue? "A. The stock is held by those persons to whom the corporation issued the stock at the time it was incorporated. Then and now, and it has never changed hands in any direction.

"Q. How long have you been an operator, or in the coal mining industry in the Eastern Kentucky area? "A. I have been actively engaged in the, in the coal merchandising business since the spring of 1958. I have been actively engaged in the coal industry since the fall of 1959.

"Q. Could you tell just briefly your experience in the coal industry since 1949? "A. I could talk two and a half hours about that.

"Q. Let me ask you this way. You have been in coal

merchandising since 1958. By that do you mean buy-
1287 ing and selling coal?" "A. Yes, sir, buying and selling coal.

"Q. It is sometimes referred to as a coal broker? "A. That's right.

"Q. Have you actually ever been in the coal mining operation? "A. As an operator, are you asking?

"Q. As an operator? "A. I have not.

"Q. Is Kentucky Oak Mining Company an operating company? "A. It is not."

* * * * * * * * * * *

"Q. Let me ask you this then, being more specifically, being more specific. Is Kentucky Oak a coal merchandising firm? "A. Yes, yes.

"Q. It operates no mines of its own? "A. No.

"Q. Does it purchase coal directly from the other mines? "A. Yes.

"Q. Does it own coal lands or have leases to coal lands?
1288 "A. Yes.

"Q. Does it sub-lease that land to other operating companies? "A. Yes, it does."

Mr. Kramer: Now, your Honor, we object from here on, for this testimony is relative to periods subsequent to December 31, 1958, and we insist it is irrelevant and immaterial and other reasons heretofore given to similar testimony.

The Court: Same ruling. I overrule your objection.

Mr. Robertson: For the purpose of any clarification as to the purpose that we are putting it in, I might say at this time that this is the company to whom this North Fork Coal Company, which we had the deposition on yesterday, who was loaned money from the union, leased this land, these coal lands.

Mr. Kramer: All of which was subsequent to December, as your Honor will recall, December 31, 1958.

Mr. Robertson: Yes.

The Court: If this testimony has any bearing, members

of the jury, on the ultimate fact that is involved in the lawsuit, namely whether there was or was not a con-
1289 spiracy between the union and trustees and one or more of the coal operators named in the complaint, then the jury may consider it. If the testimony has no bearing on this ultimate issue, then the jury will not consider it. It has no bearing on the question of damages, because, as indicated by Mr. Kramer, the period is subsequent to the alleged damage period which closed on December 31, 1958.

(The reading of the deposition continued.)

"Q. Does it purchase the coal from those operating companies? "A. Yes, it does.

"Q. From whom does Kentucky Oak lease? "A. Various.

"Q. Coal properties? "A. Various companies, various land holding companies.

"Q. Does it lease any land from Kentucky River Coal Corporation? "A. It does.

"Q. Does it lease any land from North Fork Coal Company? "A. It does.

"Q. How much coal land is leased from North Fork Coal Company? If you don't know exactly, can you give rough—
1290 "A. I don't know exactly how much land —"

Mr. Kramer: Your Honor, this record will show our objection is continuing to all this line of testimony?

The Court: Yes sir. The same ruling.

(The reading of the deposition continued.)

"A. I don't know exactly how much land is leased by Kentucky Oak mining Company from North Fork Coal Company because we lease lands from, as I stated, Kentucky River Coal Corporation, privately held tracts of land from the Combs heirs in the vicinity of where this property is located that we lease from North Fork. We lease from Carrs Fork Coal Corporation. For me to determine how much coal we have under lease from North Fork, I couldn't do it.

"Q. Well, let me ask you this. Can you tell us how much coal properties you have under lease, total, from all of

these various companies from whom you lease? "A. In the so-called Hazard Number Four, 5A, 7 and 9 seams, we have sizable coal reserves under lease.

"Q. You don't have any idea how much, how many acres, for instance, that you have under lease? "A. I do not.

"Q. Or the coal reserves? "A. They are sizable. For me to break them down either by acres or tons, I would have to go to the maps or the records. I don't carry those
1291 figures around with me.

"Q. Is this considered to be of high quality coal? "A. Hazard coal field, as such have four major seams in it, our lower seam is our better grade coals, and our upper seams are our lower grade coals. Our number 4 and number 5A coals are not what you would consider premium coals, but they are of higher quality than our upper seam coals, and we have acreage in all four seams.

"Q. All the coal lands which Kentucky Oak owns are in the Hazard Field, I take it? "A. They are.

"Q. Well, speaking relatively only of coal to be sold in the Hazard Field, is this coal which you have in reserves of high quality? "A. It is applicable to the industrial, domestic and utility markets.

"Q. Does Kentucky Oak own coal lands in its own name, in fee? "A. Yes, we do, we own coal lands, both surface and mineral in our own name, in fee.

"Q. Mr. Sturgill, could you give any rough estimate as to the percentage of the coal lands which Kentucky Oak hold under lease, which they are leasing from North Fork Coal Company? "A. I would hesitate, without looking at the maps to determine how much acreage, either in
1292 tonnages or land area, that we have under lease from them. It would be simply a matter of guess on my part, of our total holdings that we have from North Fork.

"Q. Would you say it was a substantial percentage? "A. I would, of our total coal holdings, I would guess that what we have, as a matter of guess, from North Fork, would be less than forty per cent of our holdings.

"Q. When did the Kentucky Oak actually begin business? "A. We started acquiring leases in the, in the spring of 1959.

"Q. I take it then shortly after the corporation was formed? "A. Right."

* * * * * * * * * * *

"Q. Does Kentucky Oak presently have under lease lands which were originally leased by Kentucky River Coal Corporation to the North Fork Coal Company? "A. I will ask you to repeat that question, please, sir.

"Q. Does Kentucky Oak now have a lease of property which was originally leased by Kentucky River Coal Corporation to the North Fork Coal Company? A. Ken-
1293 tucky Oak Mining Company has under lease coal lands that are owned by Kentucky River Coal Corporation. To whom they were originally leased, I do not know.

"Q. Do you know who is the owner in fee of the coal lands which you are now leasing from North Fork Coal Company?

* * * * * * * * * * *

1294 "A. The Kentucky River Coal Corporation, I would imagine, would be the owners in fee of the mineral. The surface is owned by various and sundry people."

* * * * * * * * * * *

"Q. Are the royalties on this property paid to more than one party?

* * *

"A. The royalty has to do with the mineral, and the arrangements that we make with the surface owner would necessarily make it be paid to more than one party.

"Q. Are the royalties on the mineral paid to more than one party? "A. Yes, they are.

"Q. Do you know Mr. James W. Haley? "A. Yes, I do.

"Q. With whom were the, or is there one lease or more than one lease which Kentucky Oak has from North Fork Coal Company? "A. There is only one lease.

"Q. With whom did Kentucky Oak make this lease, who

represented North Fork Coal Company in these negotiations? "A. We negotiated these leases with James
1295 W. Haley.

"Q. Did anyone else take part in these negotiations? "A. They did not.

"Q. Was this, did you represent Kentucky Oak in these negotiations yourself? "A. Yes, I did.

"Q. Did Mr. Kelly or anyone else? "A. Mr. Kelly was with me in each of the conferences that was held that had to do with the leasing of the coal land.

"Q. Just the three of you negotiated? "A. As it had to do with North Fork, that's correct.

"Q. Do you know Mr. Robert Cooper? "A. Yes, I do.

"Q. Has he ever taken part in the negotiation of any of the lease which Kentuck Oak now has?. "A. O stated earlier that we had leases from Kentucky River Coal Corporation. Those leases were negotiated with Mr. Cooper at the time he was president of Kentucky River Coal Corporation.

"Q. Does Kentucky Oak, is Kentucky Oak leasing any coal property from the Jewell Ridge Coal Corpora-
1296 tion? "A. No, we do not.

"Q. Is Kentucky Oak leasing any coal properties from Dr. Huston St. Clair? "A. No, we do not.

"Q. Has Dr. St. Clair acted in any way in any negotiations which Kentucky Oak has had? "A. He has not.

"Q. Where is this property, Mr. Sturgill, which is presently under lease from North Fork Coal Company?

* * *

"Q. In what counties are they found? "A. Without looking at the maps, I would say that all the coal that we have under lease from North Fork lies in Knott County, Kentucky.

"Q. Is there a seam in that property which is commonly known as the Number Nine seam? "A. Yes, there is.

"Q. Would you tell us anything about the thickness of that seam? "A. The Hazard, so-called Hazard Number Nine

seam in that area, runs anywhere from eight and one-half to ten and one-half feet thick. As you move to the northwest of that area, the thickness of the coal is anywhere from five and one-half to eight feet thick. I think that would be the general thickness of the Hazard Number Nine seam found in this area.

1297 "Q. Are any of the coal lands which Kentucky Oak has under lease in Letcher County, Kentucky? "A. They are not.

"Q. Does the Kentucky Oak Mining Company own any mining equipment? "A. Yes.

"Q. Is it presently leased to other mining companies, operating companies? "A. Yes, it is.

"Q. When was this equipment acquired? "A. At various times.

"Q. Since the spring of 1959? "A. Since the spring of 1939, 1959."

Mr. Kramer: Now, Your Honor, I object again and move to strike the testimony that has just been given, and especially with reference to the machinery and equipment; because this evidence shows that this is not a continued course of dealing. It went on during the period of the alleged conspiracy, assuming the ending of the conspiracy at December 31, 1958, but none of these transactions with reference to this machinery occurred until — as his last answer says— the spring of 1959.

Under Your Honor's previous ruling, this is not a
1298 continued pattern. It is a deal that arose subsequent to and is not a continuation of any previous conduct. We think it is wholly irrelevant and immaterial even under Your Honor's previous ruling.

Your Honor's previous ruling was it showed a continuation of a course of conduct, but, Your Honor, this does not show any continuation of a course of conduct. It shows something that originated subsequent to December 31, 1958, and continued only since—or since the spring, to use the language of the witness — since the spring of 1959, and

we most earnestly insist it is incompetent and irrelevant for any purpose and may be prejudicial.

* * * * * * * * * * *

Mr. Rowntree: If Your Honor please, we stated yesterday, there is a contention by the other side that we have to prove a dangerous probability of the attainment of the monopoly under Section Two.

This company, Kentucky Oak, has attained a position since our people went out of business of securing far and away the largest contracts with TVA. It is being produced on this property. This is a company, it has land which was

—the assembly of which, procurement of which has
1299 been obtained with union funds.

This is the company in the eastern end of the system, TVA system, that is attaining this dangerous probability of monopoly. On the western end are two of the companies that we have mentioned in this case to the Court, big companies who we say have attained that dangerous probability.

Our main reliance on this testimony is on that question of dangerous probability.

Our main reliance on this testimony is on that question of dangerous probability.

The Court: Well, if your client is out of business, what does that matter to your client?

Mr. Rowntree: The question of dangerous probability comes up under the monopoly section. In a question of an attempt to monopolize, the tobacco company cases state that on that question, an attempt to monopolize, there must be shown a dangerous probability of the attainment of that monopoly.

When the monopoly is sought to be attained by running other people out of business, it is impossible to prove dangerous probability unless you look to see whether they have attained that position when they have run out of business of a number of other companies out of business.

In other words, while our people are in business,
1300 while another of these other small companies is in business, it is impossible to prove that they have attained the dangerous probability. It is only after they have gone out of business that you can prove it.

The Court: Objection is overruled.

(The reading of the deposition was continued.)

"Q. Were any funds received by Kentucky Oak Mining Company from the North Fork Coal Company for the purchase of this equipment? "A. There was no funds received from the North Fork Coal Company or any other corporation, back or present, other than R. H. Kelly and myself, that bought the equipment for Kentucky Oak Mining Company."

Mr. Kramer: Now, Your Honor, we are making further objection because the statement was made yesterday that the money that was borrowed through United Mine Workers in Washington was being used for the furtherance of the conspiracy, that was the purpose for which they said it was tied in, and evidence introduced.

This evidence shows conclusively now there were no funds received from the North Fork Company—I am reading the answer the witness just read—"There was no funds
1301 received from the North Fork Coal Company or any other corporation, back or present, other than R. H. Kelly and myself, that bought the equipment for Kentucky Oak Mining Company."

So, Your Honor, the funds did not go and were not used, even assuming that this other evidence could be admissible for the purpose Mr. Rowntree has stated, this money was not borrowed, the UMW had nothing to do with the furnishing of the funds for the buying of the equipment we are now testifying about.

The Court: All right, then, the jury will not consider that.

Mr. Kramer: Then we ask, Your Honor, that that evidence be stricken.

The Court: Do you want it stricken? If it proves your point, you want it in.

Mr. Kramer: I don't want any of that borrowing of funds, because it is immaterial in this case. Of course, if the borrowing of funds as testified yesterday goes in —

The Court: If this witness' proof shows that the funds were not borrowed —

Mr. Kramer: That's right, Your Honor.

The Court: You don't want the Court to let that
1302 out?

Mr. Kramer: I don't want to just take this part out, Your Honor. That isn't my motion.

The Court: Let it stay in the record.

* * * * * * * * * *

1303 By Mr. Robertson:

"Q. Does Kentucky Oak own any augering equipment? "A. Yes, we do.

* * * * * * * * * *

1304 By Mr. Robertson:

"Q. Can you state the number of augers which it owns? "A. We have three in number.

"Q. What size augers are those? "A. We have two augers that are forty-eight inches in diameter and we have one auger that's a so-called seven foot auger.

"Q. Are these augers leased to operating companies? "A. Yes, they are.

"Q. How did Kentucky Oak finance these augers?"

* * * * * * * * * *

1305 "A. No, I think I want to answer the question. We dug down in Mr. Kelly's pocket and my pocket and got the money.

"Q. Of this property which is leased by Kentucky Oak from North Fork Coal Company, do you happen to know how North Fork acquired that property? "A. I don't know how they acquired the property.

"Q. Are there any improvements on that property? "A. Surface owners who own that property have improvements

on it. I don't think, to my knowledge, I wouldn't know anything about North Fork's business.

"Q. There were no tipples or any such mining improvements on the property at the time that the lease was made from North Fork to Kentucky Oak?

* * *

Q. If you know, of course? "A. In the leasehold there is property with tipples on it that were leased from Kentucky River Coal Corporation."

* * * * * * * * * * *

Mr. Robertson: The next deposition is that of
1306 Mr. Albert B. Hill taken at Hazard, Kentucky, on the 18th of November, 1960.

Your Honor, in order to understand the reason for this testimony, I should like to read a provision from the National Bituminous Coal Wage Agreement 1950 as amended September 29, 1952, under the section on page 3 of that amendment entitled "Application of Contract to Coal lands."

* * * * * * * * * * *

Mr. Robertson: The wage agreement, under that section, reads as follows:

"As a part of the consideration for this agreement, the operators signatory hereto agree that this agreement covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production. The said operators agree that they will not lease out any coal lands as
1307 a subterfuge for the purpose of avoiding the application of this agreement.

"ALBERT B. HILL

after first being duly sworn, deposed as follows:

By Mr. Robertson:

DIRECT EXAMINATION

"Q. What is your name, sir? "A. Albert B. Hill.

"Q. Where do you live, Mr. Hill? "A. Pineville, Kentucky.

"Q. May I ask to the best of your knowledge, will you be living there during the period from January through May of next year? "A. Of next year?

"Q. Yes, sir. "A. Yes, I expect to.

"Q. In 1958 were you president of Black Star Coal Company? "A. '58—year and a half ago. Listen, I will say I was. It was so close that I can't—it took effect in December. It took effect, I will say, January 1st, last year.

"Q. 1959? "A. That's right.

1308 "Q. By taking effect, you mean that someone succeeded you as president of Black Star Company? "A. Correct, and Black Star went out of existence.

"Q. What kind of business was Black Star Coal Company in? "A. Coal mining and sales.

"Q. Did it also own coal lands leased out to others to operate coal mining? "A. Yes, it did.

"Q. Operations on it? Where were those properties located? "A. In Clay County, in Wilton, right below Corbin. Can't think of the name of the — Clay County, primarily, Clay County and Leslie, and just below — let me see. Let me give you that in just a second. It's just passed my mind, that's all, and I know it as well as I know my own name. It's the same county that Barboursville is in.

"Q. Knox County? "A. Knox County, I couldn't think of it. That's correct.

"Q. I believe the Knox County property was called Wilton or Corbin tract? "A. Correct.

"Q. And you also had property in Leslie County? "A. In Leslie County and in Clay.

1309 "Q. Did you—how many acres were in those two areas? "A. May I bring this word in. When that was—the way that was handled as of January 1st, Black Star went out of existence, and then this new corporation, Black Star Company, was formed as a sales agent. What was your question?

"Q. Do you recall how many acres old Black Star had? "A. Old Black Star?

"Q. Yes, sir; yes, sir. "A. Wait a minute—about 16,000 acres.

"Q. In both counties combined?"

* * * * * * * * * * * *

"A. In both counties, and this Wilton property.

"Q. Did Black Star, the old corporation, have property in West Kentucky? "A. No.

1310 "Q. Did old Black Star have a coal mining operation? "A. They did.

"Q. Where was that? "A. That was at Alva, Kentucky.

"Q. Do you recall what county that is? "A. Harlan County.

"Q. What kind of a mine was that? "A. It's a deep mine, mechanical loading, hand loading, all forms of mining underground, except auger.

"Q. Was there any stripping? "A. Yes, there was some stripping. Wait a minute, we did a little augering, too. That's on a lease contract, though.

"Q. And that mine was operated by old Black Star Coal Company? "A. Correct.

"Q. Now, was Black Star Coal Company purchased by anyone? "A. Yes, it was.

"Q. Who purchased it? "A. I knew this was going to get into that. I just can't tell you, gentlemen, I just don't know the details of that entire transaction.

"Q. Who succeeded you as President? "A. Cla-

1311 rence A. Lee, Sr.

"Q. Is he a resident of Alabama, before that time was he a resident? "A. He was at that time, and still is.

"Q. Do you know if that company that bought old Black Star was the Marigold Coal Company? "A. I can't tell you just how it was worked out. I never asked and was never told.

"Q. Do you know if Peabody Coal Company had an interest in or owned the company of Mr. Clarence J. Lee?

"A. Clarence A. Lee.

"Q. Clarence A. Lee? "A. I don't know.

"Q. Now was a new corporation formed called Black Star Coal Company? "A. Yes.

"Q. And that's the company that Mr. Clarence A. Lee became President of? "A. Yes.

"Q. Did all of the properties of old Black Star Coal Company come under this new Black Star Coal Company? Did all the properties of old Black Star come under the new corporation? "A. All that was left.

"Q. And what was left? "A. Black Star, I mean,
1312 Alva, Kentucky. That's the original Black Star Coal Corporation.

"Q. What became of the coal lands in Wilton area, Knox County and Leslie County? "A. We still own them. Mr. Lee still owns them.

"Q. That's the new corporation? "A. No, sir, that's not right. The Black Star, the old Black Star Coal Corporation was formed as a sales agency all together, and they—they do not own and as far as I know did not own any part of Alva. After it was sold to interest that I cannot, I just can't tell you who they are because I don't know.

"Q. Does, did the name of the company that owned the Alva Coal mine, after this transaction, change its name? "A. Yes.

"Q. What did they—"A. Alva Coal Company, Alva Coal Company or Alva Coal Company, I think it was.

"Q. Was Mr. H. C. McCollum President of that company? "A. Gentlemen, I would say I think he was. I am not absolutely positive of that.

"Q. Did you have an office in that new company? "A. I did, I did.

"Q. What was your office? "A. Executive Vice President.

1313 "Q. Who was President? "A. I am going to come back and tell you McCullem was, but I have never seen that in black and white.

"Q. And Mr. H. C. McCollum is Vice President of Peabody Coal Company? "A. That's correct.

"Q. And did Alva Coal Company also own these tracts of land over in Leslie and Knox County? "A. They owned, they owned a sizable acreage bordering on the Harlan County line, in that portion.

"Q. And that's the property that old Black Star Coal Company used to own? "A. That's right.

"Q. Did the, is the Alva Coal mine in Harlan still in operation? "A. No, sir.

"Q. When did it close? "A. Approximately three months ago.

"Q. Why did it close down? "A. Inability to mine profitably, and they will tell you running out of coal. I don't tell you that because they have got coal.

"Q. Are you still connected with Alva Coal Company? "A. I am not.

"Q. Mr. Hill, back under the old Black Star Coal
1314 Company in the period of 1956, did Osborne Mining Company make an effort to lease land from Black Star Coal Company in that period of time? "A. Well, I can't say exactly at that time, but in the neighborhood, but approximately the same time, we leased property to Osborne.

"Q. Osborne Mining Company was a non-union operation? "A. It was.

"Q. Were negotiations had with respect to that leasing of property by Osborne Mining Company? "A. Was what?

"Q. Were negotiations carried on? "A. Oh, yes, we were negotiating with Osborne during the entire time he had the property. Then he subleased or he sold out to Callahan.

"Q. And then they made an effort to come back on that property, is that right? "A. I don't recall that. I know this, he would like very much to.

"Q. Well, you did have some negotiations with Osborne Mining Company? "A. Yes.

"Q. With respect to their coming back on the
1315 property? "A. Yes, I would say that we did. Now, gentlemen, that's a long time ago and when I make a statement like that, it's to the best of my knowledge.

"Q. Will you state whether or not a lease form was drawn up to lease that property to Osborne Mining Company? "A. Mr. Rowntree, I would have to just, to refer to the records before I answered that question. If you want the best that I recall, will give it to you.

"Q. All right, sir. "A. I think it was. But that would have to be sustained by the records in Louisville, Kentucky.

"Q. Now why was that lease not executed? "A. I just don't remember the details, we just couldn't get together. That's going wack back, gentlemen.

"Q. Can you state whether or not this lease was refused by you? "A. If it is confirmed that that lease existed, then it would have been refused by me because I would have handled it.

"Q. Do you recall that you testified about the subject before in a case? "A. I remember quite well.

"Q. And do you remember the reason you stated at that time why that lease was rejected by you? "A. I couldn't tell you off-hand.

1316 "Q. Are you acquainted with Mr. John L. Lewis? "A. Yes, sir.

"Q. Have you had conversations with him? "A. I certainly have.

"Q. On what occasion? "A. On renewal of contracts.

"Q. Was Black Star Coal Company, was it a member of any coal association? "A. It was not a member of the Harlan County Association, therefore, we negotiated our own contracts.

"Q. Directly with the United Mine Workers officers? "A. Yes, sir.

"Q. Will you state whether or not you carried on these negotiations each time a new contract came out? "A. Yes.

"Q. Now with respect to the, to the old Black Star prop-

erties in Knox and Leslie County, will you state whether or not there were non-union operators on those properties under lease from Black Star? "A. They were non-union operators.

"Q. Did any question arise between you and Mr. Lewis on any of these contract negotiations with respect to non-union leases? "A. Yes, it was certainly discussed, and that's the reason I went to Washington and had a very definite and clear understanding with Mr. Lewis,
1317 and I must say that he lived up to it one hundred percent.

"Q. Did you live up to it one hundred per cent? "A. Yes, sir, I sure did."

Mr. Combs: May it please the Court, we want to object to the testimony from here on in. Counsel is going into the question of application of contract to coal lands, as he started out.

It is our position and our contention that the application of contract to coal lands in the contract was a subject that was negotiable under the Taft-Hartley Act; that it was a question that the operators had to negotiate upon; and it is a question that the union had a right to negotiate.

It is contention that for that reason that the question of the application of coal lands in this case is not applicable to a charge of violation of the anti-trust act. That by converting a legal right of the union and the operator — remember that both parties signed these contracts. That by trying to convert a legal act of both parties, one of whom is compelled to bargain on this subject by law, to try to convert that into a violation of the anti-trust act I don't think can be done under the cases, and for that reason we would like to object to the continuing line of argu-
1318 ment concerning this application of lease to coal lands part of the contract.

* * * * * * * * * *

Mr. Combs: If it please the Court, I would like
1319 to enter into a stipulation with counsel, if it is proper, that all of the contracts executed beginning in

1941 through 1958 be entered into the record, because there will be parts of those contracts in issue in this case. Then we can specify what parts of the contract that each side is going to use.

The Court: You will stipulate, will you?

Mr. Rowntree: Yes. I didn't hear what he proposes.

The Court: The stipulation is that the entire bargaining agreement beginning in 1941 and was carried on through 1948 be made a part of the record and that each side have the privilege of reading such portions of such contracts as desired.

Mr. Combs: You said 1948. You mean 1958.

The Court: 1958.

Mr. Rowntree: Where do you want to start?

Mr. Combs: The '41 contract expired in '43, and a lot of the items we are talking about were carried forward
1320 successfully on up through 1958.

Mr. Rowntree: Start in '41?

Mr. Combs: Yes. You must have the '41 contract to get a complete picture of all the contracts that are involved, and our stipulation covers all of them.

The Court: Do you want to comment on Mr. Combs' objection to this testimony, Mr. Rowntree, and, if so, state the purpose of such testimony?

Mr. Rowntree: If your Honor please, it is our position that this clause that was read by Mr. Robertson a moment ago in the '52 amendment is not really clear. We want to show how the union construed it with respect to their right to determine who could operate on coal lands.

It is our position that the union did exercise a lot of control with respect to who could operate on coal lands, and that parties had to go to the union who had contracts with the union to discuss with the union who could operate on their lands.

We asked Mr. Lewis in the deposition specifically if he recalled Mr. Albert Hill. His testimony was that he could not, that it was one of a number of other conversations.

It is our position that this is a typical bargaining
1321 negotiation that the union participates in to determine who can operate on coal lands of signatory operators.

We think that it goes beyond the terms of this contract. It certainly clarifies the understanding of the union of how much power it has over this question.

The Court: Mr. Combs states that evidence on this point is not competent to show any violation of anti-trust laws because the contract resulted from collective bargaining which the parties had a right to do under the Taft-Hartley Act, and you can't make a legal bargaining and a legal contract, that results from a legal bargaining, a violation of another federal law, when it is legal under the Taft-Hartley federal law.

Now that is his point. The point is, as I understand him — he has made it heretofore — that that which the union did and the operators did on the subject under consideration was done legally under the Taft-Hartley Act.

If his premise is sound, he says you can't take a legal act, under the Taft-Hartley Act, and make it an illegal act under the Sherman Anti-Trust Law; that if it is legal under one act, under one federal law, it is legal under all
1322 federal laws.

What is your reply, if you have a reply, to that basic objection?

. . . . . .

Mr. Rowntree: Under the anti-trust law, where your motive and purpose is to restrain trade or to monopolize, you can accomplish that motive by legal means and still be in violation of that statute, where you do have these motives of restraint of trade and monopolization. The legality of the particular act that you use is not controlled.

The Court: All right.

1323 Mr. Combs: Your Honor, there is just one distinction that I would like to make at this time in connection with counsel's argument, and that is this, that the Taft-

Hartley Act requires—it requires the operator or the employer to bargain on these items that we are talking about, and if they reach an agreement, it requires them to reduce this agreement to writing..

I think that is a different situation where you may have certain rights under the law as distinguished from duties, and of course the purpose of the Taft-Hartley Act, the announced purpose in the law, Congress said, is to obviate these disputes, these industrial disputes by compelling the employer to bargain with the union, and I think that is a very valid distinction between the idea that you can use a legal instrumentality to further a violation of the conspiracy under the Anti-trust Act.

The Court: Now what you said, the Court believes to be correct, Mr. Combs, but in reply to that, Mr. Rowntree says even though the law requires you to do those things, and you do them in accordance with the applicable law, if you collaborate with private business, and if the motive in the collaboration is to restrain trade in a certain in-

1323a dustry—here it is the coal industry—and to monopolize a segment of that industry, if that is the motive, then even though that which he was required to do under the Taft-Hartley Law becames violative of the Sherman Anti-Trust Law.

Now what about that?

Mr. Combs: Well, the case that comes to my mind readily is the Hutchinson case where the Supreme Court says that you could not take a statute that gave a right or compelled a person to do something under one statute and you couldn't introduce another statute to say that that person is going to prison.

That is my answer to that, and we must remember that the Anti-trust Act also has criminal provisions that are parallel to the civil end of it, and I think it is applicable in this case. I think there is a difference there.

Mr. Robertson: Your Honor, may I say that here, as Mr.

Combs has said, it is not the union that is compelled to bargain, it is the operator who is compelled to bargain. And here we do not have a situation where the union is compelled to bargain on this issue, and then be penalized under the anti-trust Act.

1324 The Court: Aren't they both compelled to bargain under the Taft Hartley if they are the collective bargaining agent?

Mr. Robertson: If the operator is compelled, then of course the union has a right to bargain on that particular subject, but so far as I know, the Taft-Hartley has no compulsion whatsoever on the labor union to bargain on any particular.

Mr. Combs: Oh, yes, it does. I didn't mean it that way. It certainly does. No question about it. You have case after case that the union is required, if they are the majority representative in the appropriate union, they are required to bargain for everyone in that union including nonmembers of the union.

The Court: Yes.

Mr. Rowntree: If Your Honor please, there is certainly no compulsion on the union to bargain to obtain a boycott on coal lands, and we say that is what they have been doing. There is no requirement in any statute which requires a union to do that, and I think it is a little bit unusual type argument to say that a union is required to attain that purpose.

1325 Mr. Combs: Well, of course, counsel is assuming that it is a boycott. I am saying that this particular clause has been negotiated, it has been through the machinery of the Board, of the Labor Board, the proper tribunal. It's been through that, and if there is a charge of boycott, that is to be handled with the Labor Board. This is the first time I have heard counsel argue it is a boycott. If it is it should be before the Labor Board, and not before this Court

Mr. Rowntree: If Your Honor please, there is no remedy in the Labor Board for a boycott. A boycott remedy is in this Court right here. This is the only Court that can protect parties in a conspiracy in restraint of trade.

Mr. Combs: I don't want to debate that with counsel, but I simply point out, and I think counsel would agree with me that one of the sections of the Taft-Hartley Act not only gives remedy for a boycott, but it is mandatory for a Labor Board to ask a District Court for an injunction where they have reasonable cause to think that boycott is being committed, and then counsel tells me that he hasn't any remedy.

Now the boycott section, as Your Honor well knows, has nothing to do with the Anti-trust Act. The Act itself gives a person who claims he has been harmed by a boy-
1326 cott, gives the person a right to go to a Federal Court to seek redress in a civil suit, and to seek an injunction against that boycott, if they think there is one going.

Mr. Rowntree: If your Honor please, counsel knows very well the extreme limitations surrounding the boycott in the labor law. We ran into it in the Love and Amos case. I am sure he is familiar with how restrictive that boycott provision and the remedy is.

It is certainly not in any Labor Board; it is in this Court even under the labor law, but there is no remedy in the labor law for a straight-out boycott as distinguished in a secondary boycott under the labor law. There is no remedy for a company that's been barred from land by a boycott pursuant to a conspiracy in restraint of trade of monopolization.

Our sole remedy is under the anti-trust law; the labor law gives us no remedy; there are no labor statutes between the coal company, the small company and the union when it seeks to go to some other party and get coal land.

If Your Honor will recall, in the Love and Amos case, it was expressly held that the only parties that can recover

under boycott under the labor law are secondary
1327 employer and the primary employer. Now we can't fit either one of those when a small company goes to a big company that's got coal lands and asks to get a lease and he is barred, because of the boycott pursuant to an anti-trust purpose.

The Court: Well, I'm going to let this testimony go into the record.

Mr. Combs: Your Honor, pursuant to the stipulation, I have copies of the contracts in pamphlet form that I would like to give counsel, if counsel wishes to put it in the record at this time. I will stipulate that it is in printed form.

Mr. Kramer: In other words, the pamphlet goes from '41 to '56, and then '58 is in the printed form so that the whole matter—

* * * * * * * * * * *

Mr. Robertson: We will ask then that the booklet
1328 entitled, "Wage Agreement between Southern Appalachian Coal Operators Association and District Nineteen, United Mine Workers of America," together with the document entitled, "National Bituminous Coal Wage Agreement of 1950, as Amended December 31, 1958," be filed together as the next collective exhibit.

(Exhibit No. 77 marked for identification and filed.)

* * * * * * * * * * *

(The reading of the deposition was continued.)

"Q. What was this understanding? "A. When I went to Washington, D. C., at first—"

Mr. Kramer: Before we read, so we won't interrupt, we understand that all of this from here on to the end is subject to the objection that we have made?

The Court: Yes, sir.

* * * * * * * * * * *

"A. When I went to Washington, D. C., at first— we had six or eight, no, we had about twelve or four-
1329 teen leases, and I told Mr. Lewis that the one requirement, that we held and we would not do otherwise,

was the fact that those fourteen leases were under contract. Mr. Lewis—but I agreed, during the life of the contract, we would not negotiate another lease on our properties unless it was with union labor. We lived up to that literally.

"And another time I went to see Mr. Lewis, I told him that the conditions were such that I had no alternative but to go into this adjoining territory at Hyden and make leases. And I frankly stated that we were going to make those leases regardless because it meant our life in business. And Mr. Lewis discussed it at length, of course. He tried to talk me out of it, but he couldn't, and so finally, we agreed on a gentlemen's agreement, nothing in writing, that we would continue on that basis, and that's the way it's been.

"Q. Were the two trips you made to Washington about this matter? "A. It was about renewal of the new contract.

"Q. In other words, the trips were at different times? "A. Yes, sir.

"Q. At different contract negotiation periods? "A. Right.

"Q. Do you recall when the first trip was? "A. This last contract, I had nothing to do with it, that was
1330 signed, it was signed in St. Louis. But the two previous contract periods were the two that I have reference to."

* * * * * * * * * * *

"Q. I have here, Mr. Hill, copy of National Bituminous Coal Wage Agreement of 1950, effective March 5, 1950, with amendment of January 18, 1951, effective February 1, 1951; also the amendment of September 29, 1952, effective October 1, 1952; and the amendment of September 1, 1955, effective as of that date; the amendment of October 1, 1956, effective as of that date.

"Now looking at these, you can tell me which two contract periods you were talking about there, with respect to these trips to Washington? "A. I made the statement I

had been there twice. It is entirely possible I was there three times. It was up to me to negotiate the contracts."

* * * * * * * * * *

"Q. Yes. "A. Now with all the contracts that
1331 have come up over the past, I don't know, ten to fifteen years, I have sat in on those, and I have negotiated with the Union, except this last one, and that contract was signed in December in the offices of Peabody Coal Company. I was not in on that; I did not go to Washington.

"Q. Was that the one with respect to the Alva
1331a Coal Company? "A. That's right.

"Q. Were the two conversations you had with Mr. Lewis with respect to these Kentucky lands, were they concerned with a specific provision of the National Bituminous Coal Wage Agreement, as amended? "A. If I understand you correctly, the discussion I had with Mr. Lewis was a renewal of the existing contract, with the additions that they added on to it, and that was the case every time I went up there. I don't know if I understood you correctly.

"Q. I will show you a provision here in the amendment of 1952. You will note that's September 29, 1952. "A. 1952.

"Q. Amendment has this provision over here on page 3, captioned, 'Application of Contract to Coal Lands.' Did that —state whether or not that particular provision had something to do with your discussions with Mr. Lewis? "A. Yes, sir, that was the clause that got me to go to Washington.

"Q. And then that contract amendment came out, did that lead to the Washington trip? "A. Mr. Lewis, we discussed that, and he says, if that's your interpretation of it, then that's the agreement we will abide with, as far as you
are concerned. But that did not mean he would go
1332 to John Jones and give the same contract. That's the way I took it.

"Q. Will you state why this interpretation you had was not put in writing between you and Mr. Lewis? "A. No contract that I have had with Mr. Lewis, outside of the na-

tional contract, there's nothing been put in writing with Mr. Lewis. Now frankly, I didn't want it and he didn't want it. It was a gentlemen's agreement that was abided by.

"Q. What was— was there any difference between you at the outset, with respect to the interpretation? "A. Yes, they didn't think we ought to make any leases, and we said we were going to make leases, but we did not make any leases that was adjoining a part of our main boundary of coal. In other words, a part of Black Star, we made no lease because we felt it was a part of the contract, that was our interpretation.

"Q. Were these discussions at some length or did you just state your position? "A. We, — it was a round-robin discussion.

"Q. Of some length? "A. Yes, sir.

"Q. Did you discuss the leases that you were wanting to make? "A. Yes, sir, it was all the lease we had in
1333. effect and two more than I had given my word on that we would close. I said we are going to close those two mortgages.

"Q. Those two leases? "A. Those two leases, and we did.

"Q. And you had already made an agreement with the proposed lessees? "A. Verbal agreement.

"Q. What was the final decision then? "A. Mr. Lewis said if that's your interpretation, we will accept it, as far as your case is concerned.

"Q. And the problem was, was that these proposed lessees were non-union operators?"

* * *

"Q. Will you state what was the specific problem? State whether or not it related to whether or not these operators were union or non-union? "A. Sure it was. That was the main consideration there, that these non-union operators wanted to continue, and we made the leases to the non-union operators. And we had signed contracts, and we had made verbal promises that we were going to abide by. Mr. Lewis

knew that and he acquiesced and told me, I repeat, that if that was our interpretation, that would be the interpretation for our particular contract.

"Q. Now on the next contract negotiating period, 1334 did you go back to Mr. Lewis again? "A. Yes, sir.

"Q. Was that — "A. That was around '56, something like that.

"Q. That next one here, I believe, September 1, 1955? "A. It was the next regular contract."

* * * * * * * * * * *

"Q. And on this next trip to Mr. Lewis, did you have leases in mind at that time? "A. Yes, sir.

"Q. Of non-union operators? "A. Definitely.

"Q. And did you discuss those specific leases with Mr. Lewis? "A. I did."

* * * * * * * * * * *

"A. Gentlemen, it's the regular contract. Now, I don't want to go out on a limb. I am not positive on that. But every contract that was signed by Black Star over all those years, I had signed. The Union would not accept even my plant manager's signature. I had to make special trips over to Middlesboro, then. What we have been talking about, it was the first twelve or fourteen, plus two that I had given my verbal assurance that we would sign. Then we 1335 went back on this new contract when it was to be decided, and that was a boundary of coal which was what we call the heart of our whole proposition. I went over and told him we had to make leases on that coal or go out of business and in the final analysis, Mr. Lewis agreed with me for me to go ahead. I could tell you something else, but its personal.

"Q. And that was true on both of these two trips? "A. Yes, sir."

* * * * * * * * * * *

"A. Mr. Lewis agreed I would add an unnamed number of leases on this new property. On the last trip."

Mr. Kramer: That was my statement, "On the last trip," and now you may read the answer. "A. On the last trip.

"Mr. Kramer: But you don't mean to testify that was true on both trips? "A. I mean this, the first trip we were discussing relating to twelve or fourteen, or maybe fourteen to sixteen.

"Mr. Kramer: Already in existence? "A. Al-
1336 ready in existence, and two that were submitted. But that left no coal whatsoever to be mined on the other side of the river. I went back to Mr. Lewis, it was a cut and dried proposition as far as I was concerned, that it had to be. Therefore, we were going to regardless, even if you shut us down, we were going to go in that, that new territory. Am I clear on that now?"

Mr. Kramer: Omit my comment. Go ahead.

"A. And Mr. Lewis agreed, we would go ahead. I even talked to him about sending, sending one of his representatives to Louisville. I said, I will open my books, where you can see everything there is to see. He never did. He appreciated the offer of them.

"Q. What leases were talked about on that second trip? "A. They hadn't been formed yet, but in the end they were the Liberty Coal Company, the Carrie Lou Coal Company, the Deby Coal Company, the Kentucky Mountain Coal Company, Citation Coal Company and Black Gem Coal Company. Gentlemen, there may be one or two others, but those were the main ones.

"Q. Did you talk to Mr. Lewis about these companies? "A. I talked to him about the companies that were to be formed and the leases that were to be made. No
1337 names were given them.

"Q. And Mr. Lewis agreed to those? "A. Yes, sir, he did.

"Q. Mr. Hill, why did you feel compelled to go to talk to Mr. Lewis about these matters? "A. To get these contracts, and the only way we could do was to lay the matter

on the table with Mr. Lewis, and I did just as frankly and sincerely as I knew how.

"Q. And he appreciated your sincerity? "A. He certainly did.

"Q. And you abided by your agreement? "A. I certainly did.

"Q. And you did not make any other leases? "A. No, sir. Wait a minute, on this last trip, I made, I may be one or two short, but I gave you the main ones.

"Q. But you did not make any leases except those Mr. Lewis agreed to? "A. No, not while that contract was in effect.

"Q. What is your position now, Mr. Hill? "A. I am the personal representative of Mr. Clarence A. Lee and Mr. Clarence A. Lee, Jr., in full control of all his property over here now, owned by Mr. Lee."

Mr. Combs: May it please the Court, we are now going into cross examination. May I state the position of
1338 the Union with reference to this particular deposition?

The Court: Yes, sir.

Mr. Combs: The question involved was one of the application of the coal lease lands. The position of the union is that is entirely a legal clause within the rights.

The deposition will show you on cross examination that the conference was arranged by counsel for Mr. Hill. The question was one of interpreting that clause by counsel on both sides in the meeting.

The question was, so that the Court and the jury may understand what the principals were talking about, was the application of that particular provision on leases that had already been executed in either writing or verbally.

Mr. Hill took the position that the contract could not be retroactive with reference to any lease or promise that he had made.

Mr. Lewis agreed with him on that on the advice of counsel.

I thought I would point that out, and it will be in the cross examination and we would like to have it of record.

* * * * * * * * * * *

1339 (The cross examination was read.)

CROSS EXAMINATION

By Mr. Combs:

"Q. Mr. Hill, at the time you went to Washington that you were talking about, who went with you? "A. Mr. B. F. Reed.

"Q. Who was your counsel at that time? "A. Judge Dawson.

"Q. Judge Dawson? "A. Yes.

"Q. And you talked to him about this before you went? "A. Oh, yes.

"Q. Mr. Rowntree was asking you about the renewal of these contracts. I think you said you had personally signed each of the contracts since about 1952? "A. I think I had.

"Q. You don't mean to say you went to Washington? "A. No, sir; no, sir.

"Q. You negotiated your contracts usually in the District office, you signed the contract and it was sent in to Washington? "A. Yes, sir.

1340 "Q. The two trips you went to Washington was with reference to the leasing proposition? "A. Yes, sir, and the new contract.

"Q. Do you recall who was present with Mr. Lewis? "A. You and Mr. Hauk.

"Q. Anyone else? "A. Mr. Reed. Of course, he was with me. Mr. Lewis, and there was one young man that I can't recall his name. If you call it I will remember it.

"Q. Mr. Willard Owens? "A. Mr. Owens was not there on one of them. He's the one that's president now. He was in one of those meetings.

"Q. Now, Mr. Hill, in order to get this picture very clear, at the time you went to talk to Mr. Lewis, your mine that was operating, was not operating under the new contract at that time? "A. That's right, it hadn't expired yet.

"Q. The question was whether you were going to sign the new contract or amended contract? "A. That's right.

"Q. And the discussion you had there with reference to the leases on your producing property was one more legal in nature than it was a bargaining proposition, was it not? "A. I don't know that I understand you.

"Q. Had you not been advised by your counsel,
1341 Judge Dawson, and did you not say to Mr. Lewis that you were legally obligated on the leases that were in existence at that time? "A. Yes, sir.

"Q. That they had some time to run? "A. Yes, sir.

"Q. And that you could not legally — "A. (Interrupting) We could not legally get out of them and we wouldn't if we could.

"Q. And you further said that you had two leases promised that had not been executed? "A. Yes, sir.

"Q. And you felt morally bound because there was a verbal agreement that they would be carried out? "A. Correct.

"Q. So it was a legal proposition with reference to the producing company's mine? "A. Yes.

"Q. That Mr. Lewis agreed to? "A. Yes, sir.

"Q. That was the interpretation, I believe, both of Mr. Lewis' counsel and your counsel? "A. I don't see anything wrong in that.

"Q. When you were talking about the leases in
1342 Clay and Leslie Counties, you were not talking in terms of your company operating mines on its properties, were you? "A. No, sir.

"Q. I believe you told Mr. Lewis at that time that your company's stockholders who owned that property, that that was the only way they could get income from the property was by leasing? "A. That's right.

"Q. And the only people you could lease it to, that wanted the property, was non-union operators? "A. Everything in that field was non-union.

"Q. And the people you would lease that to had not been under contract? "A. That's right.

"Q. And the argument with Mr. Lewis was that you had not negotiated, and had not been negotiating with reference to your producing companies for the property in Clay and Leslie Counties? "A. I was referring to Alva as the main one.

"Q. That's right. And you did not think that the contract covered or should cover or would cover the property that your company was not producing coal on? "A. That's right. But if we had property, and we did, if we had property adjoining our main boundary, we felt this contract—

"Q. Would come under that contract? "A. That's
1343 right. And we would not sign it without that definite understanding.

"Q. In other words, you are talking about this contract here, and the contingency of the lands on that property? "A. Right.

"Q. Now, you were speaking in terms of agreements and understandings that you and Mr. Lewis had that had to do with your interpretations of the legal situation that existed at that time, of the leases on the company's property. It wasn't an agreement at all, it was just a recognition, wasn't it? "A. It was permission, if you want to use that word, that he was agreeable that we go ahead and make these additional leases or make these leases.

"Q. I think both of us mean the same thing. The question before you and Mr. Lewis at that time was whether or not you would sign this new contract? "A. That's right.

"Q. Now you wanted to know, before you signed that contract, whether it was his interpretation, understanding,

that it would cover these other properties? "A. That's right.

1344 "Q. And from the reasons stated, from the legal proposition stated, he would recognize the fact that it did not cover the pre-existing leases and properties that were not adjacent to this property? "A. He said he would go along on a gentlemen's agreement that these leases would be acceptable, that I would have no difficulty, and I have never had one minute's trouble.

"Q. That was in case you signed the contract? "A. I told him if my understanding was the same as his, or his the same as mine, I was ready to sign the contract. And I did, I went into the next office and signed the contract.

"Q. Now, the second trip was about the same, about the same circumstances? "A. The second trip was on leases that had not been made and it was on territory that I had told Mr. Lewis we would not make leases on. The first trip was over, was when fourteen or fifteen leases already signed, and two to be added. Now, when I got over here, that's on this new territory, I hadn't even approached it to anybody, but I told him we were going to close leases on that property, and he agreed that I do it.

"Q. But your company did not operate that property? "A. No, sir.

1345 "Q. And didn't intend to? "A. No, sir.

"Q. And you never operated it? "A. We never operated it.

"Q. It was just a question of leasing lands that your company was not going to operate on? "A. That's right. That clause comes into it. That was my interpretation, and I would have closed Black Star had we not agreed.

"Q. And this was consistent with the advice of your counsel, Judge Dawson? "A. Yes, sir."

* * * * * * * * * * *

J. S. ROUTH, JR.

Mr. Rowntree: May it please the Court and ladies and gentlemen of the jury, we have the interrogatories pro-

pounded to Mr. J. S. Routh, Jr., executive vice president of The Pittston Company.

"Question: Where do you reside and what is the
1346 distance of your residence from Knoxville, Tennessee? "Answer: My residence is Meadowcroft Road, Greenwich, Connecticut and is 670 air miles from Knoxville, Tennessee.

"Question: What official position do you hold with The Pittston Company and what is the nature of your duties in that position? "Answer: I am Executive Vice President of The Pittston Company and my duties are the general supervision of all of our subsidiaries, under the direction of the President.

"Question: Attached hereto as Exhibit 1 to these interrogatories is a statement concerning the financial position and operations of The Pittston Company. Will you state whether or not the statements in this Exhibit 1 are correct and, if not, will you state what corrections should be made thereto? "Answer: The statements in Exhibit 1 at the time they were printed by Moody's Industrial Manual were correct."

We will read from that statement, your Honor, those portions which are before December 31, 1958.

The statement is under the heading The Pittston Company.

1347 "Incorporated in Deleware and Virginia. Originally incorporated Jan. 13, 1930 in Delaware. Upon merger Dec. 31, 1942, with United States Distributing Corp. (Va.) Pittston Co. also became a Virginia Corporation."

* * *

"In Aug., 1944, company purchased 83.2% of outstanding common stock of Clinchfield Coal Corp., which owns or controls about 300,000 acres of coal lands. Clinchfield was merged Dec. 28, 1956."

Mr. Kramer: That was '44 rather than '54.

Mr. Rowntree: 1944, that is when they purchased the company. That company — I mean 83.2 per cent of that

company, and that company was merged into Pittston December 28, 1956.

"Mar. 31, 1948, company purchased entire capital shares of Amigo Smokeless Coal for $500,000, which company in Apr., 1948, purchased E. C. Minter Coal Co. with two bituminous coal mines at Beckley, W. Va."

* * *

"As of Nov. 1, 1957, acquired entire capital stock of Banner Fuel Corp., a bituminous coal producing company in Virginia.

"In Dec., 1958, acquired Elk River Coal & Lumber
1348 Co., owning 80,000 acres of coal lands in northern West Virginia, containing reserves of over 250,000,000 tons of high-grade, low-sulphur coal."

With respect to these last two transactions, your Honor, we have read heretofore —

The Court: I didn't catch them. Would you read them again.

Mr. Rowntree: These last two, the last one was with reference to the Elk River Coal & Lumber Company, purchased in December 1958.

The Court: You mean Pittston purchased that?

Mr. Rowntree: That is right.

The Court: Purchased what now?

Mr. Rowntree: Elk River Coal & Lumber Company.

The Court: Where it is located?

Mr. Rowntree: It is in northern West Virginia.

The Court: What was the other one?

Mr. Rowntree: The other one was Banner Fuel Corporation, purchased November 1, 1957.

The Court: Where is Banner Fuel?

Mr. Rowntree: That is in Virginia.

The Court: All right.

Mr. Rowntree: With reference to the Elk River Coal & Lumber Company, we had testimony with respect to the

purchase of that company and the signing of the
1349 contract. With respect to Banner Fuel Corporation, we now make reference to United Mine Workers Journal January 15, 1958, page 6.

Mr. Kramer: Now, your Honor, to the testimony with reference to the Elk River and Banner Fuel and there is another one who is outside of this territory, I forgot the name, that counsel has read, they are wholly outside of this area. It is in northern West Virginia, it is in the State of Virginia. They do not enter into our field or this field at all, where this plaintiff is participating or could be participating or was participating in the production and sale of coal, and we object to it as being irrelevant and immaterial and confusing and perhaps prejudicial.

We do not think it has any value whatsoever in this lawsuit, because it isn't in this area and has nothing to do with this area, has nothing to do with competition in this area, has nothing to do with monopolization.

The Court: The objection is good insofar as it relates to the damages of the cross plaintiffs Phillips Brothers Coal Company, but it is overruled as to the other features of the case for the reason that the cross plaintiffs are contending that there was a national conspiracy, and if this testimony has any bearing on the national conspiracy
1350 and it affected this plaintiff directly and proximately, then the jury may consider such testimony.

Now isn't that the purpose of it?

Mr. Rowntree: Yes, sir, it is to prove a national conspiracy.

This Journal article is under the heading "District 28 Organizes Banner Fuel."

"Banner Fuel reneged on its UMWA contract more than two years ago. Since then, the District 28 pensioners of the UMWA Welfare and Retirement Fund have been spearheading a strike to bring the miners there back into the Union. A picket line was kept going for more than two years. Most of the pickets were the 'old men' of Southwest

Virginia who showed up every day, rain or shine, hot or freezing."

* * *

"The strike, led by these 11 and others like them, was more than successful and forced the scab operators of the mine to sell out to Clinchfield Coal Corp., which was scheduled to sign a contract with President Carson Hibbitts of District 28 effective January 1. The mine, formerly poorly mechanized and a real death trap, normally employs 80 men, but when Clinchfield commences full-scale me-
1351 chanical production 50 employees will be hired."

* * * * * * * * * * *

"Safety conditions under the scab operators were truly horrible. Five men were killed in roof-falls over a two-year period and safety practices non-existent. A Labor Department hearing examiner — E. West Parkinson — scathingly indicted the company for its negligence and recommended that it be forbidden to sell coal to the Federal government for a three-year period."

The Court: Is that the Banner Fuel Company?

Mr. Rowntree: Banner Fuel Company.

The Court: And Banner Fuel was taken over by Clinchfield?

Mr. Rowntree: Taken over by Clinchfield after a two-year picketing by the pensioners.

The Court: And Clinchfield merged with The Pittston Company?

Mr. Rowntree: That is right.

The Court: All right.

Mr. Rowntree: The merger had already occur-
1352 red before this.

I would like to read tonnage from the Exhibit One to the interrogatories. I will have to read it in round figures, there is a little haze on some of these figures.

This is coal produced —

The Court: Now what are you reading from?

Mr. Rowntree: This is the statement with respect to Pittston Company, the portion on tonnage produced.

You might go with me on these figures.

The 1950, 6,373,000.

1951—these are tons—7,329,000.

. . . . . .

Mr. Rowntree: 8,840,000 was 1952.

1953, 8,557,000.

1954, I believe that is 6,450,000.

1955, 8,050,000.

. . . . . .

1353 1958, 8,058,000.

1956, 10,291,000.

1957, 12,634,000.

1958, 10,040,000.

. . . . . .

Also, from this statement to get the nature of this company, it is a holding company, Your Honor, with a coal division. The coal, —

"A holding company with a coal mining division holds securities of subsidiaries engaged in directly or otherwise in one or another of the following lines of business: mining of bituminous coal, operation of retail stores at mines, wholesaling and retailing of anthracite and bituminous coal, petroleum products, natural gas and other fuels, armoured car operations; general trucking, truck rentals, warehousing."

So it is a rather broad holding company.

. . . . . .

Mr. Kramer: Your Honor, there is one other of
1354 these interrogatories that we wish to have read.

The Court: All right.

Mr. Kramer: It is number six. I want to go back to number five first.

"Question: Does the Pittston Company or any of its subsidiaries or divisions have any other operations with re-

spect to coal mining in the State of Tennessee other than the Clinchfield Division mine at or near Monterey, Tennessee? "Answer: No.

"Question Six: Does the Pittston Company itself have a contract with the United Mine Workers of America and is this contract the so-called 'National Bituminous Coal Wage Agreement of 1950' as amended? "Answer: No."

* * * * * * * * * * *

Mr. Kramer: Number seven.

1355 "Question: Does the Clinchfield Division of the Pittston Company have a separate contract with the United Mine Workers of America and is this contract the so-called 'National Bituminous Coal Wage Agreement of 1950' as amended? "Answer: Yes."

* * * * * * * * * * *

Mr. Combs: May I make one comment in connec-

1356 tion, Your Honor, with reading from Moody's Industrial Manual and picking out particular companies. As we have said before, that is an industrial book that they use as a reference work. Counsel has been reading and picking out particular companies.

We have pointed out, and this document will show that these companies own a number of coal mines. These large coal companies are made up of a collection of smaller mines in different states under different circumstances, and under different conditions.

Now, I think it is only fair that it is the contention of the Mine Workers that they not buy non-union mines as counsel is talking about, but very, very frequently, they buy union mines, so there iis no significance to that. These large companies buy these mines, and it is the collective bunch of mines that they buy, so they are changing constantly in the industry.

Mr. Kramer: Who are you going to read?

Mr. Rowntree: Clinchfield Coal Division.

The Court: Interrogatories of whom?

R. H. HUGHES

Mr. Rowntree: Mr. R. H. Hughes, President of the
1357 Clinchfield Coal Division of the Pittston Company.

"Question: Where do you reside, and what is the distance of your residence from Knoxville, Tennessee? "Answer: I live at St. Paul, Virginia, which is approximately one hundred fifty miles from Knoxville.

"Question: What official position do you hold with the Clinchfield Coal Division of Pittston Company, and what are your duties in that division? "Answer: I am president of the Clinchfield Division of the Pittston Company. As Chief Executive of the Clinchfield Coal Division, I direct the operation of seven bituminous mines employing 3,300 people. This direction includes production planning both public and labor relations, financial management, quality control and improvement and expansion of the division's activities.

"Question: Does the Clinchfield Coal Division of the Pittston Company operate a mine at or near Monterey, Tennessee, which mine is or was formerly known as the Meadow Creek Mine? "Answer: Yes.

"Question: When did the Clinchfield Coal Division of the Pittston Company acquire this mine and occence to operate the mine? "Answer: November 30, 1953.

1358 "Question: What is the annual tonnage capacity of this mine, and give the approximate number of employees employed in the mine. "Answer: 450,000 tons per year; 116 employees.

"Question: Does this mine operate under a contract with the United Mine Workers of America, and is this contract known as the 'National Bituminous Coal Wage Agreement of 1950' as amended? "Answer: Yes.

"Question: Does the Clinchfield Coal Division of the Pittston Company operate any other coal mining operations or mines in Tennessee other than the mine at or near Monterey, Tennessee? "Answer: No."

If Your Honor please, this next series of short depositions

deals largely with a charge we make that large operators aided the union in knocking out a rival union, Progressive Mine Workers of America, from certain important mines, this being part of the arrangement or agreement between the major companies and the union.

Mr. Combs: May I make an observation, Your Honor?

The Court: Yes, sir.

1359 Mr. Combs: The activities that are covered by this deposition that counsel talks about are activities that were involved in a charge before the National Labor Relations Board. The Board held hearings of three weeks duration. The trial examiner made recommendations to the Labor Board. The Labor Board granted—which it doesn't often do—an oral hearing on the exceptions to the charges of the trial examiner.

1360 The Labor Board approved the Trial Examiner's report as modified. The Labor Board went into the 7th Circuit for an enforcement of its order—7th Circuit Court of Appeals.

The parties—they had three respondents there. The Union, the local union, the company, and certain individuals.

The Court of Appeals reversed the Labor Board in practically all of its findings. The question of certiorari is now before the Labor Board, and they have told us that they expect to take certiorari to the Supreme Court on certain points. They are not going to take certain other points that they had because of the decision that your Honor knows about in the recent typographical series of cases that was decided by the Supreme Court last week.

The deposition was taken from the persons that were involved in this Labor Case that has gone to the 7th Circuit and now before the Supreme Court.

I think, your Honor, that is a typical illustration of the contention of the Union, that these charges have no part in an anti-trust suit.

I might say, that if we go into them exhaustively, I think

it will be practically necessary for the persons involved to try to state their contentions to this Court and to this
1361 jury to see who is right.

The Labor Board found, in most all of the instances that the Union was right.

So that is an illustration, your Honor, that I would like to comment on and what we are going into here. And we object, of course. The object of my contention is that we object to this line of testimony on the same grounds that we have others, that this matter that they are going into is a matter that is in the exclusive jurisdiction of the National Labor Relations Board. That board has taken jurisdiction in this particular case and there is no purpose of it being tried out in the courts, and we don't think it could be any part of an anti-trust action under the decisions.

Mr. Rowntree: If your Honor please, we are not here trying an unfair labor practice. This unfair labor practice charge is not a remedy for our company. We weren't involved in it.

We do not grant counsel's statement with respect to the decisions in the Labor Board matter. We think they have nothing to do with it. But just to clear the record, the Labor Board hold in favor of the Progressive Miners and
1362 after that the mine was closed by Peabody Coal Company. The case became somewhat mute after that. The mine was permanently closed and stripped after that decision by the Labor Board. It has nothing to do with this case.

Our case is to show how closely Peabody Coal Company worked with the United Mine Workers to hurt the Progressive Mine Workers and knock them out of those mines as showing the arrangement and agreement between the major coal company and the union, being part of the whole pattern of the relationships between the major coal company and the union that we allege were part of this national conspiracy.

We do not want to seek any remedy for unfair labor practice. That is certainly beyond any issue in this case. But how closely they work together is an issue, for their mutual advantage.

Mr. Combs: There is one thing that counsel has said about the stripping of those mines. I know of no evidence of that act whatsoever.

Mr. Rowntree: There is.

Mr. Combs: As I said, the cases now before the Labor Board are being asked for certiorari before the Supreme Court. I think one of the mines did shut down, been worked out. I don't know of any contention that had anything
1363 to do with the union or not. My point is simply this, your Honor, that if we are going to try these Labor Board cases, that you have a Labor Board case in front of you. And as I said before, that is exactly the same person, the same activities, the same charges, that counsel is going into here on his side.

He has his contention and we have ours, but those contentions were tried. As a matter of fact there are countless charges before the Labor Board between the union and operators and if you want to pick and choose you can go all over the country. That is what the Labor Board is for, to decide those.

* * * * * * * * * * *

This is the deposition of Mr. Herbert C. McCollum
1364 taken in St. Louis, Missouri, October 20, 1960.

HERBERT C. McCOLLUM

* * * * * * * * * * *

"DIRECT EXAMINATION

"By Mr. Rowntree:

"Q. What is your name, sir? "A. Herbert C. McCollum, M-c-C-o-l-l-u-m.

"Q. What is your position, Mr. McCollum? "A. Vice-President in charge of Underground Mines for Peabody Coal Company.

"Q. How long have you held that position? "A. Since about 1954."

Mr. Rowntree: If your Honor please, all of these depositions are not confined to that issue. This is the general Peabody set of depositions but they do go into that question I was talking about.

Mr. Kramer: Insofar as they go into that question, our objection is in the record. When they come to other questions, of course, we will make further objections. But
1365 our objection, as I understand your Honor's ruling, stands as to this portion of the deposition.

The Court: Yes, sir.

(The reading of the deposition was continued.)

By Mr. Rowntree:

"Q. Where do you reside, Mr. McCollum? "A. St. Louis.

"Q. You were Vice-President in charge of underground mines in 1957, I believe? "A. Yes, sir.

"Q. In or about May, 1956, did Midwest Coal Company acquire the capital stock of Midwest Radiant Corporation? "A. Yes, sir.

"Q. Was Midwest Coal Company a wholly owned subsidiary of Peabody at that time? "A. Yes, sir.

"Q. At that time or immediately prior to that acquisition did Midwest Radiant own and operate a strip mine at Millstadt, Illinois?

"Q. Did Midwest Radiant also own the capital stock of Perry Coal Company? "A. Yes, sir.

"Q. And did Perry Coal Company own and oper-
1366 ate the St. Ellen Mine at O'Fallon, Illinois? "A. Yes, sir.

"Q. In July, 1957, did you write certain letters to Progressive Mine Workers of America as Vice-President of Midwest Radiant Corporation and as Vice-President of Perry Coal Company? "A. No, sir.

"Q. That was Mr. Snider? "A. Yes, sir.

"Q. I show you a letter, Mr. McCollum, dated July 10,

1957, from Hugh White, President of District 12, United Mine Workers of America, addressed to you at your Peabody Coal Company address. Did you receive that letter in the mail? "A. Yes, sir."

Mr. McCombs: While we are hunting for that letter, may our objection run to the exhibits offered under this line of testimony? The Court: Yes, sir.

Mr. Rowntree: This letter states—it is dated July 10, 1957 on the letterhead of the United Mine Workers of America, District 12, signed by Hugh A. White, president. It is addressed to Mr. H. C. McCollum, Peabody Coal Company, at St. Louis.

1367 "Dear Mr. McCollum:

"You are hereby formally advised that the joint Bituminous Coal Wage contract to which the Peabody Coal Company was signature is effective at any and all mining operations operated by the signatory company. Full compliance to the terms of the aforesaid agreement is expected from the Peabody Coal Company by the United Mine Workers of America."

(The reading of the deposition was continued.)

By Mr. Rowntree:

"Q. I show you here copies of letters, July 4th, 1957, from Ray Dupee to Perry Coal Company and Midwest Radiant Corporation, letter dated August 34d, '57, from Ray Dupee, to Midwest Coal Corporation, letter dated August 3rd, from Ray Dupee to Peabody Coal Company, and letter dated August 3rd, '57, from Ray Dupee, that's D-u-p-e-e, to Midwest Coal Corporation, and ask—

"Mr. Zempel: You do have two to Midwest Radiant Corporation?

"Mr. Rowntree: One is Midwest Radiant and one is Midwest Coal Corporation. And I will ask you if these letters were received in the mail by you?

* * *

"The witness: I no doubt received the letters addressed to

Perry Coal Company. Midwest Radiant, I don't have
1368 anything to do with.

"Q. What about the one to Peabody Coal Company? "A. Peabody Coal Company, no doubt I saw that.

"Q. And Midwest Coal Corporation? "A. Yes, I think I saw all these letters.

"Q. July 4, 1957, letter of Ray Dupee to Perry Coal Company, and Midwest Radiant Corporation and Midwest Coal Corporation and Peabody Coal Corporation, all addressees at the top of the letter, mark that as Exhibit '2'."

Mr. Rowntree: These letters, your Honor—

Mr. Kramer: We object to the letters or any reference thereto. Your Honor has followed, no doubt, that these letters are not to the United Mine Workers of America; United Mine Workers are not a party to the letters at all. They are letters by Dupee to the Midwest—incidentally, Dupee is president of the Progressive Miners and not in anywise affiliated with the United Mine Workers. Statement by an outside third party, unsworn to, pure hearsay, and how in the world they could bind us or have any effect on us, I do not see.

The Court: Certainly those letters are not competent to prove the contents in them. In other words, that would be hearsay testimony and you cannot prove facts, or alleged facts, contained in the letters by such method.

1369 Now what is the purpose—what is the limited purpose you seek to introduce them?

Mr. Rowntree: The limited purpose, your Honor, is to show that—and perhaps we can just state the substance of it rather than read them all or put them into the record—

Mr. Kramer. We object to the stating of the substance.

The Court: They are competent as bearing on the contest between this alleged Progressive union and the UMW and on the alleged part that these big coal operators took in that controversy.

They are competent for those limited purposes only, but

if a letter states thus and thus is so, you don't find that which it states is so. It is not competent for that purpose. That is to say, you cannot prove the contents of the letter by the letters themselves, but you may look to the letters as bearing on this relationship between this alleged Progressive union and the UMW and the big coal operators.

Mr. Kramer, if you have any doubt about that ruling the Court had it up over and over in the picture show cases and the roofing case and in the—well, I am not sure of the other case, but—

1370 Mr. Kramer:

* * * * * * * * * * *

What we have here that they are attempting to introduce is two letters—the ones I am objecting to. One dated July 4, 1957—three letters—no, two—and one dated August 3, 1957, written by Mr. Ray Dupee, president of the progressive Mine Workers of America.

Now it is not by a coal company at all. I know
1371 what your Honor ruled with reference to the picture show people and so on in those cases. I read those. But, your Honor, I think this is beyond the scope of that. This is another union.

The Court: A letter to whom?

Mr. Kramer: It was — the letter was written, one to Midwest Coal Corporation and the other one was written to the Midwest Radiant Corporation.

The Court: The Midwest is a subsidiary of Peabody, is that right?

Mr. Kramer: Yes, it is, your Honor.

The Court: Of course, Mr. Kramer, that is not competent to prove anything in it, is correct, or anything in the letter is a fact. You can't prove facts that way. You are exactly right on that point. But it is competent to show that there was a contest there or an alleged contest between these parties.

For example, Mr. Kramer, in the picture show cases, the

picture show people introduced hundreds of advertisement notices. You know how advertising is used. You know how they advertise, brag on themselves.

Mr. Kramer: They brag a little, your Honor.

The Court: They wanted to show that advertising, show
1372 strategic location of these theatres. The Court let that advertising in as bearing on that question only, but not to prove the contents of the advertising, because that comes under the hearsay rule.

The Court is instructing the jury the best it can to not consider this proof as providing the contents of the letters.

. . . . . .

Mr. Combs: I understand the ruling on that. I just want to make one remark, though.

These letters here are from the president of the Progressive Mine Workers of America protesting to the company that they want to bargain with them. The other letter that he has is the letter from a president of a district of United Mine Workers in which he is asking the company to bargain with the Mine Workers.

Now as of now, as of this very minute, the Seventh Circuit Court of Appeals has an outstanding decree ordering an election by the Labor Board between this fight between these two people. There is an outstanding decree on that right now. Of course, it is subject to going on to the
1373 Supreme Court, as I told your Honor.

These same letters —

The Court: Can't you stipulate on this overall question?

Mr. Rowntree: I would like to, your Honor, if counsel will work with us.

The facts are all in here, and I think the facts bear upon the question of the major coal company, Peabody Coal Company working with the United Mine Workers.

The Court: The Court has held that you can't prove your facts that way because what those letters state about those facts —

Mr. Rowntree: We are not proving that by these letters. We just want to show the notice that Peabody got from Progressive, that they were the contract collective bargaining agent.

Notice was given in these letters by Progressive Mine Workers to Peabody that Peabody was the collective bargaining agent, had a contract with Peabody at these mines. That is the substance of the letter. I will let it go at that.

The Court: In the opinion of the Court, the letter is clearly competent for that limited purpose.

1374 Mr. Combs: Counsel was talking about stipulating. Let me make one more remark in connection with that court's decree.

That court said that this company was caught in the middle. The Seventh Circuit said that. That is not me saying that, or either one of the unions. The Seventh Circuit said the company is caught in the middle. They have got a typical union fight, two unions, one wants to represent the employees. So the Seventh Circuit ordered the Labor Board to hold an election under the auspices of the Labor Board, see which one does represent the men. That is the situation there.

So how that can have any bearing on the anti-trust case here, I don't know. It is a contest between two unions.

I will stipulate from the time the charges start right on up to the hearing —

The Court: Let me see the letter. I don't want to let anything get into this record, if I can avoid it.

* * * * * * * * * * * * *

The Court: Just read the third paragraph of that letter and don't read any other part. It may be filed.

* * * * * * * * * * * * *

1375 Mr. Rowntree: This is the letter of July 4, 1957, from the president of Progressive Mine Workers of America to Perry Coal Company, Midwest Radiant Corporation, Midwest Coal Corporation, and Peabody Coal Corporation.

This paragraph states:

"You and each of you are hereby advised that the contract now in existence between the Progressive Mine Workers of America, District No. 1, and the Coal Producers Association of Illinois is a valid and binding contract covering the operation of the Midwest Mine and the St. Ellen Mine, and that we shall expect from you full compliance with said contract and that you will comply with the wishes of your employees as to Union affiliation, and any future contract negotiations."

The Court: Members of the jury, in order that you may further understand the Court's ruling, that language which is read is not received as evidence to prove that the Progressive Union did have a valid and binding contract. That would be proof of a fact, but you can't prove a fact by that method. That would be hearsay. That would
1376 be self-serving and you will not consider that letter as proof of that alleged fact. But you may consider it as bearing on the notice of that union to the addressee of that letter that it was claiming that it had a contract with the operators.

If you have any other letters, let me see the paragraphs that you want in and let's keep out all other paragraphs that don't bear on this collateral question.

* * * * * * * * * *

Mr. Combs: Yes, we will stipulate that it is substantially — the other letters are of the same character, without waiving our objection.

The Court: That is right.

Mr. Combs: One more observation.

The Court: The Court has ruled that the jury will not look at the other parts of this letter; only the part that he read to the jury is in this record for consideration by the jury. The whole document may go in for identification purposes only.

Mr. Combs: For clarification, I believe counsel would also stipulate that the question of whether or not that they

had a valid contract in existence at the time the let-
1377 ter was written on this contention, that that was not in contention anywhere. They did have a valid contract.

The Court: All right.

Mr. Rowntree: We just submit to the record for identification these letters that I have referred to.

The Court: That is right.

Mr. Rowntree: As Exhibit 78.

(Exhibit No. 78 was marked for identification only.)

Mr. Combs: May we make this reservation? May we have the right of offering in evidence such exhibits that may have a bearing on this?

The Court: Yes.

Mr. Combs: Since I said they had a valid contract. The court did hold that they had a valid contract at the time the letter was written. That was not in contention. We may want to put some of those things in later on.

The Court: You may have that reservation.

Mr. Rowntree: Down at the bottom of page five.

(The reading of the deposition continued.)

"Q. Mr. McCollum, were written responses made to these letters" — that is the letters of Progressive.

* * *

1378 "A. Not by me.

"Q. Mr. McCollum, did you furnish the names of employees at the St. Ellen Mine to the United Mine Workers of America, or to Mr. Hugh White or an officer of District 12 of the United Mine Workers of America on or before July 10, 1957? "A. I can't recall the date. I did furnish a list.

"Q. You did furnish a list? "A. Yes, sir.

"Q. Do you know if it was furnished some several days prior to the date that United Mine Workers of America circulated a letter to the employees of St. Ellen Mine, or do you know? "A. I don't know. I can't recall it just now.

"Q. Was that list furnished prior to the time that United Mine Workers of America was recognized as the collective bargaining agent for the employees at the St. Ellen Mine? "A. Yes, sir.

"Q. Was that list submitted to United Mine Workers of America at the request of that Union or an officer of that Union or of District 12 of that Union? "A. Yes, sir.

"Q. Now, Mr. McCollum, did you attend a meeting of the Pit Committee which was also attended by the President of the Local of Progressive Mine Workers of America at the St. Ellen Mine a short time before United Mine Workers of America was recognized as the collective bargaining agent of the employees at the St. Ellen Mine? "A. Yes, sir."

1379

Mr. Rowntree: For clarification, the Pit Committee I was referring to is the Grievance Committee, I believe, of Progressive Mine Workers of America.

. . . . . .

"Q. Would you state your best recollection of what happened at that meeting? "A. Mr. Rowntree, that meeting happened four or five years ago and it is hard for me to recollect details that far back. I did testify in this recent hearing that we had, and I would like, if I could, to let that testimony stand because I related at that time what had happened in that meeting.

"Q. You have no firm recollection at this time as to what took place? "A. Well, it would be difficult for me to recall in detail.

"Q. Were you President of Alva Coal Company, "A. Yes, sir."

1380

. . .

"Q. How long did you hold that position? "A. Well, I held that position from the time Alva was acquired until the present time.

"Q. Did that company operate one mine? "A. Yes, sir.

"Q. You don't recall when it was organized or when the

Company started business? "A. No, I don't remember that."

The Court: What is the name of that mine?

Mr. Rowntree: That was Alva. We had discussion of that in Mr. Hill's deposition a moment ago. That is up here in Kentucky.

Mr. Combs: I think the evidence shows that mine has been under contract since 1951 or '2 before it was acquired by Peabody, if it did acquire it. There is no question here about that.

I could advise counsel, if he wants to know, since 1933 they have been under contract.

Mr. Rowntree: 1933.

Mr. Combs: Yes, sir.

1381 The Court: Where is Alva located?

Mr. Rowntree: That is near Pineville.

Mr. Combs: It is in Harlan County in Kentucky.

(The reading of the deposition continued.)

"Q. Where was that mine located? "A. Located in Eastern Kentucky. Paul, do you recall the name of that town?

"Q. Is it pretty close to the Tennessee line? "A. Well, it's in Harlan County, a small mining camp."

"Q. Pineville would be close, I think? "A. Our one mine is at Evarts, and this one is at — well, it's in Harlan County, Kentucky.

"Q. Is there a little community called Alva? "A. Yes. Yes, it's at Alva. There's another little town down there, I am not sure which is the post office address.

"Q. Was Mr. Albert B. Hill an officer in that company? "A. Yes, sir.

"Q. Is that company still operating? "A. We have the Alva Coal Company, but no holdings in East Kentucky any more, that's been sold, that property has.

1382 "Q. Do you recall when it was sold? "A. Oh, about possibly a year ago."

Deposition of Herbert C. McCollum

"CROSS EXAMINATION

By Mr. Kramer:

"Q. There was one question asked that I didn't get, in relation to this, and that question dealt with the Alva Coal Company and the question was, or rather the answer, that you were President of Alva Coal Company from the time of its acquisition. By whom was it acquired, or what did you mean by its acquisition? "A. Peabody Coal Company.

"Q. Purchased the capital stock of Alva? "A.
1383 Correct.

"Q. And thereby became the owner of its assets of stock ownership? "A. That's right, sir.

"Q. Mr. McCollum, you were asked something about furnishing the names of the employees of, was it Perry Coal Company, to a representative of the United Mine Workers of America? "A. Yes, sir.

"Q. Were you ever requested at about that time, or any other time, to furnish the names of the employees of that company to other people or other organizations? "A. We have from time to time supplied names of our employees to insurance companies, charity organizations, and as a matter of fact nearly anybody that wants them.

"Q. Anybody that would ask for them? "A. Yes, sir.

"Q. Was that a practice that you followed at that time upon a request made to you? "A. Yes, sir.

* * * * * * * * * *

Mr. Rowntree: This is redirect.

"REDIRECT EXAMINATION

1384 "By Mr. Rowntree:

"Q. Mr. McCollum, did the National Labor Relations Board enter an order in that case that you testified in?

* * * * * * * * * *

"A. Yes, they did.

* * * * * * * * * *

"Q. Was the St. Ellen Mine closed after this order
1385 was entered? "A. The St. Ellen Mine was closed May 20, 1960.

"Q. Was that a permanent closing? "A. Yes, sir.

"Q. The equipment is being taken out of the mine? "A. Yes, sir."

* * * * * * * * * *

Mr. Rowntree: The deposition of Mr. Merl C. Kelce.
1386 "MERLE C. KELCE,

* * * * * * * * * *

"DIRECT EXAMINATION

"By Mr. Rowntree:

"Q. What is your name, sir? "A. Merl C. Kelce, K-e-l-c-e.

"Q. What is your residence, Mr. Kelce? "A. St. Louis.

"Q. What is your present position? "A. President and Chief Executive Officer.

"Q. Peabody Coal Company? "A. Yes, Peabody Coal Company.

"Q. How long have you held that position, Mr. Kelce? "A. Since 1957.

* * * * * * * * * *

1388 "Q. Mr. Kelce, I have handed to you a copy of Moody's Industrial Manual Statement on Peabody Coal Company, and I will ask you to file that as Exhibit '6'. If you will, state whether or not that contains a direct statement of Peabody Coal Company subject to your checking it later and filing an addendum to this deposition making any corrections that are called for?"

Mr. Rowntree: There were no corrections to that statement, Your Honor.

Mr. Combs: I think, though, you should read what Mr. Zempel said about that.

Mr. Rowntree: All right.

(The reading of the deposition was continued.)

"Mr. Zempel: We don't say it's correct, we don't know.

"Mr. Rowntree: I might state—

"The Witness: I am perfectly willing for him to
1389 make this an exhibit if it's subject to our check and correction if there is any.

"Mr. Rowntree: All right, sir."

Mr. Kramer: Mr. Zempel, Your Honor, was the attorney for the witness and not for the parties.

Your Honor, this same type of evidence we have gone over many times. I want to continue our objections for the reasons heretofore stated, and I take it it is not necessary to restate it.

The Court: Yes, in the opinion of the Court, the testimony is competent in the light of his statement that he will check it, and if there are any inaccuracies, he will check it and make an addendum.

Mr. Kramer: Of course, that wasn't the basis of the objection. It was this type of evidence, Moody's and so forth, is not competent in this lawsuit. It is irrelevant and immaterial. Not checking on Moody's. I assume he did check, and it is correct.

The Court: It is held that the information of Moody's, unless it is verified by the witness, is not competent, but the Court understands that he verified it.

Mr. Kramer: Your Honor has held it is admissible for a limited purpose.

The Court: That's right.

1391 Mr. Kramer: I am not raising an objection because of the accuracy, because he's checked it, but Your Honor has heretofore ruled it is competent for a limited purpose, and I assume Your Honor rules the same here.

Mr. Rowntree: Is your objection on relevancy?

Mr. Kramer: Yes, sir, relevancy, that it is wholly irrelevant in this lawsuit for any purpose whatsoever.

Mr. Rowntree: I might interject, Your Honor, that we have charged certain companies with being alleged conspirators. We don't think the case will be won or lost on the basis of this information, but certainly it is of interest to know

something about these companies, how old they are, what subsidiaries they have got, and how big they are.

The Court: And the size.

Mr. Rowntree: That's right.

Mr. Combs: May I point this out?

The Court: Yes, sir.

Mr. Combs: The Moody's under discussion for 1960. Mr. McRoberts was counsel for Kelce at that time, personal counsel. Mr. McRoberts made this statement in connection with the accuracy of Moody's that they are talking about.

"I think the answer, Mr. Rowntree, is correct as
1392 far as it pretends to give any information. It is of course not complete."

That is our point, that—one of our points—1960 doesn't necessarily reflect in the least the condition of that company in 1958 or 1959. That is all it purports to be, and that doesn't purport to be complete.

The Court: Of course, if it doesn't, the jury will not consider it, but if the conditions shown in 1960 substantially existed in 1958, inasmuch as 1958 was the end of the period involved in this suit, then the jury will consider it.

Now, that is the purpose?

Mr. Rowntree: That's right, Your Honor. I think the dates specified here show clearly when these situations—what period of time they fell in. The great bulk on it shows on its face we are talking about a period of time before 1959.

In other words, dates are given with respect to certain transactions, that they occurred certain dates.

The Court: It deals with information within the period.

Mr. Rowntree: The great bulk of it, yes sir.

The Court: Well, of course, the jury may consider
1393 that for whatever it may be worth.

Mr. Rowntree: This is a statement headed "Peabody Coal Company."

"Incorporated in Illinois May 2, 1928, as a consolidation of a predecessor corporation of the same name and Indus-

trial Coal Company, Midland Counties Coal Company, Southern Counties Coal Company, Merchants Metropolitan Coal Company and Big Muddy Company. Subsequently, and particularly in 1928 and 1929 acquired Bellwood Coal Company, Federal Coal Company, American Eagle Colliery, Manufacturers Coal and Coke Company, Saline County Coal Corporation and Crerar Clinch Coal Company.

"In 1952—"

Let's see, it speaks about mergers and subsidiaries.

"On March 31, 1956, acquired Midwest Radiant Corporation and Perry Coal Company.

"On March 1, 1957, acquired Poplar Ridge Coal Company."

* * *

"In 1958 acquired remaining minority interests in Peabody-Southern Coal Company (liquidated in 1958) and Midco Mines, Inc., and remaining fifty per cent interest in River Queen Coal Company.

1394 "In November, 1958, acquired Mid-America Transportation Company, Kay Coal Company, and Alva Coal Corporation."

* * *

The subsidiaries are listed, but that is of 1960.

The Court: Now, what company are you dealing with there?

Mr. Rowntree: This is Peabody Coal Company, Your Honor.

"Affiliate: Simeo-Peabody formed in 1957 by company and Columbus and Southern Ohio Electric Company to mine coal leased from properties near Conesville, Ohio. Properties are owned by Stimco, Incorporated, subsidiary of Columbus and Southern Ohio Electric Company, to which coal will be sold.

"Business and Products

"This company's business is principally the mining,

jobbing and selling of bituminous coal. Through subsidiaries, the company also does a retail coal business.

"Coal Contracts Company serves most of important electric utilities in Midwest area.

"Sales contracts with electric utilities are either fixed price or cost-plus contracts. Fixed price contracts
1395 include escalation clauses which provide for increased prices under conditions of increased costs. Company considers contractural provisions adequate to protect it against cost increases which are beyond its control.

"In March, 1951, the thirty-year contract, dated May 1, 1928, with Commonwealth Edison Company, Public Service Company of Northern Illinois and Chicago District Electric Generating Corporation was amended and extended, effective May 1, 1951. New contract includes same Edison Group of utility companies and runs to December 31, 1982. Original contract had been scheduled to end April 30, 1958.

"Under new agreement, these utilities are required to purchase from company not less than fifty per cent and are entitled to purchase up to sixty-six and two-thirds per cent of annual Edison System coal requirements. New agreement extends approximately twenty-four years beyond life of superceded agreements. It provides that purchases will be made from coal produced by company at certain designated mines on a 'cost-plus' basis. This includes cost depreciation and depletion on contract mines, a return on company's net book investment balances in such mines com-
puted at five per cent per annum, plus a profit of fif-
1396 teen cents per ton of coal delivered. In addition, fixed charges and operating costs applicable to coal washing and other preparation plants at various mines covered by agreement will be shared by these utility companies on an equitable basis.

"Minimum annual obligation of these utility com-
1397 panies under the agreement will be 50% of Edison System Coal requirement or 2,000,000 tons, which-

ever is greater, but in no event in excess of 100% of such coal requirement."

The production by tons:

1950, 9,175,000	1951, 15,186,000
1952, 15,606,000	1953, 8,773,000
1954, 9,947,000	1955, 19,000,000
1956, 25,563,000	1957, 25,726,000
1958, 23,290,000.	

(The reading of the deposition was continued.)

By Mr. Rowntree:

"Q. Mr. Kelce, how many mines does Peabody Coal Company have operating?

* * *

"A. Twenty-five — between twenty-five and thirty mines that are now operating.

"Q. How many of those are strip mines? "A. As of August 1st?"

Mr. Kramer: This is 1960, your Honor, he is talking about now. This is subject to our previous objection.

"Q. Yes, sir. "A. All those mines are strip mines except one.

"Q. And which mine is that? "A. That's Mine Number 10 near Taylorville, Illinois.

"Q. Is that a large mine? "A. Yes.

"Q. Approximately how many employees are employed at that mine? "A. Something over six hundred.

"Q. Do you know the annual production at that mine say in 1959?

* * *

"The Witness: No, it's public information. About three and a half million tons.

"Q. What is your largest strip mine or the most productive? "A. Well, there's two or three large mines, maybe one year one will produce more than the others. Our largest coal mine, strip mine this year, as I remember, it's our River Queen Mine, Western Kentucky.

* * * * * * * * * *

1399 "Q. In August, 1960, how many states did you operate in? "A. Let me figure it up. Five.

"Mr. McRoberts: Five mines you are talking about?

"The Witness: Five states. Is that when you said?

"Mr. Rowntree: Yes.

"A. Yes.

"Q. In which you have mining operations? "A. That's right.

"Q. Does Peabody Coal Company have a collective bargaining agreement with the United Mine Workers of America? "A. Yes.

"Q. Is that the National Bituminous Wage Agreement of 1950 as amended? "A. I think that's right.

"Q. When did Peabody Coal Company first sign that contract? "A. I don't know that we ever signed a contract. Our association — our coal association generally does that.

"Q. Do you recall when the Coal Association, which is your representative, first signed the contract on Pea-

1400 body's behalf? "A. No, I wouldn't.

"Q. Was it prior to the transaction by which Peabody acquired the Sinclair Mine properties? "A. I can't tell you anything about Peabody Coal Company prior to the time they acquired the Sinclair property because I wasn't with Peabody.

"Q. Was the contract signed at the time the Sinclair Mines properties were acquired by Peabody coal Company?"

* * * * * * * * * *

1401 (The reading of the deposition was continued.)

By Mr. Rowntree:

"A. I don't understand your question.

"Q. In the period of time say for two or three months after the Sinclair Mines properties were acquired by Peabody Coal Company, was there a contract between Peabody Coal Company and United Mine Workers of America? "A. There was a contract with the United Mine Workers and

Peabody Coal Company when Peabody Coal Company acquired the Sinclair properties.

"Q. Did the Sinclair Mines, Incorporated, have a contract with United Mine Workers? "A. Not that I remember.

"Q. Did the United Mine Workers of America furnish any financial aid in the acquisition of Sinclair Mines properties by Peabody Coal Company? "A. Absolutely not.

"Q. Has United Mine Workers of America furnished any financial aid or guaranteed any loans or furnished assets as pledges to guaranteed loans on behalf of Peabody Coal Company since that time? "A. Not one cent.

"Q. I believe in October, 1956, Peabody Coal Company issued thirty five-million dollars debentures, did
1402 United Mine Workers of America furnish any funds, or did they buy any of those debentures, to your knowledge? "A. None to my knowledge.

"Q. The Perry Coal Company operates the St. Ellen Mine, I believe, it operated it? "A. It did.

"Q. The stock of Midwest Coal Corporation at that time was owned wholly by Peabody Coal Company; is that correct? "A. In '56?

"Q. '56. "A. To the best of my recollection they did.

"Q. And Midwest Coal Company was the corporation that acquired the stock of Midwest Radiant? "A. Peabody Coal Company, you say?

"Q. Yes. "A. I think that's right."

* * * * * * * * * * *

"Q. Your answer is you are not certain as to which
1403 company owned the stock of which other company? "A. That's right.

"Q. Peabody Coal Company was the parent company which wholly owned the St. Ellen Mine and the Millstadt Mine? "A. That's right.

"Q. And this acquisition, when did it occur, do you remember? "A. I am not certain, but it seems like it was in 1956.

"Q. Was there any election held at those two mines prior to the recognition of United Mine Workers as the collective bargaining agent? "A. Not that I know of.

"Q. Now, on exhibit here, Exhibit 1 to Mr. McCollum's deposition, a letter dated July 10th from Hugh White of United Mine Workers to Mr. McCollum which refers to language of the National Bituminous Coal Wage Agreement, did Peabody Coal Company feel compelled to recognize the United Mine Workers as the collective bargaining agent, the employees at the Millstadt and St. Ellen Mine?

"A. I don't remember that letter, but evidently it passed over my desk because there is my initial on it. What was your question, Mr. Rowntree?

"Q. Why did Peabody Coal Company recognize United
1404 Mine Workers as the collective bargaining agent of those two mines? "A. Because the United Mine Workers brought in signed cards supporting they had a majority of employees.

. . . . . .

"Q. Do you know, Mr. Kelce, when the Alva Coal Company was organized?

. . . . . .

"A. It seems to me like it was 1958.

. . . . . .

"Mr. Kramer: The date of its organization?

"The Witness: Yes. I wouldn't be sure of that,
1405 but it seems to me like that is when it was.

"Q. Was that property previously owned by Black Star Coal Company? "A. I don't understand what property you are talking about.

"Q. The Alva Coal Company at Alva, Kentucky. "A. Was it previously owned by the Black Star Coal Corporation?

"Q. Yes. "A. That's right.

. . . . . .

"Q. Do you recall if Peabody Coal Company owned at any time the stock of Black Star Coal Company? "A. No. It owned stock of the Lee Coal Company, as I remember.

"Q. Lee? "A. Yes.

"Q. Is that an Alabama corporation? "A. Yes. Clarence Lee lives in Alabama, I suppose it's an Alabama corporation. Am I correct there?

"Q. I mean, its principal office. "A. Principal office is Jasper, Alabama.

"Q. And the Black Star Coal Company also owned some coal lands which are leased out to operators who mined the coal from that property? "A. That's right.

"Q. Has the Alva Coal Mine been closed? "A. Yes, it was closed in July of this year.

"Q. Why was it closed? "A. Because it wasn't making any money.

"Q. That's a deep mine? "A. Yes. It's an old mine.

"Q. Is it a mechanical mine or was it a mechanical mine? "A. Yes.

"Q. Can you recall what extent it had been mechanized? Did it have any continuous miners? "A. No, no continuous miners. The coal seam was irregular. They had several different types of underground equipment.

"Q. Did it have cars pulled by locomotives? "A. I never was underground in the mine, I wouldn't know.

"Q. Was Peabody paying the union scale at that mine? "A. Yes.

"Q. They were paying Welfare royalties on the coal mine? "A. That's correct."

* * * * * * * * * *

"Q. Is Peabody Southern Coal Company a wholly owned subsidiary of Peabody Coal Company? "A. It isn't now. There isn't such a thing as Peabody Southern.

"Q. Has it been merged into Peabody Coal Company? "A. It is either that or liquidated, I don't remember which."

* * * * * * * * * *

"Q. Mr. Kelce, do you have a contract with Tampa Electric Company? "A. Yes.

"Q. I will ask you if this is a copy of that contract together with a memorandum with respect to certain water transportation companies?

* * * * * * * * * * *

"The Witness: I would have to read the contract to find that out.

"Mr. McRobert:" — attorney for the witness — "As far as you can tell them from superficial examination, is that what it is?

"The Witness: It appears to be."

1409 Mr. Rowntree: We would like to offer this as the next exhibit.

Mr. Kramer: May it please the Court, we object to the introduction of this instrument, it being irrelevant for any purpose in this lawsuit, immaterial, may be prejudicial. It is an instrument dated in November, as I recall it, 1959. Is that not true?

Mr. Rowntree: February.

Mr. Kramer: February 1959. Subsequent to the period involved in the conspiracy. And it is, your Honor, an instrument to which, of course, the United Mine Workers is not a party. We do not think it is relevant for any purpose here. If it is an effort to prove conspiracy, it is by the word or conduct or course of acts of one of the alleged conspirators, and at this time would not be competent for all of which reasons we object, your Honor.

Mr. Rowntree: If your Honor please, it is offered on the question of conspiracy. It is not offered on the question of damages, this particular contract.

There will be proof with respect to this market of coal down in Tampa, Florida. That was the market that
1410 our people supplied when they could get a contract, and there were some 4,000 tons of coal shipped by our client to Tampa Electric Company when they were able to get a contract.

Now this is a rather involved question with respect to this market. This is a market that has already come up once before with respect to union ownership of stock. There will be proof with respect to West Kentucky Coal Company on this market. In fact, there is already proof in the record that West Kentucky Coal Company had a contract by reason of purchase of Nashville Coal Company, had a contract with Tampa Electric Company to furnish large tonnage to Tampa Electric Company.

There was one question and answer in Mr. Eastin's deposition with respect to that as to why the contract was not fulfilled. Mr. Eastin stated that Tampa Electric Company had cancelled that Nashville Coal Company contract.

We will put into the record subsequently a portion of it, or the record in the case of Tampa Electric v. Nashville Coal Company and West Kentucky Coal Company, which sets forth in the pleadings, both the pleadings, the original complaint and the answer of the company, West Kentucky Coal Company, the reason for the failure to ship coal.

1411 The Court: Is that the reported case?

Mr. Rowntree: That is right, yes, sir. Subsequent to that failure to ship coal to Tampa, a local or a Nashville broker obtained a reduced rail rate from our coal field in this vicinity to ship rail coal to Tampa, since the other contract, the Nashville contract, was not being fulfilled. And having obtained that rail rate, it secured a contract with Tampa Electric Company to ship coal to Tampa from this section.

Our client shipped coal to that market, such quantities as they could obtain contracts for.

The proof will show that Peabody Coal Company shipped coal to Tampa, some several thousand tons, even after the contract is made by Love and Amos, the company that had gotten the rail contract. Subsequently, Peabody Coal Company obtained a very large contract, this contract here, to ship water coal to Tampa.

It develops in the testimony of Mr. Eastin and in the testimony of the current witness that West Kentucky Coal Company was to have the right to ship half of that Peabody contract.

Now that contract has eliminated the possibility
1412 of shipping the large tonnage from our section here.

It is our contention, too, that West Kentucky Coal Company reneged on the first Tampa contract, on the basis that it had a monopoly on that market. Its purposes in that regard are not known, of course, but one thing that it did was to divert the coal from the Uniontown mine and they dumped it on the Tennessee Valley market in large quantities, and particularly the spot market of TVA. And we say that was a damaging blow to our client.

The Court: The objection to the testimony is overruled.

(Exhibit No. 79 was marked for identification and filed.)

Mr. Combs: May I, if it please the Court? The contract that counsel has reference to was the subject of a Supreme Court decision dated February 27, 1961. The majority opinion was written by Justice Clark.

The sequence of events that counsel was talking about was something like this. A towing company had a contract to deliver a certain amount of coal to the Tampa Electric Company. That towing company was a subsidiary of Nash-
ville Coal Company. After West Kentucky Coal
1413 Company and Nashville Coal Company merged, West Kentucky Coal Company assumed as part of the contract in acquiring Nashville the contract.

After assuming that contract, and after studying
1414 the contract, they have notified Tampa Electric that they would not perform under the contract, because in their opinion the contract was in violation of the anti-trust law. Tampa Electric sued for non-performance, and a declaratory judgment. The District Court held that it was a violation of the Anti-trust Act, and was not enforceable as against West Kentucky.

The Court: Sixth Circuit affirmed, and a strong minority opinion was written by Judge Weick which was upheld by the Supreme Court.

Mr. Combs: That's right.

Mr. Rowntree: Minority opinion upheld.

The Court: That's right.

Mr. Combs: In the same case, the evidence will show that immediately after West Kentucky had notified Tampa Electric they would not perform under the contract, Tampa Electric looked elsewhere for their coal and made a contract with the Love and Amos people to deliver the coal via the contract. It is in this decision here.

Now this contract — and we might go ahead a little, Your Honor, and say that the Supreme Court reversed both the District Court and the Sixth Circuit and said it was
1415 not in violation of the Anti-trust Act.

As of now, there is some doubt on the status of that contract, because obstensibly when the Supreme Court said it was legal and enforceable, Tampa Electric could still enforce that contract against West Kentucky.

Now this same contract then, counsel is contending is evidence and furtherance of a conspiracy between these parties that has been through this series of litigation. I don't see how it could have anything to do with this case.

Mr. Rowntree: We are not talking about the old contract; we are talking about what has happened since that old contract.

Mr. Combs: You mentioned the Tampa Electric contract, and I was just reciting what the West Kentucky -- one of the so-called co-conspirators — what part it had to play in it, and that is the history of that contract that Peabody has now.

The Court: All right, Mr. Rowntree, are you talking about the contract which was contested in the District Court at Nashville on the grounds that it violated the anti-trust laws as amended by the Robinson-Patman Act.

1416 Mr. Rowntree: We do not —

The Court: And which was appealed to the Sixth Circuit, and wherein Justice Shackleford Miller, writing for the majority of the Court, affirmed the District, but when it reached the Supreme Court of the United States, that Court held that Judge Shackleford Miller was wrong.

Now is that the same contract that you are talking about this minute?

Mr. Rowntree: No, sir, this is a subsequent contract after that one. We do not have anything to do with the legality of that first contract. We have no position one way or another. Of course it is academic to do so, after the Supreme Court has ruled.

But the purposes of West Kentucky Coal Company in reneging on that contract and their subsequent activity with respect to getting back into that market, that it thought it had a monopoly on, when it was learned that a new contract was made with local producers in this section here is what we are talking about, and we have here a situation where Nashville — West Kentucky Coal Company reneged on a market that it thought it had a monopoly on, diverted that coal — why it reneged, we don't know — but it did divert its coal and dumped it on the Tennessee Valley Au-

1417 thority spot coal market.

Mr. Combs: Well, Your Honor, I don't follow counsel. Maybe I am just too stupid, but I don't know.

Now he says that West Kentucky reneged on a contract. Now the only contract I know of West Kentucky having with Tampa Power is the contract that Justice Clark was commenting on.

Mr. Rowntree: That's right.

Mr. Combs: Now that was the contract the Supreme Court says it is enforceable. They didn't want to abide by that contract, and they stated the reason.

Mr. Rowntree: Just as I say, the reason being they thought they had a monopoly on that market. They con-

tinued to build their transportation facilities on the river, and at Tampa, their loading and unloading. There is testimony already in the record that they continued even after the purchase of Nashville Coal Company, and the guarantee of the old contract by West Kentucky Coal Company, they continued to build their transportation facilities, and when they had got those in shape, they reneged on the contract.

Mr. Combs: For the stated reason, according to the Court, under sworn testimony and witnesses, that
1418 they thought that contract was in violation of the Anti-trust Act.

Now remember this, West Kentucky at no time delivered a pound of coal on that contract, and they haven't to this date. Now why would they form a conspiracy to get a monopoly of the coal and get a contract and then renege? I don't follow counsel's logic.

Mr. Rowntree: I can give a good reason, Your Honor. I can give a good, logical reason.

That is because they thought they did have a monopoly, and they wanted to raise their price down there, and they wanted to use the coal in the meantime to beat this Tennessee Valley Authority down. That is a good logical reason.

Mr. Combs: Talking about logical, it wouldn't be logical, Your Honor, for West Kentucky to state a defense to jeopardize them, perhaps criminally, on the reason they weren't going to comply with the contract and process it through the Courts and two Courts agreed with them, and it is wholly irrelevant, I think.

Mr. Rowntree: I think the evidence will indicate that they had an agreement with Peabody Coal Company to share their contract.

1419 Mr. Combs: I haven't seen any such evidence. I don't know of any such evidence.

The Court: All right, I will let it go into the record.

Mr. Rowntree: This contract dated February 16, 1959, between Tampa Electric Coal Company and Peabody Coal

Company and River Queen Coal Company is for a term —

I will just paraphrase the contract, Your Honor, or summarize.

Is for a term of twenty years commencing on or about the month of October, 1959. The source of the coal, quoting:

"The coal to be delivered hereunder shall be supplied from the River Queen Mine of River Queen Coal Company, provided that Sellers reserve the right to furnish said coal from any other mine or mines, whether or not owned by Sellers, upon condition that the cost of the coal delivered to Buyer's plant shall be the same delivered cost per million BTU's as if such coal had been delivered from the said River Queen Mine.

"Quantity.

"The base quantity of coal to be supplied by Sellers shall be as follows:

1420	"1959	100,000 tons
	"1960	550,000 tons
	"1961	800,000 tons
	"1962	1,000,000 tons
	"1963 through 1979, inclusive	1,250,000 tons each year.

"Delivery.

"The coal to be sold hereunder shall be delivered to Buyer f.o.b. barges at the River Queen Mine dock on the Green River, Kentucky. Subject to the provisions of paragraph 2, Sellers may, at their option, deliver said coal to Buyer f.o.b. barges at any other accessible river dock.

"Quality.

"The coal delivered hereunder shall have an 'as received' average calorific value of at least 12,000 BTU's per pound, determined as provided in paragraph 11 hereof. The size shall be three inches or smaller.

"Base price.

"The Base Price to be paid by Buyer to Sellers for coal hereunder shall be $3.70 per ton f.o.b. barges at River Queen

Dock, subject to the provisions of paragraph 2."

1421 There is a provision for base price revision depending upon changes or increases in straight time wage rate per hour and by reason of changes in cost of materials and supplies.

* * * * * * * * * * *

1422 "Q. Mr. Kelce, I ask you, do you recall when the first shipments of coal went to Tampa Electric Company from Peabody Coal Company? Was it before or after the contract was signed? "A. Before the contract was signed.

"Q. Do you recall approximately how much tonnage was shipped before the contract? "A. There was several thousand tons shipped, I don't know exactly the amount.

* * *

"Q. Do you recall how many months before the contract, Exhibit 7, those shipments commenced? "A. To the best of my knowledge, six or seven months.

"Q. This memorandum makes reference to certain transportation companies. Does Peabody Coal Company have an interest in certain water transportation companies jointly with Tampa Electric Company? "A. Yes.

1423 "Q. Do you recall what proportion of ownership is shared by those two companies? "A. At the present time it's fifty per cent of it is owned by Peabody Coal Company and fifty per cent by Tampa Electric."

The Court: What is that?

Mr. Rowntree: That is a water transportation company. There are actually two waterborne transportation companies. One of them is river-borne and one of them is ocean or gulf.

(The reading of the deposition was continued.)

By Mr. Rowntree:

"Q. The Virginia and Carolina Chemical Company previously owned one-third?

"A. Well, in the Gulf Transit Company we had no owner-

ship in it at the beginning. Virginia and Carolina Chemical Company and Tampa Electric Company was sole owners of the Gulf Transit Company.

"Q. What kind of equipment did that company have? "A. A T-2 tanker, converted tanker.

"Q. Was that a self-loading and unloading vessel? "A. It can load itself and unload itself, yes.

"Q. What is the other company, what's its name? "A. There's a river company, Mid South Towing Com-
1424 pany.

"Q. What kind of equipment does it have? "A. It has one tow boat and a number of barges.

"Q. Were these companies organized in order to transport this coal into Tampa, the coal sold on contract, Exhibit No. 79? "A. Yes.

"Q. And the organization of the companies was completed after this contract was made? "A. I think that's correct.

"Q. And the equipment was purchased or acquired by those two companies after this contract? "A. I think that's correct, I am not sure.

"Q. Did Peabody Coal Company lease the loading or transfer facilities of West Kentucky Coal Company below New Orleans?"

* * * * * * * * * * *

1425 "Q. Did Peabody Coal Company lease from West Kentucky Coal Company or firm a subsidiary of West Kentucky Coal Company, loading or transfer facilities on the Mississippi River below New Orleans? "A. It was either with the West Kentucky Coal Company or one of the subsidiaries, I don't remember which. There was a lease made.

"Q. Was that lease made by Peabody in order to handle the coal on this Tampa contract? "A. That and other coal possibly, and other bulk materials.

"Q. Was the lease made after this Tampa contract with Peabody Coal Company, the last exhibit? "A. Well, there

had been negotiations for quite a little while, I don't know whether it was after or before.

"Q. When did those negotiations commence? "A. On the transfer facilities?

"Q. That's right. "A. I don't remember exactly, but it's been quite sometime ago.

"Q. Was there an agreement between West Kentucky Coal Company and Peabody Coal Company, that West Kentucky coal Company would be used in part to
1426 supply on the Tampa contract? "A. Not exactly, no.

"Q. Would you state what was the arrangement "A. The arrangement that we would take from West Kentucky Coal Company or one of those subsidiaries tonnage equal to half of the Tampa contract.

"Q. Was coal actually shipped from West Kentucky Coal Company on the Tampa contract? "A. No.

"Q. Why not? "A. Because we found it the best interest of both of us to ship it elsewhere.

"Q. And where was that coal shipped then? "A. Memphis.

"Q. Did Peabody Coal Company have a contract to supply coal to the Memphis plant, electric plant? "A. That's right.

"Q. Who owns that plant? "A. Its a municipal plant.

"Q. Do you know what other coal companies had contracts to supply the Memphis plant? "A. There's two other suppliers besides ourselves, West Kentucky Coal Company is one of them, I don't know who the other supplier is. Yes, I do, too, it's Pittsburgh Midway Coal Company."

1427 Mr. Kramer: We haven't specifically objected. The objection may be broad enough to cover it. But, your Honor, they go into the Memphis municipal plant and I do insist on our argument and reasons similar to those heretofore given.

The Court: Same ruling.

(The reading of the deposition was continued.)

By Mr. Rowntree:

"Q. Did Kirkpatrick Coal Company have a contract with the Memphis plant? "A. He doesn't supply any coal. Now, he may be in on some of those contracts as a jobber."

* * * * * * * * * * * *

"Q. Did Peabody Coal Company ship coal to Memphis on its contract to Memphis? "A. Has it shipped coal?

"Q. Yes. "A. I don't remember whether we have or not.

"Q. Is that the contract that West Kentucky Coal Company took over? "A. West Kentucky Coal Company are supply our portion of the contract.

"Q. Does Peabody Coal Company own any stock of Tampa Electric Company? "A. Whether Peabody
1428 Coal Company owns any stock of Tampa Electric Company?

"Q. That's right. "A. The answer is no.

"Q. Have you heard of any one purchasing large blocks of Tampa Electric Company stock in the past two years? "A. I think it's pretty good stock to buy, but I don't know of anybody buying any large blocks, no.

"Q. Mr. Kelce, do you have any analysis of profit on the coal sold by Peabody Coal Company to Tennessee Valley Authority? "A. No."

The Court: Did he testify there that West Kentucky Coal Company took over Peabody's contract with Tampa Electric Company? Is that what he said? "A. What did he say?

Mr. Rowntree: He said, your Honor, that sometime back there, and he couldn't say when, but some considerable period back, that he started negotiating between Peabody and West Kentucky for the leasing of the loading and unloading fac. .es on the water from West Kentucky to Peabody.

He states that when the Peabody contract was made
1429 with Tampa, that Peabody Coal Company had the understanding that West Kentucky would ship half the coal to Tampa on that contract.

Mr. Combs: As I read the question and answer it has to do with shipping coal to Memphis.

The Court: Does it?

Mr. Combs: Yes. The question on the bottom of page -- the question and answer has to do with the Memphis plant.

Mr. Rowntree: I think your Honor was addressing a question to the Tampa Electric Company contract. Is that the contract you were inquiring about?

The Court: I lost the connection, and I heard the witness say West Kentucky Coal Company took over Peabody something.

Mr. Rowntree: The answer to that was:

"The arrangement that we would take from West Kentucky Coal Company or one of those subsidiaries tonnage equal to half of the Tampa contract."

The Court: But he goes on and connects it with Memphis.

Mr. Rowntree: Then he goes into the Memphis situation.

Mr. Combs: Then the answer your Honor heard about West Kentucky shipping part of the contract to Peabody, has to do with the Memphis plant.

1430 Mr. Rowntree: That's right. The actual shipments from West Kentucky are on Peabody's part of the Memphis contract.

The Court: And is Memphis a municipal plant?

Mr. Combs: That is right. That is the testimony here. And the testimony show there are five or six suppliers that are not even named here.

Mr. Robertson: Wait a minute.

The Court: You mean Memphis is in the coal business down there?

Mr. Rowntree: Coal buying business. A municipal plant there. They buy coal to generate electricity in their municipal plant over there.

The Court: I see. All right.

Mr. Rowntree: And Mr. Kelce here says that the coal—the "West Kentucky coal was diverted from Tampa con-

tract to the Peabody contract to ship it to Memphis because we found it to the best interest of both of us to ship it elsewhere."

Mr. Combs: I don't know where you are reading.

Mr. Rowntree: Top of page 31, second line.

Mr. Kramer: There is a diversion of the witness to show, I think, there was coal shipped to Memphis. We admit that West Kentucky shipped coal to the municipal plant in Memphis, but that is all it amounts to.

1431 Mr. Robertson: Your Honor, the witness testifies otherwise.

Mr. Rowntree: On the Peabody contract?

Mr. Kramer: Yes. Peabody Coal Company had a contract to ship coal to the Memphis plant, and the answer is: That is right.

* * * * * * * * * *

1432 "Q. Mr. Kelce, do you have any analysis of profit on the coal sold by Peabody Coal Company to Tennessee Valley Authority? "A. No.

"Q. Now — "A. Afraid to look at some of them.

"Q. Peabody Coal Company was awarded a contract to supply coal from properties adjacent to the Paradise site of the new TVA Power Plant being constructed at Paradise, Kentucky; is that correct? "A. That's right.

1433 "Q. When did you first learn about the Paradise Plant being constructed by TVA? "A. When did I learn it was going to be, or they were anticipating it?

"Q. They were anticipating it. "A. After we placed our bid.

"Q. What was the bid that you are referring to there? Was there an invitation for a bid? "A. Invitation, yes.

"Q. Do you recall what the invitation specified in the way of quantity of coal? "A. No, I don't. It mentioned a new generating station.

"Q. Did it specify sixty-five million tons? "A. No.

"Q. Did you have discussions with TVA preliminary to the submission of your bid? "A. No, I didn't.

"Q. Did anyone of Peabody Coal Company under your authority have such discussions? "A. There was some discussions, I don't know whether they were afterwards or before, I don't remember.

"Q. I notice here, Mr. Kelce, on the bid award of July 27, 1959, that — "A. July 27th?

1434 "Q. 1959, that your Peabody contract for the Shawnee Plant was awarded that day, and also down at the bottom the new plant contract was awarded. Were those two awards at the same time? "A. The two awards, I don't get you.

"Q. Were they made at the same time? "A. Which two awards are you talking about?

"Q. The one down at the bottom here (indicating). "A. Date of award is October 1. Is this the other one you are talking about (indicating)?

"Q. Yes. September 30th, 1959? "A. '59. That was a day apart.

"Q. Were there negotiations between TVA and Peabody Coal Company with respect to this Paradise Plant correct? "A. After the bid were there negotiations?

"Q. Yes. "A. Yes, sir."

* * * * * * * * * *

"Q. Do you have a copy of the invitation? "A. Do I have a copy?

"Q. Yes. "A. No. I don't have a copy.

* * * * * * * * * *

1435 "Q. Will you supply a copy if you can find one?"

* * *

"A. I don't see why we wouldn't."

Mr. Rowntree: That invitation is in the file, in the original here. In order to maintain continuity, I would like to retain the right to put that in the connection with the contract when the contract comes in. The contract itself could not be verified until we have the TVA witness on the stand.

The Court: All right.

"Q. Do you know, Mr. Kelce, when you started to acquire the right to mine coal on the properties adjacent to the Paradise site sometime before this contract was made; is that right? "A. Yes; we purchased most of that
1436 property from the Wickliffe Coal Company, twelve or thirteen years ago.

"Q. Twelve or thirteen years ago? "A. Yes.

"Q. Does that property lie immediately south of the plant site? "A. No, it's west of the plant site. Some of it lays south, but the majority lays west."

"A. I assumed that is what your question was."

"Q. Mr. Kelce, can you describe the type of equipment that you use for your stripping operation? I understand it's unusual type of equipment. What size shovels do you use? "A. All the way from — for stripping I assume that is what you are talking about?

"Q. Yes, sir. "A. All the way from ten yards to seventy.

"Q. Seventy yards? "A. Yes, that's the largest machinery we are now operating.

1437 "Q. How many tons make up seventy yards?"

Mr. Kramer: Of course, your Honor, we are continuing our objection because this is long subsequent to the period, and the type of operation, the size of equipment this company may be using in the future long after this period we think is immaterial and irrelevant.

The Court: All right. That is along the same line?

Mr. Rowntree: Yes.

The Court: Objection overruled.

(The reading of the deposition continued.) "A. About a hundred five tons.

"Q. And one dipper of that shovel makes seventy-five tons, did you say? "A. About a hundred five tons.

"Q. Does this Paradise plant contract contemplate larger shovels than that? "A. That's correct.

"Q. Do they make such shovels today? "A. There hasn't been one made, they are making one, we hope it works.

"Q. How big will that one be? "A. Hundred fifteen yards."

1438 Mr. Kramer: Your Honor, we are continuing that objection. They are projecting—they will build a shovel that will handle 115 yards of coal. Why would that be competent for this case?

Of course, we know mechanization is going to improve.

The Court: I will sustain the objection to that last question, what they expect, 115 tons. That might be in the realm of conjecture.

Mr. Rowntree: If your Honor please, we are talking about a specific contract that calls for this shovel to be put in operation to take over the supplying of a TVA plant.

The Court: If you will read the provision of that contract to me.

Mr. Rowntree: That contract was subsequently put into the proof through the TVA witness.

The Court: I will reconsider the ruling, if you will read that to me, if that is in the contract. The basis of the ruling was that it is conjecture. If it is in the contract, they have bound themselves to do it, and that presents another matter.

Mr. Rowntree: This is under Exhibit B, mining operations of the bid submitted by TVA, which became a contract.

1439 "The major equipment contemplated to be necessary for this operation follows:

"1—Marion Type 5960 shovel with 100-yard capacity dipper and 150-foot boom."

It looks like he was off five yards there.

The Court: Fifteen yards.

Mr. Rowntree: Yes, he was off 15 yards. Maybe they changed their mind.

"1—Marion Type 5960 shovel with 65-yard dipper and 220-foot boom.

"4—Overburden drills of the type of the Bucyrus-Erie 50-R drill.

"4—Drills for the interval between the No. 12 and No. 11 coal of the type of the Bucyrus-Erie 40-R drill.

"2—8-yard long-range shovels for the removal of the parting.

"2—10-yard medium-range shovels for the loading of the coal.

"A sufficient number of haulage trucks of the 100-yard, 80-ton capacity type now offered by several manufacturers, or larger, possibly of 200-ton capacity, if available."

It goes on and describes other equipment. It also involves some underground mining and the use of some continuous miners in the underground mining phase.

1440 Mr. Combs: May I inquire of counsel, your Honor—I don't have a copy of that and I am not too familiar with it: May I inquire of counsel whether or not that TVA required this type of equipment to furnish this coal?

The Court: Yes; sir.

Mr. Rowntree: The TVA required that the bidder submit his equipment that he would use in the operation when he mined the coal that was contracted.

Mr. Kramer: We want to state our objection clearly, your Honr, on this.

This contract, TVA contract, to which this type of equipment is listed as evidentiary of what they would use when they produced the coal under the contract, if awarded, your Honor, was not entered into until the first day of October, 1959. There is no way on earth to say what was anticipated a year before in 1958, nor to say that this was anticipated in connection with a conspiracy.

Here is something that arise in 1959, long afterwards. Not part of any agreement to form a conspiracy. The agreement for the conspiracy must have been in existence prior to December 31, 1958 for it to be a basis for recovery in this lawsuit.

1441 Your Honor has ruled that subsequent course of conduct is admissible to show that conspiracy existed prior to December 31, 1958

But, your Honor, here is the TVA calling for bids for a new plant, for a brand new plant that they are going to put into use—a plant which is not yet completed today, the time we are talking to your Honor, and they say that they can prove as a part of an intent, as a part of an agreement, unlawful agreement, what may have been contemplated a year afterwards, looking to something that is to be built some time out yonder in the future.

Now I can't for any reason on earth, your Honor, see how this could be a part of an agreement or evidenced an agreement even of conspiracy that existed prior to December 1958.

In 1959 TVA asks for the first time, your Honor, under this record, for the supply of a certain quantity of coal for a new plant—for the first time, almost a year after the termination of any rights under a conspiracy, to put it the way your Honor has ruled, of any rights under a conspiracy. Now they seek to say that because in 1959 some company, alleged to be a conspirator, said, "We are going to use a certain type of machinery to produce a certain type
1442 of coal", that evidences an intent upon the part of the United Mine Workers or the trustees of the Welfare Fund, back in 1958 and prior thereto, to absorb the coal market.

The Court: I don't understand, Mr. Kramer, that he is offering that testimony for the purposes that you have indicated.

As I understand it, he is offering that testimony to show that the company to which it relates operated with this large machinery, that it was a large company, and that by reason of its large machinery, large tools, it could put out more coal with less manpower; therefore, it could save costs to that extent, and having saved that cost, it was in a position to pay what the cross plaintiff has characterized as

high wages, union wages, plus what the cross plaintiff has characterized as a high royalty, and that in the light of that situation, since he contends that it bears on those questions, the Court is of the opinion that it is competent.

Has the Court misconstrued the purposes for which you offer this testimony, Mr. Rowntree?

Mr. Rowntree: That is part of it, and also upon this question—not this just alone, but all the proof in the record.

1443 This is offered on the question of dangerous probability of obtaining a monopoly of the TVA market, and we think that this is very strong evidence.

They have taken a 65-million ton contract here, which is considerably over a complete three year supply of TVA coal, and we say that is dangerous probability of obtaining a monopoly on this market. This is a 65-million ton contract, your Honor.

The Court: As I understand, Mr. Kramer is objecting to you introducing testimony pertaining to this mechanical equipment. The Court is undertaking to pass on that objection.

What does the mechanical equipment have to do with the issues in this case, Mr. Rowntree? The Court has undertaken to state that to Mr. Kramer. Is the Court misinterpreting your position about it?

Mr. Rowntree: No, sir, your Honor has stated the specific issue upon which the mechanical equipment bears. The contract as a whole, however, is introduced on this question of dangerous probability.

1444 The Court: The size of it. We went into that question of size and used the grocery store as an analogy, the little grocery store, since it is so small, it couldn't monopolize anything.

Mr. Rowntree: That's correct.

The Court: But the bigger something gets, the bigger it gets, it might be in a position to monopolize or be in a position to attempt to monopolize.

Mr. Rowntree: That's correct.

Mr. Kramer: Let me say this, Your Honor.

The Court: But I sustain your objection to that testimony about what they propose to do in the 115-ton—

Mr. Rowntree: Shovel.

The Court: shovel, because I think that is getting too far afield.

Mr. Kramer: All of this, Your Honor—

The Court: Off the record.

(Remarks off the record.)

Mr. Kramer: But Your Honor, our objection goes broader, to what Your Honor has just ruled incompetent in this respect.

Let me state what we have here. Counsel is now offering—they haven't offered the contract itself, but they have offered the exhibit to it as to the type of machinery
1445 which the bidder stated to the Tennessee Valley Authority they would use, if they were awarded the contract.

Now, Your Honor, the contract itself, no bid was called for the contract, this contract, for sale of coal by TVA, and it talks about the sixty-five million tons, that was not in the picture in 1958 or any time prior thereto. Later developments in the industry caused the TVA to decide they wanted to award a large contract, and if they say we want to award a large contract in order to be—that that contract may be fulfilled, we want to know what kind of machinery and equipment you are going to fulfill it with, and thereupon, the bidders submitted the type and kind of equipment they were going to use.

Now, Your Honor, counsel tells Your Honor that this is admissible, because it shows the dangerous possibility of the monopolization of the industry. How in the world, when these things hadn't been thought of so far as anybody within the sound of my voice knows, and I think anybody on earth knows, how anybody could say that a year a half later, because someone or more than that later—no, not

quite that much later, but October, 1959, ten months later—ten months later, someone comes along and says, "We want a certain type of contract for so many tons of coal."

1446 Now that could not have created within the period of this lawsuit, material to this lawsuit, any fear of monopoly. It had nothing to do with dangerously monopolizing the field—danger of monopolizing the field. It had nothing to do with anything of that sort.

Here is the big machines we say later on, maybe some company is going to use; here is the large amount of coal somebody is going to purchase. That wasn't in the field; that wasn't in the purchasing area; that wasn't a quantity of coal to be monopolized at that time. It is clear otuside of the field. It is in the future. It was unthought of in the period here, and how that can be used as a guide to determine whether or not there was an unlawful agreement, the result of which was to create a reasonably-founded fear or likelihood—not fear, reasonably-founded likelihood—of monopolization, when it didn't even exist back in the period here, it might as well have been ten years later.

The Court: Didn't we learn later in our ruling and quotation from 15 Corpus Juris Secundum on a certain section that the Courts permit acts of the alleged conspirators that occurred before the time period of time involving the

1447 conspiracy as well as acts alleged to the conspirators subsequent to the time?

Mr. Kramer: That authority holds—

The Court: If they shed any light on the ultimate issue involved in the lawsuit, namely whether the anti-trust laws were violated, and secondly whether the cross-plaintiff was injured as a result of this?

Mr. Kramer: Your Honor, that authority so holds provided they are within the same range or type of conduct.

This, we say, Your Honor, with all earnestness, is not within the same type of conduct. No conduct for anything like this quantity of coal bids had ever been called or so far as I know, and certainly so far as this record shows. —

Under that authority—if that be a good authority, and you remember there was a "provided by" in there—but assuming that Your Honor is correct on that, there is no similarity here, the conduct, sixty-five million-ton contract. Oh, no. Nothing to compare with that, that they now seek to put in afterwards, shovels the size of this one. Oh, no. Even half the size of this. I don't think they got that big. They may have, but not more than half the size of this.

There is no relationship between what happened
1448 before and happened afterward, and I don't think that 15 Corpus Juris Secundum is the authority.

The Court: The Court is of the opinion that that testimony is competent for whatever bearing it may have, if any—if any—on the ultimate issues involved, namely whether there was a monopoly created by cross-defendants or an attempt to monopolize in which cross defendants participated, and whether or not this cross-plaintiff was damaged as a direct and proximate result of these alleged violations of the anti-trust laws.

Now the Court sustains counsel's objection to that machinery which related to the future, one item of which dealt with a proposed 115-ton shovel which the party to this contract, Mr. Browntree, expected to construct in the future. The Court holds that that is getting into the realms of uncertainties; it is conjecture; it is problematical; it is too uncertain to go before the jury. Therefore, the objection to that part of the testimony is sustained.

Mr. Rowntree: I think, Your Honor, that we should not put it in on the question of damages.

The Court: The Court has held over and over in this case, at the present time, and will continue to hold
1449 that the testimony that relates to events that occurred before February the 14th, 1954, and testimony that relates to events that occurred subsequent to December the 31st, 1958, may not be considered by the jury as bearing on the question of damages, because only damages that the jury will be allowed to consider is that that resulted

directly and proximately on the alleged violation of the anti-trust laws by the cross-defendant, and which occurred between or from February the 14th, 1954, to and including December 31, 1958.

Mr. Rowntree: I would like permission to introduce this contract, Tennessee Valley Authority and Peabody Coal Company dated October 1, 1959, as the next exhibit, and the Invitation for Bids which were submitted with the deposition of Mr. Kelce as the exhibit after that.

The Court: The Court holds that those exhibits may be received in evidence.

Mr. Kramer: I don't care to reargue the question except to point out to Your Honor that this contract is not yet enforced today under its terms, does not go into force and into effect until such time as the project for which this coal is to be furnished goes into operation, which may be three or four years in the future. It doesn't become
1450 effective until that time.

(Exhibits Nos. 80 and 81 were marked for identification and filed.)

The Court: Mr. Rowntree, what about Mr. Kramer's last observations?

Mr. Rowntree: The contract was a result of invitations put out July 19, 1959, some seven months after our company was put out of business.

Mr. Kramer: We deny that fact, that the company was run out of business. Let's keep the record straight. They ceased to operate as a partnership and started operations as a corporation. We deny they were run out of business.

The Court: Mr. Kramer says this contract purports to go into effect three or four years from now. What about that?

Mr. Rowntree: I think the Paradise plant is pretty well along. It is going to be operating before long, but I can't give you the precise date.

Mr. Kramer: It isn't operating today, counsel will concede?

Mr. Rowntree: I concede that.

Mr. Kramer: The contract doesn't go into effect
1451 until the Paradise plant starts operating.

The Court: Does the contract provided by the TVA to provide coal when the Paradise plant is—

Mr. Rowntree: That's right, Your Honor.

Mr. Kramer: No dispute about that, but it is not to be effective until the Paradise plant is ready to open.

The Court: What about the prospects for the Paradise plant?

Mr. Rowntree: It is well along the way. I'm sorry I don't have a date on that.

The Court: What does the contract say?

Mr. Rowntree: I think it's got a prospective date on it.

The Court: I would like to read that and see.

Mr. Rowntree: If Your Honor please, I might say this, that the contract does require:

"Peabody will proceed with due diligence to install facilities for the orderly mining of coal which can practicably be recovered from this area from strip mining and from high-wall mining."

As the witness states, they have contracted out for the shovels. In other words, there are present obligations arising from the contract to get ready.

1452 Mr. Kramer: It seems that answers Your Honor's question.

The Court: And does Peabody agree to supply to TVA so many tons per year over a period of years?

Mr. Rowntree: Yes, sir. I might read this portion here.

"TVA will use such coal in a power plant with two or more units with a combined capacity of approximately one million two hundred thousand KW which it will proceed with due diligence to construct within the area outlined in blue on Exhibit A.

"TVA's plans call for commercial operation of the first generating unit by October, 1962, and of a second unit by June, 1963.

"Subject to the following provisions, coal shall be furnished at a delivery site of forty thousand tons a week from the first full calendar week in August, 1962, through the last full calendar week of April, 1963, and that a delivery rate of fifty thousand tons a week thereafter until a total of sixty-five million tons has been mined and delivered hereunder."

Mr. Kramer: That is the reason I used the ex-
1453 pression "three years", because this is dated in 1959, and the first obligation to furnish, Your Honor, is in 1962. I thought I was correct on that, that is the three-year period I used in my argument to Your Honor.

The Court: I see. All right, the Court holds that is competent for whatever bearing it may have to the issues involved in this case.

1454 (The reading of the deposition was continued.)

By Mr. Rowntree:

"Q. Mr. Kelce, did you have any discussions with anyone about producing rail freight rates to eastern plants of the TVA in the past year? "A. No.

"Q. You are familiar with the reduction in rail rate to the Widow's Creek plant? "A. No, I am not.

"Q. Have you submitted any bids contemplating that reduced rate? "A. If there had been I don't know about it

"Q. Do you handle the submission of bids in your organization? "A. Do I?

"Q. Yes. "A. No."

* * * * * * * * * * *

The Court: Yes, sir.

Over what period was this 65-million tons of coal to be furnished?

Mr. Kramer: It doesn't say the period. It gives mini-
mum monthly deliveries, and says until a total of 65-
1455 million tons have been delivered. The period of time you can calculate, but it doesn't give period of time. Except it says minimum quantities and it varies as between one and two units that are installed.

Mr. Rowntree: That is correct. It isn't spelled out. I don't think the maximum is actually spelled out.

Mr. Robertson: No, it isn't.

Mr. Kramer: The maximum is spelled out and the rate of delivery is spelled out with a beginning date. That is all.

* * * * * * * * * *

CROSS EXAMINATION

By Mr. Combs:

"Q. Mr. Kelce," ----

Mr. Combs: This is the cross examination without waiving our rights of objection, may it please the Court.

The Court: Yes, sir.

"Q. Mr. Kelce, talking about mechanization, do you know how long Peabody has operated mechanized mines? "A. Mr. Kramer, I was with the Sinclair Coal Company up until July of 1955. I can only speak from 1955.

1456 "Q. When you came with Peabody in '55, were they operating mines largely mechanized? "A. Yes.

"Q. You have been with the coal industry for a good many years, and from general knowledge, can you tell us whether Peabody had been mechanized for many years prior thereto! "A. Yes, they had been.

"Q. I will ask you if Peabody hasn't for something like a quarter of a century been one of the outstanding mines or branches of the mining industry in the mechanization of mines, it has been so recognized in the industry? "A. I think that's true.

"Q. And hasn't Peabody had the reputation even before you came with it, and isn't it true, as a matter of fact, you have tried to keep up with the most modern mechanization process concerning the size of seams geographically, topography at the place where you are operating? "A. We have.

"Q. And you are continuing that policy today by even going into larger mechanized equipment? "A. That's the reason we are developing this hundred fifteen yard shovel.

"Q. Has there, to your knowledge, in recent years, especially since you were connected with Peabody, but even going back years prior thereto, been any change so
1457 far as you know of policy with reference to operating the most modern means they can? "A. I didn't understand.

"Q. Has there been any policy— "A. Since I came into the picture?

"Q. Yes. "A. Not that I know of, no.

"Q. You have operated, and you are today, from your general knowledge before you came with Peabody, they have operated largely on the surface or strip mining? "A. The Peabody Coal Company has all been under ground.

"Q. Until when? "A. Until they acquired Sinclair's properties in July, 1955.

"Q. Since then what have you been doing? "A. Most of it is stripping operations.

"Q. Today you have only one deep mine? "A. That's correct.

"Q. Was that deep mine in operation in 1955 and '56? "A. Yes.

"Q. How about its capital compared with 1955 and 1956 as of today?"

* * * * * * * * *

1458 "A. It's producing more coal today per shift than it did in 1955.

"Q. In answer to Mr. Rowntree's questions, you told us something about the more modern mechanization of your strip mines. What about the deep mining in this one mine you still operate? "A. There has been improvements.

"Q. Was it a mechanized mine in '55? "A. Yes.

"Q. Was it at that time what you would consider modernly mechanized? "A. It was a highly modern mechanized mine.

"Q. From your knowledge of that mine and the industry, had it been mechanized for many years? "A. It's

1459 a fairly new mine. It's probably twelve, thirteen years old, but it has been a highly mechanized mine.

"Q. During the twelve or thirteen years of operation has it been a highly mechanized mine? "A. That's correct.

"Q. Why does Peabody go in for mechanization? "A. It's the only way we can live and compete with other fuels.

"Q. Explain what you mean by that, will you, please. "A. Compete with the gas and oil that we have to compete with in this section of the country.

"Q. What is the effect on cost of operation, and in which phase of the cost of operation does mechanization have in effect? "A. Would you repeat that question?

"Q. Let me get at in a different way? Does modern mechanization either underground or on the surface permit you to operate with less man hours per tonnage than the old methods? "A. Yes.

"Q. Has mechanization improved over the last quarter of a century, that has been true; is that correct? "A. That's correct.

1460 "Q. There has been a gradual reduction in the number of man hours per ton of coal produced as mechanization has increased and improved during the last twenty-five years? "A. Yes.

"Q. What new fuels has coal had to compete with in the last quarter of a century, and I mean by that, what fuels have grown in use as coal had to meet its growth to maintain its market? "A. In the Middle West where we operate, gas mostly.

"Q. In order to compete with gas as a fuel, it's been necessary for you to be able to produce coal at a lower cost? "A. That's correct.

"Q. Has the production of oil or the use of oil as a fuel had any effect on the amount of coal that is consumed? "A. Yes, to a certain extent. Not as much as gas, however.

"Q. What is the principal market for coal today, what type of industry or use? "A. On our coal it's the Public Utility industry.

"Q. I take it you intended by an answer made earlier this afternoon to a question by Mr. Rowntree to state you did not know just when Peabody entered into its first
1461 collective bargaining agreement with the United Mine Workers of America? "A. You confuse me there; Peabody? See, I was with the Sinclair Coal Company prior to 1955.

"Q. And I understood you told Mr. Rowntree when you came with Peabody in '55, there was already in existence between Peabody and United Mine Workers of America a collective bargaining agreement? "A. That's right.

"Q. When they first entered into a collective bargaining agreement, and by they, I mean, United Mine Workers and Peabody, you do not know? "A. I don't know.

"Q. Since you have been connected with Peabody, Peabody negotiations for the collective bargaining agreement, I understood from your answer awhile ago, was handled largely by a Coal Association which Peabody is a member? "A. That's correct.

"Q. What is the association to which Peabody belongs? "A. There are several of them, Illinois Coal Operators' Association, Ohio Coal Association, Southwestern Coal Association, I think the Kentucky Coal Agency, they call the one in Western Kentucky.

"Q. I take it you companies that belong to these
1462 associations, and for which companies the companies do the negotiating on the bargaining agreement, instruct your negotiators to get the best contract they can out of the United Mine Workers? "A. I am sure that's true.

"Q. At least that's what you want to get? "A. That's what we are supposed to have.

"Q. You have not personally participated in any negotiations? "A. No, I haven't.

"Q. Let's talk a minute about the safety program of the Peabody outfit. What is the attitude of Peabody on safety, safety regulations and statutory requirements with refer-

ence to safety? "A. We have a safety director that is in charge of our safety program in all these coal mines.

"Q. Why? "A. Because it's real important to us.

"Q. Why? "A. To keep our mines as safe as humanly possible.

"Q. Why is it important to keep them that safe? "A. We value a man's life.

"Q. Have you cooperated in any safety programs since you have been connected with Peabody either for the enactment of federal legislation or state legislation in
1463 states in which you function for the purpose of freezing out any little miners? "A. No.

"Q. Small operations? "A. No.

"Q. Have you ever entered into any arrangements of any sort with reference to safety where the objection or purpose of your planning on safety was with the intent or for the purpose of freezing out the little fellow who may be claimed he couldn't pay for such safety? "A. No.

"Q. Has it been your purpose in the mechanization of mines of Peabody since you have been connected with it and further improvement, such mechanization to freeze out the little fellow? "A. No.

"Q. I believe the stock of Peabody is listed on one of the markets, isn't it, one of the stock markets? "A. On the New York Stock Exchange and the Midwest Stock Exchange.

"Q. It's been listed on these exchanges for many years? "A. Well, I can go back to 1955.

"Q. You have got a cut off date for most of these questions, in '55? "A. Yes.

1464 "Q. Mr. Kelce, do you know now approximately how many stockholders there are of Peabody's common stock? "A. Something over ten thousand.

"Q. And, of course, the holdings of various stockholders vary greatly in amounts? "A. Yes, one share up to several hundred thousand.

"Q. You were asked awhile ago about whether or not after Peabody became the owner of the, I believe it's the St. Ellen Mine, there had been any election among the employees of that mine in order to determine whether or not the men employed therein desired the United Mine Workers to represent them as a collective bargaining agent, and I think you said there was no election so far as you know. Do you feel certain there was no election held there? "A. I am not sure. I am not positive.

"Q. You are not positive? "A. No.

"Q. You don't know whether the men had a voluntary election, though, not supervisod by or under certification or under notification of the National Labor Relations Board? "A. No.

"Q. You can't say whether it was or wasn't? "A. That's right.

"Q. You do know, however, that Peabody did not
1465 recognize the United Mine Workers of America as a bargaining agent for the men in these two mines that were acquired by peabody in '56 and '57 until after they had received cards indicating a majority of such employees desired U.M.W. to represent them? "A. That's right.

"Q. After that do you know whether any other steps with reference to notice of termination of contract with Progressive Miners had been given pursuant to terms of Progressive Miners' Agreement, collective bargaining agreement prior to entring into the U.M.W. agreement? "A. I don't know.

"Q. You didn't handle the legal phase of that? "A. No.

"Q. I notice some reference to something of that sort in the letters, you did not handle that? "A. No."

REDIRECT EXAMINATION

By Mr. Rowntree:

"Q. Mr. Kelce, this Paradise, T.V.A., contract contemplates the use of one or more continuous mining machines

on the — "A. This will be a strip mine, Mr. Rowntree, we couldn't use continuous mining machines, we use those in the underground.

"Q. As I understand it, the available strip tonnage
1466 was to be supplemented by some underground mining to make up— "A. That's contemplated, yes."

Mr. Kramer: Our objection continues because we are talking about the same contract.

The Court: That's right.

(The reading of the deposition was continued.)

By Mr. Rowntree:

"Q. In doing that underground mining, it's contemplated the continuous mining machine would be used? "A. Yes, that's our thinking.

"Q. What is a continuous mining machine? "A. Well, on conventional mining, you have a machine that goes into a working face and cuts the coal, cuts the bottom part of the seam, then your drillers, shooters, come in and shoot the coal down, then the third operations is the loading machines come in that loads the coal. Well, that's three separate operations.

1467 "Q. That's also— "A. That's conventional mining, conventional mechanized mining. Now, in continuous mining, the machine goes in and digs the coal off the solid, it isn't necessary to cut it or shoot the coal.

"Q. The machine does all the work? "A. Yes, one machine does the three operations.

"Q. Including the loading? "A. That's right.

"Q. When Peabody Coal Company acquired the properties of Sinclair Mines, Incorporated— "A. You say Sinclair Mines, Incorporated, you mean the Sinclair Properties.

"Q. Properties, yes. Did the stockholders of the Old Sinclair Mines receive stock of Peabody Coal Company in exchange for those properties? "A. Yes.

"Q. And did that stock which represented that exchange

amount to six million five hundred thousand shares, approximately? "A. That's approximately right, yes.

"Q. Immediately before that transaction, were there approximately eight hundred seventy thousand shares of Peabody outstanding? "A. I have forgotten.

1468 "Q. It was a greatly smaller number of shares outstanding before the transaction? "A. That's correct.

"Q. And the shares the Sinclair Mines stockholders acquired of Peabody Coal Company amounted to several times the number of shares that were outstanding before that transaction? "A. That's correct."

* * * * * * * * * * *

Mr. Rowntree: That concludes that deposition.

We have the deposition of Mr. R. J. Snider, taken the same time and place.

* * * * * * * * * * *

"R. J. SNIDER

* * * * * * * * * * *

DIRECT EXAMINATION

By Mr. Rowntree:

"Q. What is your name, sir? "A. My name is R. J. Snider.

"Q. Where do you live? "A. I live in Webster Groves, Missouri.

1469 "Q. What is your position, Mr. Snider? "A. I am Vice President of Peabody Coal Company.

"Q. Are you in charge of financial work of this company? "A. Yes.

"Q. How long have you been in that position? "A. I have been in that position since about 1953.

"Q. Mr. Snider, I show you a letter dated—"

Mr. Kramer: Just a moment.

Your Honor, we are going back into a phase of some dealings between this company—the Peabody Coal and this other mining organization, organization of miners, and we object to this and any reference to it.

* * * * * * * * * * *

Mr. Rowntree: I think we could summarize them, your Honor, maybe—let's see now.

The Court: Are they introduced for the same purposes as the other letters, on the question of notice, that they were claiming to be the representative of the men?

Mr. Rowntree: In this particular instance these are letters terminating—showing a termination of the authority
1470 of a coal association to represent Peabody in signing contracts for Peabody with Progressive Miners.

* * * * * * * * * * *

(Thereupon, the jury retired from the courtroom and the following proceedings were had in the absence of the jury.)

The Court: Mr. Rowntree, I suggest that you pick out paragraphs illustrative of your point.

Mr. Rowntree: Yes, sir.

This letter is from Perry Coal Company, and I think all these companies sent the identical letter pretty much to the coal association that had been representing these companies in dealing with Progressive Mine Workers in collective bargaining, and these letters contain this statement here:

"This letter shall constitute a revocation effective immediately of any authority that the association may have to negotiate on behalf of the company, any extension of
1471 or any changes, additions or amendments to the existing collective bargaining agreement with Progressive Mine Workers of America, District No. 1, which is terminable on or after September 30, 1957."

The Court: That is the paragraph you want to use in each of the letters and you want to use it for the sole purpose of showing that collective bargaining dealings between the Progressive Union and these companies were terminated?

Mr. Rowntree: That is correct.

The Court: The Court holds that is competent.

Is that all you want to introduce of the letters?

Mr. Rowntree: That is right.

The Court: Can you gentlemen stipulate on these other letters? If not, I will let him read each paragraph.

Mr. Kramer: I think they all contain a similar paragraph. I think, for the purpose of the record, we need to get our reason for the objection.

Mr. Combs: The letter in question, your Honor, is a letter addressed by an official of Peabody Coal Company to a coal association that was their bargaining representative
1472 as counsel has stated. It was a notice on the part of the coal company to terminate the authority of that association to bargain with them or anyone.

We object to that type of evidence, because obviously under the law, the operator has a right to choose their collective bargaining agent, and there is no showing and can't be any showing that the union had anything to do with them terminating their bargaining agent.

That is between two separate entities and could not be evidence of any conspiracy against these people.

The Court: All right, I hold that is competent and I will let that be read into the record in the presence of the jury.

Do you want to stipulate right now, in the absence of the jury, so we will know where we are going when jury returns?

Mr. Combs: I suggest, if he has other letters, we may.

The Court: All right.

Mr. Rowntree: The next series of letters is from all this group of little companies and one big company, the
1473 big company and its subsidiaries.

Mr. Kramer: We don't agree to use that language to the jury, but go ahead. We know what you mean.

Mr. Rowntree: These are letters from these companies to Progressive Mine Workers of America, sending copies of this previous series of letters, terminating the bargaining authority of the coal association.

The Court: And you just want to state that to the jury, is that right?

Mr. Rowntree: That is right.

The Court: The names —

Mr. Combs: Subject to our objection. We merely wish to point out that the case that was involved in this, the court said that they had a legal contract and the company terminated it within its terms. There is no argument about that.

Mr. Rowntree: I don't think there is any argument. It is just preparatory to what happened after that, to focus the matter.

Mr. Combs: My position is just simply this. I wouldn't want the jury to think we had some kind of question about the legality of it.

Mr. Rowntree: I think counsel has a good point there. We don't maintain there is anything wrong.

1474 The Court: That is right. You want to state to the jury the sole purpose, and you don't contend there is anything wrong with these letters.

Mr. Rowntree: About these letters.

The Court: That is right.

* * * * * * * * * * * * *

(A recess was had, after which the jury returned to the courtroom and the following proceedings were had in the presence of the jury.)

The Court: All right, gentlemen.

Mr. Rowntree: If it please the Court and ladies and gentlemen of the jury, it is stipulated by and between counsel that the two companies which own these two mines, the Millstadt mine and the St. Ellen mine, had used the Coal Producers Association of Illinois to bargain collectively on labor matters for those two mines. And on July 19, 1957, those two companies, subsidiaries of Peabody Coal Company at that time, dispatched letters to the Coal Producers Association of Illinois cancelling their authority to represent these two mines for collective bargaining purposes, and on the same day—

The Court: What is the name of the mines again?

1475 Mr. Rowntree: That is the Millstadt mine and the St. Ellen mine.

The Court: St. Ellen?

Mr. Rowntree: St. Ellen, E-l-l-e-n.

And on the same day, July 19, 1957, the two companies dispatched letters to the Progressive Mine Workers of America giving notice of termination of the collective bargaining agreement with respect to these two mines, to be effective September 30, 1957.

It is not the position of either side that there was anything wrong in the dispatching of these letters. This evidence is presented only to clarify the situation with respect to the subsequent testimony.

Is that agreeable?

Mr. Combs: That is agreeable.

Mr. Rowntree: With that, we will turn from Mr. Snider's deposition to the deposition of four individuals who were or had been connected with Progressive Mine Workers of America.

Mr. Combs: May it please the Court, may we have an objection that would run to these depositions, because they are along the same line, and our objection would be on the same line—that is a Labor Board case and is not proper evidence here.

1476 The Court: Yes sir.

Mr. Rowntree: The deposition was taken October 7, 1960 in East St. Louis, Illinois.

* * * * * * * * * * *

"RAYMOND DUPEE

* * * * * * * * * * *

DIRECT EXAMINATION

By Mr. Rowntree:

"Q. State your name, please. "A. Raymond Dupee.

* * * * * * * * * * *

"Q. And in 1957, the early part of the year, were you president of the Progressive Mine Workers of America?
"A. I was.

"Q. How long had you held—did you hold that position?
"A. two years.

1477 "Q. From what dates? "A. Well, it would be February 1st, that would be in fifty-seven, well, February 1959.

"Q. To February 1, 1959? "A. Yes."

The Court: Is this a deposition you are talking about?

Mr. Rowntree: Yes.

The Court: What is his name?

Mr. Rowntree: Raymond Dupee, D-u-p-e-e. He was president of Progressive Mine Workers of America.

The Court: All right.

Mr. Rowntree: Not at the time of the deposition, however. This was during the time of this incident.

Mr. Combs: And he was not an employee of the company at this time.

The Court: I see.

Mr. Rowntree: At the time of the incident.

Mr. Combs: Yes.

The Court: But he worked for whom?

Mr. Rowntree: He subsequently worked for the Millstadt mine. He had worked for the Millstadt Mine before he became president of the union and he was em-
1478 ployed after he was president.

Mr. Combs: I believe, as a matter of clarity, your Honor, that we might point out that he was president of a districtwide—it wasn't a local union at all. It was a national union. And he had been working at this mine before he was elected president, and the company, under a contract or custom, he had a right to return to work after he had served in this office. Just for purposes of clarity, that is what happened.

Mr. Rowntree: That is right.

This is not United Mine Workers of America, this is Progressive Mine Workers we are talking about.

Mr. Combs: Right.

(The reading of the deposition continued.)

"Q. From what dates? "A. Well it would be February 1st, that would be in fifty-seven, well, February 1959.

1479 "Q. To February 1, 1959? "A. Yes.

"Q. And you started as president February 1, 1957? "A. Yes.

"Q. The Progressive Mine Workers of America is a labor union, is that right? "A. That is right.

"Q. And it represents employees that work in coal mines? "A. That is right.

"Q. Where is the union concentrated? Does it have a concentration of membership? "A. Well, it would go down as far as Salene County in Illinois.

"Q. Illinois? "A. Yes, and it would go as far north as around the Peoria District. I don't know.

"Q. Peoria? "A. Yes, up in that territory.

"Q. Is that Illinois also? "A. Yes.

"Q. In 1957, what was the largest mine whose employees were represented by Progressive Mine Workers of America? "A. Well, I imagine offhand it would have been the St. Ellen Mine over at O'Fallon."

* * * * * * * * * * *

1480 "Q. How old is Progressive Mine Workers of America? "A. Well, it was formed in 1932."

* * *

"Q. Did Progressive Mine Workers also represent the employees at the Millstadt Mine? "That is right.

"Q. In 1957, early part of the year? "A. Yes.

"Q. Is that right? "A. Yes.

"Q. Now, did the Progressive Mine Workers have individual locals at each of those two mines, St. Ellen and Millstadt? "A. They did.

"Q. Do you remember the number? "A. Millstadt was 167, and O'Fallon was Number 75.

"Q. And O'Fallon is St. Ellen Mine? "A. Yes.

"Q. Did each of those locals have a president and Mine Committee? "A. They did.

1481 "Q. Or Pit Committee? "A. Yes.

"Q. Now, I believe that you are under subpoena here today, is that correct? "A. That is right."

* * * * * * * * * * * *

"Mr. Rowntree: Mr. Dupee, when did you first become aware of the drive of the United Mine Workers of America to become the collective bargaining agent of the employees at the two mines we have mentioned? "A. Well, it was sometime in—it was sometime in June, just prior to the vacation period of the miners.

"Q. And how did you become aware of it? "A. You know this all happened three years ago.

"Q. Yes, I understand. If you can't remember, just state. "A. I had several ways I found out about it, by Mr. Winters, superintendent of the coal company at one time at that mine informed me that there would be a drive made by the United Mine Workers on the part of the United Mine Workers, and they would have cooperation from the company in turning that—"

* * *

1482 "Mr. Rowntree: This is the first information that you had on the subject? "A. Yes, I would say so.

"Q. Mr. Winters was connected with which mine? "A. Well, at one time he was connected with the Midwest Mine as a superintendent, but that was before it was taken over by Peabody.

"Q. Is that the Millstadt? "A. And he served there a lot under Peabody too.

"Q. Is that the Millstadt Mine? "A. That is the Millstadt Mine.

"Q. Now, when was the vacation period in 1957 scheduled to be held?"

* * * * * * * * * * *

1483 "Q. Mr. Dupee, did you receive a letter from the UMW in July of 1957, in correspondence to this letter here which I show you (indicating)? "A. Yes, I received a copy of that letter.

"Q. I would like to have this entire file marked as Collective Exhibit 1, and I would like to have marked as Exhibit '1-A' the letter dated July 1, 1957, signed by Hugh
1484 White, President, on the letterhead of the United Mine Workers of America, District 12, and addressed to the employees of the Midwest-Radiant Coal Corporation."

Mr. Rowntree: If your Honor please, that letter was brought up in the course of Mr. Lewis' deposition, and the substance of the letter—

Mr. Combs: May I inquire from counsel, isn't that the same letter you introduced a while ago?

Mr. Rowntree: No, this is an entirely different letter.

Mr. Combs: From Hugh White?

Mr. Rowntree: Yes.

* * * * * * * * * *

1485 Mr. Combs: Of course, we object.

* * * * * * * * * *

The Court: All right, the Court holds you may introduce it.

1486 Mr. Combs: We reserve our objections and point out that this letter was a letter that was sent to the employees of the two companies involved; it was published in the newspapers; and was subject to radio comment. We don't think it is pertinent here at all.

The Court: All right.

Mr. Rowntree: This paragraph of the letter to the employees of the mines:

"After becoming a member of the United Mine Workers of America and working under the National Bituminous Coal Wage Agreement of 1905, as amended October 1, 1956, they will be eligible to receive all benefits from our Welfare

and Retirement Fund which include —" And there the letter sets forth the benefits under the Welfare Fund:

* * * * * * * * * * *

"Q. Mr. Dupee, you did receive a copy of the letter marked Exhibit —"

Mr. Rowntree: The letter just read from —

(The reading of the deposition was continued.)

1487 "— in the mail?

"A. Yes, sir

"Q. Did you address any letters to the coal companies, Peabody Coal Co., Perry Coal Company, Midwest Radiant Corporation, and Midwest Coal Company? "A. Regarding what?

"Q. Regarding the information that you previously received with respect to the organizing campaign of the UMW? "A. Well, there was several letters sent to the Peabody from my office.

"Q. In what months? "A. Well, there I would have to see. I don't remember the dates."

* * * * * * * * * * *

"Q. Do you have copies of these letters? "A. I don't know."

* * * * * * * * * * *

"Q. Was this after you received information concerning the UMW drive? "A. Yes, it was.

1488 "Q. Did you get replies to those letters? Did you receive replies from the company? "A. No.

"Q. Did you make telephone calls to Peabody Coal Company? "A. Yes, several of them.

"Q. Concerning the same subject matter? "A. Yes.

"Q. Did you talk to anyone at Peabody on the telephone? "A. No.

"Q. Why not?"

* * *

"A. There wasn't anybody available at any time that I called over there."

* * * * * * * * * * *

"Q. I'll show you a copy of another letter, and ask you if that is a copy of a letter which you addressed to the company? "A. Yes, sir, that is the letter I sent.

"Q. Do you have the original of that letter? "A. I don't know whether it is on the files of the Progressive
1489 Mine Workers or not."

Mr. Rowntree: To save paperwork, those letters have already been referred to and are the ones which give notice from Progressive to Peabody, and its subsidiaries, that they claim to have the contract to represent the employees at the two mines.

Mr. Kramer: Those are the ones referred to in the Snider testimony a minute ago.

* * * * * * * * * *

"Q. Mr. Dupee, did you receive a reply to this letter of July 4th which is marked Exhibit '1-B'? "A. No.

"Q. Did you later receive in the mail a termination of the contract between Progressive Mine Workers of America which covered the representation of the employees at these mines? "A. Yes."

Mr. Rowntree: There we introduce the letters which we referred to in Mr. Snider's deposition where the cancellation occurred of the Progressive contract effective September 30, 1957.

(The reading of the deposition was continued.)
1490 "A. I received it.

"Q. Do you have the original of that letter? "A. I don't. It may be on the file of the Progressive Mine Workers of America."

* * * * * * * * * *

"Q. Mr. Dupee, before you became president of Progressive Mine Workers, were you an employee at the Millstadt Mine? "A. I was.

"Q. And that is the mine operated by Midwest-Radiant Corporation? "A. I think that is the name.
1491 "Q. And you are presently employed at that same mine? "A. I am.

"Q. And you are a member of the United Mine Workers of America now? "A. I am."

* * * * * * * * * *

Mr. Rowntree: The next deposition, page nineteen.

Mr. Combs: This deposition, Your Honor, is on the same subject matter, and we have the same objection.

The Court: All right, same ruling.

"DINO FRATIGLIONI,

* * * * * * * * * *

"DIRECT EXAMINATION

"Questions by Mr. Rowntree:

"Q. State your name, please. "A. Dino Fratiglioni.

* * * * * * * * * *

1492 "Q. What is your present position? "A. President of Progressive Mine Workers of America.

"Q. How long have you held that office? "A. A year and a half.

"Q. Do the Progressive Mine Workers of America have an office? "A. Yes, sir.

"Q. Where is it located? "A. Springfield, Illinois.

"Q. And that is your office? "A. That is correct.

"Q. — at the present time? "A. That is right.

"Q. Mr. Fratiglioni, how large a union is Progressive Mine Workers of America? "A. Well, approximately — I wouldn't know offhand. I didn't bring the record with me. I just wouldn't know.

"Q. Approximately. "A. Oh, I would say possibly eighteen hundred working men.

1493 "Q. And what is presently the largest mine that you represent the employees in?

* * *

"A. I think the Lumaghi Coal Company, Collinsville, Illinois.

"Q. Aproximately how many employees? "A. I would say around two hundred.

"Q. In 1957, what was the largest mine that Progressive Mine Workers represented? "A. St. Ellen Mine.

"Q. How many employees, approximately did they have? "A. Approximately three hundred fifty.

"Q. And at that time what was the second largest mine? "A. Well, I imagine still Lumaghi Coal Company at that time.

"Q. At that time did they have approximately two hundred employees? "A. Well, probably at the time, they had a few more than two hundred employees.

"Q. How long has Progressive Mine Workers been in existence? "A. Since 1932.

"Q. I believe they are concentrated in Illinois? "A.
1494 Mostly, yes.

"Q. Was there any other union in the coal industry to your knowledge, besides Progressive Mine Workers of America and United Mine Workers? "A. No.

"Q. Were you employed in either the Millstadt Mine or the St. Ellen Mine? "A. No.

"Q. Where was your employment in 1957? "A. Lumaghi Coal Company."

* * * * * * * * * * *

1495 "Q. Let me ask you, are you here under subpoena, Mr. Fratiglioni? "A. You 'bettcha.' "

Mr. Combs: May it please the Court. I move to strike this entire deposition. How in the world it could have a bearing on this case, I don't know. It describes the size of it, the size of — I don't see how it —

The Court: If that is all there is to it, just the size, I sustain the objection.

Mr. Combs: That is about all I can see he is asking about, the union.

Mr. Rowntree: We are taking a focus on the Progressive Miners to see who they are, leading up to the dispute which occurs here in these two mines.

The Court: All right.

Deposition of George Schmidt

Mr. Rowntree: We only have two more depositions here which are the depositions we rely on to show the conduct of the company.

The Court: All right, I will let you read it.

Mr. Combs: We will object to the next deposition.

* * * * * * * * * *

1496 Mr. Rowntree: Next is the deposition of George Schmidt.

"GEORGE SCHMIDT,

* * * * * * * * * *

"DIRECT EXAMINATION

"Questions by Mr. Rowntree:

"Q. State your name, please? "A. George Schmidt.

* * * * * * * * * *

1497 "Q. When were you first employed in the St. Ellen Mine? "A. Well, first I was employed at St. Ellen Mine was in '23, 1923.

"Q. And did you leave the mine to go to other employment after that? "A. I left St. Ellen Mine and went to Taylor Mine and worked the Taylor Mine until '31.

"Q. And did you come back to the St. Ellen Mine? "A. I came back to St. Ellen Mine in '31, yes, sir.

"Q. That's the Perry Coal Company Mine at the time you came back to it? "A. That's right.

"Q. Have you worked at the St. Ellen Mine ever since 1931? "A. Up until they closed down, yes.

"Q. At the time the mine closed down, were you a member of the United Mine Workers? "A. Yes, sir.

"Q. And in the early part of 1957, were you a member of Progressive Mine Workers of America? "A. Yes, sir.

"Q. Did you hold any office in the Progressive Mine Workers? "A. Yes.

1498 "Q. What was that? "A. Mine Committee.

"Q. A member of the Mine Committee? "A. Yes, sir.

* * *

"Mr. Rowntree: Will you state whether or not the St. Ellen Mine vacation for 1957 was scheduled to be held June 28th, — July 9, 1957? "A. I would think — would think that was it.

* * *

"A. I think that is right, twenty-eighth to the ninth.

"Q. Did the mine, the St. Ellen Mine reopen on July 9, 1957? "A. No, sir."

* * * * * * * * * * *

"Q. Did you have a meeting of the Mine Committee with anyone on this subject of the reopening of the mine? "A. Yes.

"Q. When was that? "A. Well, that took place I think on about the 17th or 18th of July.

"Q. And where was it held? "A. Held at the office out at the mine.

1499 "Q. Whose office was it? "A. Well, at that time Joe Johnson was my superintendent.

"Q. This was his office? "A. Yes.

"Q. Do you recall who was present at this meeting? "A. Well, there was the superintendent, Johnson, and Mr. McCollum.

"Q. And the Mine Committee? "A. The Mine Committee and local present.

"Q. What was the number of this local? "A. The number of our local?

"Q. Yes. "A. After we went under the United Mine Workers or before?

"Q. Before. The Progressive Mine Workers. "A. Local 75.

"Q. Number 75 of Progressive Mine Workers? "A. Yes.

"Q. What did Mr. McCollum — did he introduce himself to you? "A. Yes, sir.

"Q. Did he state who he was? "A. He stated he was Vice-President of the Peabody coal Company."

* * * * * * * * * * *

1500 "Q. Will you please state whether or not Mr. McCollum said anything about —

* * *

"Q. —said anything about the mine not having reopened at that time or any reason for it? "A. Well, yes. He said the mine was closed down on account of the State Mine Inspector had the mine closed down on account of bad air.

"Q. Would you state whether or not he said anything about not having advised the men before as to the reason for the closing? "A. Well, when he introduced himself as Vice President of Peabody Coal Company he said he was sorry he hadn't met with us before, and told us the reason why the mine didn't resume operations on the 9th of July, as scheduled. It was due to the fact that it was shut down on account of the State Mine Inspector.

"Q. Did you notice any sign posted with respect to bad air in the mine? "A. No.

"Q. Did Mr. Feist say anything to Mr. McCollum? "A. About the air?

1501 "Q. No, about the mine being down.

* * *

"A. Well, if I recollect right, I think he did ask Mr. McCollum if it wasn't true that the mine was shut down on account of what the miners were sent out to join up with the United Mine Workers.

"Q. And can you recall if Mr.—whether or not Mr. McCollum had a letter with him at the mine?

* * *

"A. Well, yes, he did. He handed a letter to Feist, Stanley Feist. Stan read it and passed it on to me, and I read it.

"Q. Do you have a copy of that letter? "A. No, I don't.

"Q. Do you recall from whom the letter was sent and to whom it was sent? "A. I don't know to who it was sent, but I know the signature on the letter was from Hugh White, president of the District 12, United Mine Workers.

"Q. Do you recall whether or not the letter was ad-

dressed to Peabody Coal Company? "A. No, sir, I couldn't tell you that.

"Q. What was the substance of this letter? "A. I don't just remember what it was. I can probably remember par[illegible]t.

1502 "Q. All right. "A. Peabody was under contract with the United Mine Workers. That's about all. I just can't remember what else was in that letter. If you got the letter, why you read it."

Mr. Rowntree: I showed him the letter previously introduced, previously read, from Mr. White, president of United Mine Workers of America, District 12, to Peabody Coal Company.

(The reading of the deposition was continued.)

By Mr. Rowntree:

"Q. * * * Will you look at that letter, Mr. Schmidt. "A. Yes. To my best ability that reads like the same one I read.

"Q. Reads like the same letter that was at the meeting that Mr. McCollum brought? "A. Yes.

* * *

"Mr. Rowntree: Mr. Schmidt, do you recall what Mr. McCollum said after the letter was handed to you and Mr. Feist? "A. Well, as near as I can get to remembering what he said was that Peabody owned and operated twenty-seven other mines outside of the two, the one in O'Fallon and Midwest, and he said most certain that they wouldn't want any trouble at their other twenty-

1503 seven mines by trying to work these two mines.

"Q. Can you think whether or not Mr. McCollum stated the officials of Progressive Mine Workers of America were notified that after the contract expired that was then in effect on September 30th, there would not be another contract signed by Peabody Coal Company with Progressive Mine Workers of America."

* * * * * * * * * *

1504 "A. He did.

"Q. Now, did the Mine Committee report the results of this meeting with Mr. McCollum back to the next meeting of the local? "A. Yes, sir.

"Q. Mr. Schmidt, you came here under subpoena? "A. I did.

"Q. And understood you had to come? "A. I wouldn't have been here if I hadn't."

* * * * * * * * * * *

1505 CROSS EXAMINATION

By Mr. Kramer:

"Q. Did Mr. McCollum tell you at the meeting that the mine would return to work as soon as the bad air was cleared up? "A. Yes, sir. He did on that—that was on the 17th I think when we met with him out there.

"Q. Do you recall when the mine did return to work? "A. Well, I think the 17th was on a Friday and the mine went back to work on a Monday.

"Q. The following Monday? "A. Yes."

* * * * * * * * * * *

Mr. Rowntree: That was St. Ellen Mine. The next deposition pertains to the Millstadt Mine, your Honor.

Mr. Combs: We have the same objection, your Honor, on the same grounds.

The Court: Same ruling.

1506 "FRANK KREITNER,

* * * * * * * * * * *

"DIRECT EXAMINATION

By Mr. Rowntree:

"Q. State your name, please. "A. Frank Kreitner.

* * * * * * * * * * *

"Q. Are you presently employed at the Millstadt Mine of Peabody Coal Company? "A. Am I?

"Q. Yes. "A. —president there?

1507 Are you presently employed there? "A. Yes, sir. Yes, sir.

"Q. And that is the mine that was previously operated by Midwest-Radiant Corporation? "A. Yes, sir.

"Q. How long have you worked at the Millstadt Mine? "A. Ever since February 5, 1943.

"Q. Are you presently a member of the United Mine Workers of America? "A. Yes, sir.

"Q. Do you hold any office in the United Mine Workers? "A. No, sir.

"Q. In the period of July through September, 1957, were you a member of Progressive Mine Workers of America? "A. Yes, sir."

* * *

"Mr. Rowntree: Did you hold any office in Progressive Mine Workers? "A. Yes, sir, I was president of the local.

"Q. What was that local number? "A. 167.

"Q. Is that the local for the Millstadt mine? "A. Yes.

"Q. Do you recall whether or not the vacation

1508 period for the Millstadt Mine in 1957 was to run from June 28th to July 8th? "A. Well, I don't exactly remember, but I guess that's about it.

"Q. Now, do you recall whether repair work was going on at that mine at that time? "A. Yes. There was some repair work going on at that time.

"Q. Do you recall when the mine was scheduled to go back into operations? "A. You mean after the vacation period was over?

"Q. That's right. "A. I just don't remember what day it was. I know we had just about two weeks vacation, but I don't remember what day it was we were supposed to go back to work. I don't know the day of the month, see.

"Q. Yes. Do you recall if the mine did go back to operating after July? "A. Not the way it was scheduled, no."

* * * * * * * * * *

"Q. State whether or not you received a call from the superintendent of the Millstadt Mine before the mine reopened? "A. Yes, I did.

1509 "Q. And who is that? "A. Fred Schroeder."

* * *

"Q. What was the substance of this conversation you had with Mr. Schroeder?

* * *

"A. Well, he told me the mine wasn't going to reopen at this time and I asked him the reason, and I don't remember just exactly what he told me. Anyhow, he told me they wasn't going to work, and then I said, "Well, I have to have some kind of an answer to present to the men," and I said I would get the committee together and we would like to meet them, and he says, "That's okay," he said, "That will be fine. I will have Mr. Hartman out there." So, we went out and saw Mr. Hartman and Schroeder on that day. I forget what date it was.

"Q. That was in between the end of the vacation period and the time the mine reopened? "A. That was about when he called me. I think it was about the last day of the vacation period.

"Q. Now, present at this meeting with you, were, I believe you said, Mr. Hartman? "A. Yes.

"Q. Who is he? "A. He is superintendent of the mine.

1510 "Q. And Mr. Schroeder? "A. He is pit superintendent.

"Q. And your Mine Committee of Progressive Mine Workers local? "A. Yes.

"Q. And you were present as president of the local? "A. Yes.

"Q. Did Mr. Schroeder make any statement at the beginning of this meeting? "A. Yes, he did, but I just couldn't put it that way. It's been so long ago, I just don't remember all he said, but we asked him why the mine wasn't

opening and I forget just how he put it. No, he said,—he said the reason they wasn't opening, he said they couldn't work two mines and shut down twenty-seven

• • •

"Q. Now, did you ask Mr. Hartman about this? Did you address a question to Mr. Hartman? "A. Yes. I asked Mr. Hartman, I said, "I understand the mine wasn't going back to work unless we join the United Mine Workers."

"Q. What did Mr. Hartman say? "A. He said he wouldn't comment on that.

"Q. Did you make a statement to Mr. Hartman at
1511 that point? "A. Well, yes. I did, I said, 'Well, when we left here we left the Progressive Miners, and that's the way we intend to come back.'

"Q. What did Mr. Hartman reply to that?

• • • •

"Q. You said you intended to come back as Progressive Mine Workers. What did Mr. Hartman say to that? "A. Well, he said,—I don't know just how he put it.

"Q. State whether or not he said the majority rules, and they might make the mines united? "A. Yes, that's it.

"Q. When did the Progressive Workers contract for the Millstadt Mine terminate? "A. I think it was about the first of October.

"Q. At this meeting that we have been talking about, did Mr. Hartman have a letter with him? "A. Yes sir.
1512 "Q. Did he read that letter at the meeting? "A. Yes, sir.

"Q. Do you recall the substance of the letter? "A. Well, I just can't remember just what it said, but he did say all the mines Peabody acquired would be under the United Mine Workers, they had a contract to that effect.

"Q. Was this a letter from the United Mine Workers? "A. I don't know where it was from. Hartman had the letter there in the office that he showed us.

"Q. I will show you a copy of a letter—"

Mr. Rowntree: That is the same letter as before, United Mine Workers to Peabody Coal Company.

(The reading of the deposition continued.)

"A. You want me to look at that?

"Q. Yes, sir. "A. Yes, I think that's the one. It reads about the same as the one he had out there.

"Q. Now, did Mr. Hartman say anything after he read this letter at this meeting? "A. Well, he said—I think he said, 'That's the way it is boys,' or something in that order. Something on that order, he said, 'That's the way it is,' or I forget just exactly what he said.

1513 "Q. Now, was the result of this meeting we have been talking about reported to the local union meeting of your local? "A. That's right.

"Q. Following this meeting? "A. Yes, sir.

"Q. Do you recall whether or not a substantial amount of members of the local were present at that meeting? "A. The biggest part of them."

. . . . . .

"Q. Did the Millstadt Mine reopen July 20th or do you recall the date? "A. Well, somewhere right around 1514 there. I just don't exactly know for sure. Seems to me it was about the twentieth.

"Q. What day of the week was it? "A. Well, it was on a Saturday.

"Q. Did the overburden crew work on Sunday? "A. Yes.

"Q. Were the men paid straight time on those two days? "A. No, we get time and a half for Saturday and double time for Sunday.

"Q. And the mine had been closed the week days preceding that? "A. Yes."

. . . . . .

J. L. HAMILTON

Mr. Rowntree: The interrogatories propounded to Mr. J. L. Hamilton, executive vice president of Island Creek Coal Company.

. . . . . .

1515 Mr. Rowntree: "Question: Where do you reside and what is the distance of your residence from Knoxville, Tennessee?

"Answer: I reside at 1511 Enslow Boulevard, Huntington, West Virginia, which is approximately 185 air miles from Knoxville, Tennessee.

"Question: What is your official position with Island Creek Coal Company and what are your duties in that position?

"Answer: I am the Executive Vice President of the Company and its subsidiaries. I am second in command of the Company, directing all its affairs subject to the President.

* * * * * * * * * * *

1516 "Question: Has any analysis been made of profit made by Island Creek Coal Company on coal shipped to Tennessee Valley Authority and, if so, kindly file as collective Exhibit 2 to these interrogatories a copy of such analysis?

"Answer: No.

"Question: Does the Island Creek Coal Company have a contract with the United Mine Workers of America, and, if so, is this the so-called 'National Bituminous Coal Wage Agreement of 1950', as amended?

"Answer: Yes."

We would like to read extracts from the statement which was filed.

Mr. Kramer: This is another one of these 1960 statements, your Honor, taken from Moody's Industrial Manual, and for the reasons heretofore given with reference to others, we object.

The Court: Same ruling.

Mr. Rowntree: "Incorporated in Maine September 30, 1910, and acquired the property and assets of United States Coal & Oil Co.

1517 "In 1923, 5,500 acres of coal lands in Logan and Mingo Counties, W. Va., were leased for a period of

50 years with the privilege or renewing for a further period of 50 years. This acreage added 50,000,000 tons to the coal reserves of the company. In 1926 sold Island Creek Railroad to Chesapeake & Ohio Railway Co. . . ."

"On Dec. 27, 1941, acquired 97.06% of capital stock of United Thacker Coal Co. which owns coal lands adjacent to company's properties in West Virginia. During 1942 company increased holdings to 99.97%."

1518 "In November, 1954, company acquired coal sales division and lake docks at Duluth, Minnesota, and Port Huron, Michigan, from Cleveland-Cliffs Iron Company.

"As of August 31, 1955, merged Pond Creek Pocahontas Company."

"As of January 1, 1956, acquired principal assets of Red Jacket Coal Corporation from W. M. Ritter Lumber Company for one million dollars cash and two hundred and fifty thousand common shares."

Tonnage, 1950 — 7,363,438
1951 — 9,002,623
1952 — 6,733,658
1953 — 6,364,299
1954 — 5,699,879
1955 —10,881,786
1956 —15,257,543
1957 —14,504,061
1958 —10,758,102

"Upon completion of Pond Creek merger in 1955, company and subsidiaries owned in fee or mineral interests, about ninety-six thousand acres of coal lands in Logan, McDowell, and Brooks Counties, West Virginia; Washington County, Pennsylvania; and Breathitt and Ma-
1519 goffin Counties, Kentucky; and held under lease about fifty thousand five hundred acres of coal lands

in Logan, Mingo, McDowell and Wyoming Counties, West Virginia; and Breathitt, Knott, and Magoffin Counties, Kentucky.

"At that time company operated or held fifteen mines fully equipped and with accessory plant and employee facilities capable of producing twelve million tons per year.

"Since that time company has acquired leaseholds of Red Jacket Coal Corporation in Mingo, Wyoming, and Logan Counties, West Virginia, and Buchanan County, Virginia, with seven operating mines. Assigned and unassigned reserves so acquired at time of acquisition were estimated well over fifty million tons.

"Company also acquired, since 1955 Pond Creek merger, leaseholds of Algoma Coal and Coke Company in McDowell and Wyoming Counties, West Virginia, with one operating mine. Estimated reserves at the time of acquisition were seven million five hundred thousand tons."

It goes into the reserves in 1959, but I guess that is a little questionable on that.

We go to interrogatories of Duke Power Company. I might say the Duke Power Company was one of the
1520 customers of the defendant and cross-plaintiff, Phillips Brothers Coal Company.

* * * * * * * * * *

H. D. WATERS

Mr. Rowntree: Interrogatories propounded to Mr. H. D. Waters.

* * * * * * * * * *

1521 "Question: What is your official position with Duke Power Company?

"Answer: Manager Fuel Purchases.

* * * * * * * * * *

1523 Mr. Kramer: All of these Moody's, your Honor, he has read. 1958, 1959 and 1960.

Go ahead. You have a right to read it the way you want to, I guess.

Mr. Rowntree: That is what I was thinking.

This is a purchaser of coal here. You saw the producers. This is the purchaser.

"Stonega Coal & Coke Co., 552,359; Clinchfield-Pittston Co., 361,003; Island Creek Coal Co., 353,844, Pocahontas Fuel Company, 265,266"—Pocahontas is the company that merged into Consolidation — "Guyan Eagle Coal Co., 241,281."

1957. "Stonega Coal & Coke Co., 445,985; Clinchfield-Pittston Co., 208,649; Island Creek Coal Company, 218,509; Guyan Eagle Coal Company, 279,593; Wise Coal & Coke Company, 306,291."

1958. "Clinchfield-Pittston Company, 256,711; Island Creek Coal Company, 182,250; Guyan Eagle Coal Company, 185,325; Wise Coal & Coke Company, 229,892; Virginia Iron, Coal & Coke Company, 191,674."

That is all.

. . . . . .

1524 Mr. Kramer: Now, Your Honor, I want to read this same testimony of this Interrogatory No. 3, reading across, as they have read, as to the production.

Stonega Coal & Coke Company, 1956, 552,359 — this is tonnage. 1957, 445,985; 1958, none at all.

Clinchfield-Pittston Company, one of the union companies: 1956, 361,003; 1957, 208,649; 1958, 256,711.

Island Creek Coal Company:—another one of the union companies—1956, 353,844 tons; 1957, 218,509; 1958, 182,250.

Pocahontas Fuel Company: 1956, 265,266; 1957, none; 1958, none.

The Guyan Eagle Coal Company:—this is the first time this one has been in the record, your Honor—1956, 241,281; 1957, 279,593, 1958, 185,325.

The Wise Coal & Coke Company: 1956, none; 1957, 306,291; 1958, 229,892.

The Virginia Iron, Coal & Coke Company: 1956, none; 1957, none, 1958, 191,674.

These last two, the Wise and Virginia companies, are

not operating under collective bargaining agreements, your Honor.

The Court: All right.

. . . . . .

1525 Mr. Kramer: Yes, we want to read the cross interrogatories your Honor.

. . . . . .

Mr. Kramer: "Will you kindly state the total number of coal producing companies who ship coal to Duke Power Company during each of the years 1956 to 1960"—we will limit it to 1958 under this record—"and indicate whether such number included small as well as large producers, and also indicate all of the coal producing states which were the source from which such total number of coal suppliers produced the coal you purchased?"

Answer: "1956, 130 producers; 1957, 113 producers; 1958, 146 producers. . . . During each year above coal originated in West Virginia, Virginia, Tennessee and Eastern Kentucky."

No. 2: "During the period 1956 to 1960 were your coal purchases on a spot market basis rather than an annual or longer term contract basis?"

Answer: "1956, Annual Contract; also spot basis. 1957, Annual Contract; also spot basis. 1958, spot basis only."

No. 3: "If your purchases during the period 1956
1526 to 1960 were made on the bases of spot market purchases and also on annual or longer term basis, please state the approximate percentage of purchases which were made on each basis."

Answer: "1956, 35% Spot; 65% Contract. 1957, 37% Spot; 63% Contract. 1958, 100% Spot basis."

Cross Interrogatory No. 4: "Please explain your purchasing policy and practice as to your spot market purchases of coal, including a statement as to how your purchase price is determined."

Answer: "We purchase our coal on the basis of com-

petitive bidding. Our general specifications are: 5% maximum moisture, 10% maximum ash, 13,000 minimum BTU per pound. While we do not adhere strictly to these limits, our average heat value for the coal that we burn is usually at 13,000 BTU or possibly a little better.

"Each month we receive from eighty to one hundred twenty-five quotations. These are tabulated to show supplier, type of coal, tonnage, mine price per ton, freight rate per ton, delivered price per ton, cost per million BTU, percentage of moisture ash and BTU per pound.

"In this manner we are able to evaluate all coals on a cost per million BTU basis, which equalizes the heat value per pound of coal."

* * * * * * * * * * *

1528 (The deposition was read by Mr. Rowntree and Mr. Robertson.)

"MICHAEL F. WIDMAN, JR.

was called as a witness, and having been first duly sworn, was examined and testified as follows:

"DIRECT EXAMINATION

By Mr. Rowntree:

"Q. What is your name? "A. Michael F. Widman.

"Q. Where do you reside? "A. I reside in Montgomery County, Maryland.

"Q. What is your position in United Mine Workers of America? "A. Assistant to the President.

1529 "Q. How long have you held that position? "A. Since April, 1957.

"Q. Did you have any connection with the United Mine Workers of America before that time? "A. Yes, sir, as a representative."

* * * * * * * * * * *

"Q. How long were you a representative? "A. Well, I have been a representative of districts off and on, and

away from if maintaining, of course, close relationships while I was with other organizations in the thirties.

But I have been working for the labor movement generally as a Mine Workers representative since April 1, 1929.

"Q. Mr. Widman, you are the Assistant to the President of the International Union? "A. That is right, sir.

1530 "Q. What are your duties in that position, generally speaking? "A. Well, there is no job description in connection with my assignment. I do some liaison work between the various districts and our own organization. I do some research work and this is primarily research at the moment.

"Q. Were you in some other field primarily before the research became your primary activity? "A. Yes. I was pretty much since 1950 been assigned to the organizing committee of the International Executive Board for liaison work between the districts and the National Union, particularly in northern West Virginia and central Pennsylvania in those years.

"Q. Mr. Widman, about March 21, 1958, did you attend the meeting with the three directors of the Tennessee Valley Authority in Knoxville, Tennessee? "A. Yes.

. . . . . .

"Q. Who invited you to attend the meeting? "A.

1531 One of two people and I am not sure which one. It was either Mr. Bayfield of American Coal Sales or Mr. Moody of the Southern Coal Producers, I believe is the organization he represents. It was one of the two of them. I just don't recall which.

"Q. Is Mr. Moody President of Southern Coal Producers Association? "A. He was at that time.

"Q. That is Mr. Joe E. Moody? "A. I think it is Joe E. We call him Joe, I don't know about that initial.

"Q. Who else attended that meeting, if you recall? "A. Well, I would say there were about twenty people in the meeting, roughly, representing operators, and the TVA.

There were not just the three directors, there were others there. I don't recall all their names.

"Q. Was Mr. Moody there? "A. Oh, yes.

"Q. Was Mr. Bayfield there? "A. Yes.

"Q. Was Mr. B. C. Smith of Intermountain Coals, Inc., there? "A. Coals? If you mean Pat Smith, I don't know by that initial he was there. There was a Smith by the name of 'Pat'.

1532 "Q. Can you state the purpose of that meeting?

"A. Well, I was in pretty much of a position of a listener. I had never met with TVA before that time. I have yet to know just what the purpose of the meeting was. There was no definite designation to me of any specific purpose. But there was considerable complaints aired, one in, one in particular was the practices of TVA.

Most of the time was devoted to that problem, that is the cancellation of delivery on the part of TVA on a coal allocated in a bidding system. That was the biggest complaint. Most of the time was spent on that.

I didn't speak on it. I merely made a few remarks at the end of the meeting. As I said, I considered myself a listener and I was listening.

"Q. Are you familiar with the difference between term contract coal awards of TVA and spot, so called spot coal awards? "A. I think I am fairly familiar with it.

"Q. Was the matter of the amount of coal bought by TVA on spot coal awards discussed at this meeting? "A. Only on this basis, as I recall it, it has been over two years ago. That spot bidding was advertised weekly or semi-monthly. I am not too sure just which. I think it was weekly. When these bids then were, well, I guess you would call awarded to the various groups, they were

1533 sometimes reduced from the award granted.

In other words, the tonnage received. That is where they were complaining more on that phase of it than anything else. The term contracts, I don't think, entered the picture very much.

"Q. Was the discussion along that line that the spot coal award should be in larger amount? "A. No. TVA coal—the statement that there, as a matter of position as I recall it, they wanted the major portion of their coal to be term coal rather than spot coal. Spot coal was intended to fill in the gap, as they said, I think up to, I think they talked about twenty per cent.

"Q. Was there a general expression of opinion at the meeting that the spot coal was in too great a quantity to serve the purpose of filling in gaps? "A. I didn't gather that from the conversation that went on.

"Q. Did you state just now that the principal discussion at the meeting involved the matter of TVA sticking to bidding for coal? "A. Not, of course, TVA does have the bidding procedure on a competitive basis. There was no complaint that I heard of in this conference of the method of the bidding so far as bidding is concerned. If you
1534 mean the rules of the game or anything like that, there was nothing said there about that.

"Q. Just what was the purpose of this meeting? "A. The purpose of this meeting was complaints on the part of the operators, there were a number of them originally met the night before the meeting with TVA. There, I wouldn't venture a guess on how many were there. But there were operators from all over the area. During the meeting they were all airing their problem. It all went back to this uncertainty after bid award of the possibility of fulfilling at that price. That seemed to be the big problem that they were trying to get TVA, if you bid five thousand tons and awarded to this fellow, they wanted delivered five thousand tons. There were many of them in the crowd, I think one of them had a thousand ton award.

I believe one was less. I don't remember. I knew it was under a thousand. I thought it was quite small, that complained for the very same reason that he tried to get this coal in there at that price, then they cut him off before

they took delivery. That is all I heard about it is what they had to say.

As far as their case is concerned, I couldn't verify it.

"Q. You mean the main purpose of the meeting then was to discuss the matter of TVA cancelling all or por-
1535 tions of contracts after award? "A. Whether that was the main purpose of the meeting, I don't know. I know that was the main part of the discussion at the meeting.

"Q. Do you know if a memorandum was distributed to those participating in the meeting concerning the subjects to be brought up at the meeting? "A. I don't recall them right now.

"Q. Did you make any memoranda as to what happened at the meeting? "A. No, it was not my meeting. As I said, I was pretty much an observer. I usually don't pay too much attention to taking a memorandum.

If I call a meeting or am one of the principals of setting it up, then I do.

"Q. Isn't it a fact, Mr. Widman, that contracts awarded by TVA are firm contracts and TVA has no power to cancel them?

You say TVA has been cancelling contracts after award? "A. I am merely repeating what I heard discussed at the conference.

"Q. You say that is all you heard discussed? "A. That was the principal part of the discussion. They talked about the future of TVA, how much coal it was going to
1536 burn, so on, so forth. But the principal discussion was this, the operators, both as represented particularly by Bill Bayfield, in the sales section, were complaining bitterly of the treatment they got on these spot bids in particular.

There didn't seem to be too much argument on term contracts. There was some, but it was very, very spotty.

"Q. Most of the objection was based on spot coal con-

tracts; is that correct? "A. On concerning spots, not on spot coal contracts as such, but concerning this, well, let's say, unevenness in acceptance after bid allowance or bid award.

"That was the principal squabble they were having in the thing.

1537 "Q. What do you mean by acceptance, in that answer? "A. This is, as I understand it, I don't know whether it is the terminology that might be understod by others. Say they were awarded a bid for 'X' cents per million BTU. Before they got that delivered, TVA would cancel part of that on this basis now. Now we are going to take this coal probably after a while but if you want us to take it this next week, our bids are lower. This is sometimes following. That was the big beef down there.

"In other words, they were trying to make a going market price when it was lower on coal already awarded, probably not delivered for some reason or another, delays over which neither side had control, as I understand the explanations made.

"Q. Is your general indication of those participating in the meeting that the TVA price was too low? "A. Oh, I think that was in all sections of it, there was some complaint of the price being so low that Walsh-Healey Wage Schedules were not even met, could not be met by the prices.

"Q. That matter was discussed? "A. Briefly. I think I raised that question at the end of the meeting and it didn't take but about five minutes at the end of the meeting for me to raise the question.

1538 "Q. Are you the only one that discussed that matter? "A. I was the only one I think.

"Q. What about some of the others? Did they talk about the ability to make a profit at the TVA price? "A. Oh, yes, passively. There was a remark made by one or two on the subcommittee on that question. They talked about affording them an opportunity to mechanize their

mines. They couldn't do it on the price because TVA was suggesting some mechanization as a source of meeting the competitive price they were awarding contracts.

"That discussion was not very long, either.

"Q. Which committee are you referring to there? "A. Well, both sides, TVA and the operators in the group. There were about, I think, six or eight.

. . . . . .

1540 "Q. Mr. Widman, United Mine Workers of America, International Union and the District Unions enter into so-called 'sweetheart' contracts; is that not right? "A. I know of no such sweetheart contracts. What do you mean by sweetheart contracts?

"Q. I suppose it is what the newspapers refer to, which is an agreement between an operating company and the union that the operator will pay a scale less than that contained in the National Bituminous Coal Wage Agreement? "A. There is only one contract in our industry recognized our union, only one official United Mine Workers contract. I think that is a matter of public record. It is not hard to find. That is it. That sets out the only wage scale we have.

"Q. Is that true since the 1958 Amendment? "A. That has been true throughout the life of our industry, with this exception. In the early days, in the thirties, we had differentials of agreements. For instance, the north and south day wage scale. But all of those, during the thirties, were changed to make them uniform. In other words, a mule driver in our early agreements would get probably a dollar or dollar and a half day less than some of the well,
1541 say, states like Alabama and Tennessee, than they did in the north in those days, but the operators and mine workers got together and made one uniform agreement in the industry.

"They cut out all these little subdistrict agreements or disagreements that were provided for during the days of the central competitive field negotiations.

"Q. Has the increase in wage under the National Bituminous Coal Wage Agreement of 1950 as amended from time to time in later years been on a uniform basis throughout the country? "A. I think it is uniform with probably a historic differential of some new job that may have come in. For instance, with the job evaluation made jointly in that district, there may be a few cents variance there. I don't recall of any specifics because we have been trying to make them all uniform.

"Q. Have you succeeded? "A. I think we have.

"I know of none personally that are different now.

* * * * * * * * * * *

1542 "Q. Has any operator told the Union that it could not afford to pay the union scale? "A. Not to my knowledge. Of course, I do not negotiate the contracts.

"Q. But you have been in organizing work? "A. Oh, yes.

"Q. You say that no coal operator has told the Union or the organizing representatives that he could not afford to pay the union scale? "A. From time to time, I think that has been a position taken by the industry over a course of years in national negotiations.

"Q. I am talking about individual operators recognizing the fact that operators differ as to their cost factor, so far as labor is concerned? "A. I know of no specific case.

* * * * * * * * * * *

1543 (The following deposition was read by Mr. Rowntree and Mr. Robertson.)

"ELMER C. HILL

a witness called at the instance of the defendants and cross plaintiffs.

* * * * * * * * * * *

DIRECT EXAMINATION

By Mr. Rowntree:

"Q. What is your name, sir? "A. Elmer C. Hill.

* * * * * * * * * * *

"Q. What is your occupation, Mr. Hill? "A. My title is Chief, Coal Procurement Branch, Division of Materials, TVA.

"Q. Your office is located in Chattanooga, Ten-
1544 nessee? "A. That is correct.

"Q. How long have you held that position? "A. I have held this specific position for — well, since September of '56.

"Q. Can you tell us briefly what your job consists of? "A. I say officially that my position consists of directing the administration of the policies and procedures employed by TVA in securing its coal requirements.

"Q. Do you have anything to do with the actual procurement of coal? "A. Well, I direct the procurement of coal."

Mr. Rowntree: At that point we introduced the coal awards of TVA. This was entered pursuant to a stipulation which I should read:

"Mr. Rowntree: Let it be stipulated by and between counsel that Exhibit 1A through 1J are true copies of the lists of coal contract awards by TVA for the period February 1, 1954 through approximately September, 1960.

"Is that stipulation agreeable with you?"

Mr. Kramer: I would like to state that the stipulation should go further and specify that these various exhibits or pages contain the information as shown in the headings of the different columns listed thereon.

1545 Mr. Rowntree: That's all right with us.

* * * * * * * * * *

Mr. Rowntree: We will offer as next exhibit Term Contract Awards, being Exhibit 1-A to the deposition.

(Exhibit No. 82 was marked for identification and filed.)

Mr. Rowntree: Offer as next exhibit Spot Coal Awards, Shawnee and other plants, November, 1952, through June, 1957, being Exhibit 1-B to the deposition.

(Exhibit No. 83 was marked for identification and filed.)

* * * * * * * * * *

Mr. Rowntree: Eighty-three.

We offer as Exhibit 84, Spot Coal Awards, Shawnee and other plants, July, 1957, through December, 1959, being Exhibit 1-C to the deposition.

Mr. Kramer: Your Honor, we object to this exhibit insofar as it goes beyond December 31, 1958, for the reasons which have been given to Your Honor. We do not offer objections through December 31, 1958.

* * * * * * * * * *

1546 The Court: Objection overruled.

(Exhibit No. 84 was marked for identification and filed.)

* * * * * * * * * *

Mr. Rowntree: We offer as Exhibit 85 Spot Coal Awards, Shawnee and other plants, January, 1960, through September 1960.

Mr. Kramer: And the same objection with reference to the relevancy on account of the date, Your Honor.

The Court: Same ruling.

(Exhibit No. 85 was marked for identification and filed.)

Mr. Rowntree: We offer as Exhibit 86, Spot Coal Awards, August, 1952, through June, 1957, being Exhibit 1-E to the deposition.

(Exhibit No. 86 was marked for identification and filed.)

1547 Mr. Kramer: Isn't that limited to a particular plant?

Mr. Rowntree: That is for Kingston and other plants.

We offer as Exhibit 87, Spot Coal Awards, for Kingston and one other plant, for July, 1957, through December, 1959, being Exhibit 1-F to the deposition.

Mr. Kramer: To the portion of this tendered exhibit subsequent to December 31, 1958, the same objections and for the same reasons.

The Court: Overrule.

(Exhibit No. 87, was marked for identification and filed.)

Mr. Rowntree: We offer as Exhibit 88, Spot Coal Awards, Kingston and one other plant, for the period January, 1960,

through September, 1960, being Exhibit 1-G to the deposition.

Mr. Kramer: This again, Your Honor, is a period subsequent — it is all 1960, and the same objection for the same reason.

The Court: Same ruling.

(Exhibit No. 88 was marked for identification and filed.)

Mr. Rowntree: We offer as Exhibit 89 Spot Coal
1548 Awards for John Sevier Plant, March, 1955, through June, 1956, being Exhibit 1-H to the deposition.

(Exhibit No. 89 was marked for identification and filed.)

Mr. Rowntree: We offer as Exhibit 90, Spot Coal Awards for Widow's Creek Steam Plant, August, 1952, through April, 1956, being Exhibit 1-I to the deposition.

(Exhibit No. 90 was marked for identification and filed.)

Mr. Rowntree: We offer as Exhibit 91, Spot Coal Awards for Wilson Steam Plant, November, 1952, through January, 1956, being Exhibit 1-J to the deposition.

(Exhibit No. 91 was marked for identification and filed.)

* * * * * * * * * * *

1549 "Q. Mr. Hill, state whether or not these awards made in Exhibit 1-A through 1-J represent the awards made by TVA as a result of bidding and whether they show the name of the seller to whom was awarded the coal contract by the Tennessee Valley Authority. "A. Hold it just a minute."

1550 * * *

"A. Well, to answer your question, the tabulations of the awards that we loaned you are true copies of the awards that TVA has made since the period you indicated. Most of these awards were made as a result of competitive bidding, but there were a few awards during the period about 1956 which were made under emergency conditions; and those few awards were negotiated purchases.

"Q. Do these lists in this exhibit correctly list the cost of the coal delivered at the plant mentioned in the award

according to cost per million BTU? "A. Yes, those tabulations do list the cost of the coal according to BTU's.

"Q. Will you state whether or not these computations of costs were made by TVA in the ordinary course of business with a view to determining the cost represented by each bid and each contract that was awarded? "A. That is correct.

"Q. What are the principal factors in determining the cost of the coal to TVA? "A. The destination price per ton and the quality of the coal.

"Q. By 'destination price', does that mean the quoted price per ton of the bidder, excluding transportation cost?

A. Well, some coal is bought on a destination price
1551 basis, particularly truck coal, in that we are offered only one price, period, and that is the price we pay for the coal if we buy it, but other coal is bought on an origin price basis, such as f. o. b. rail cars and then we are responsible for the transportation cost.

"Q. So the cost shown on these exhibits would include the transportation cost where the TVA pays the transportation costs? "A. I believe most of these tabulations indicate only the BTU cost of the coal to TVA, which would be a destination cost.

"Q. Well, the cost of getting the coal to TVA is included in your BTU cost? In other words, I am trying to find out whether or not the BTU cost there includes all of the transportation cost to TVA. "A. Yes, it does. Now, to answer your question here, some of these tabulations do show a mine price as well as the transportation cost if one is separate, but the spot awards, I believe, only list the destination and BTU cost, they don't show a separation.

1552 "Q. They do not show a separation of transportation cost from the cost at the mine but they are figured in together, is that correct? "A. As far as the tabulations are concerned in connection with the spot awards, I don't believe they show a mine or transportation cost but they do show a destination cost per million BTU, which includes any transportation that would be involved in getting

the coal to the particular destination that TVA has bought the coal for.

"Q. The bids include an analysis of the coal to be furnished on the bid and you take that in determining the cost of the coal? "A. That is correct, each bidder has to specify the quality of the coal that he would propose to furnish, that is taken into consideration in determining the destination BTU cost of the coal.

"Q. Now, on those sheets in Exhibit 1A through 1J, which show several plants, the award in each case was made with a view to securing the coal for the plant which is underlined on the particular sheet? "A. These tabulations list, in a number of instances, more than one TVA plant. The BTU cost that is listed for each of those plants and the one that is underlined indicates the particular plant that the coal was consigned to.

1553 "Mr. Kramer: Would you take one of these sheets of a particular exhibit and point out with particularity just what you are testifying about now so that the record will be clear, please, sir?

"You are now referring to a particular sheet in exhibit what, Mr. Rowntree?

"Mr. Rowntree: Exhibit 1B."

* * * * * * * * * * *

"The Witness: On this particular sheet we have a listing of five TVA plants. These are Shawnee, Johnsonville, Colbert, Gallatin and Widow's Creek. Under each of the plant headings there is indicated a destination BTU cost for coals if it could be determined. In some instances there is an asterisk, which indicates there was no competitive transportation rate to that particular plant from the source from which the coal was offered.

"The first award listed on this sheet involves coal bought from Coyltown Mining Company. That coal was consigned to the Johnsonville Steam Plant, so the BTU cost under the heading of 'Johnsonville' is underlined to designate that the coal was consigned to that particular plant."

Mr. Rowntree: We would like to pass to the jury this Exhibit 1B with a word of explanation, if your Honor please.

* * * * * * * * * *

1554 Mr. Rowntree: Ladies and gentlemen of the jury, you will observe that these contract award sheets is rather bulky. The last question and answer referred to this first item here, this page 1 of the Exhibit 1B. (Exhibit 83) And the first column shows contractor, Coyltown Mining Company.

The next column gives the contract number — the TVA contract number; the next column gives the tonnage awarded in that spot coal contract; the next column gives the mine from which the coal is to come, and in many instances you will observe that the mine is not the contractor.

The contractor may, in some instances, be the same as the mine, but there being sales companies who sold other people's coal sometimes the contractor will be different from the mine name in quite a few instances.

The next column shows size of coal under the contract. Coal comes in different sizes, and this shows what amount was offered under a particular size.

The next column shows the mode of transportation. And I take it that "I.C." means Illinois Central.

1555 Then Shawnee, Johnsonville, Colbert, Gallatin and Widow's Creek are listed in series here in separate columns, those being five plants of the TVA. And these columns show the delivered cost per million BTU.

That is a unit of cost in the coal business, and BTU is a technical phrase that I am not an expert on and probably some of you know more about it than I do. But it is a unit of heat value and costs on these sheets are determined according to the cost of a million BTU of heat unit.

Johnsonville was the plant to which TVA consigned the coal on this particular award, as is shown by the underscoring of the cost in the column under Johnsonville Plant.

* * * * * * * * * *

By Mr. Rowntree:

"Q. Now, that underlining of that figure under Johnsonville Plant on that line results from computations made by TVA from the bid rather than something appearing
1556 on the bid itself, in other words, the bid does not specify that that coal will go to Johnsonville but he merely submits a figure of cost at the mine and the analysis of the coal and the computations of TVA determine to which plant the coal will be consigned? "A. Well, the computation by TVA determines the destination BTU cost and then the location to which the coal is consigned is determined on the basis of what appears to be to the most advantage of TVA.

"Q. Mr. Hill, these lists in Exhibit 1A through 1J also show unsuccessful bids submitted on the various advertisements for coal in addition to the actual awards made, is that correct? "A. The lists that are included in those particular exhibits show the unsuccessful as well as the successful bidders only with respect to spot offers, they do not include the unsuccessful bidders on term offers.

"Q. With respect to those unsuccessful bids the TVA has likewise made computations of costs which appear on the sheets? "A. That is correct.

"Q. Mr. Hill, I show you a copy of a statement entitled 'TVA's Coal Mining Program' purportedly put out by the Tennessee Valley Authority, Knoxville, Tennessee, April 11, 1956.

1557 "Do you recognize that as being a TVA publication put out at about the time mentioned. "A. Yes, I do.

"Q. Does that correctly set forth the TVA coal buying program and problems?"

Mr. Kramer: Now, your Honor, of course we object to this introduction for the reason that it is a course of action of a governmental authority according to this testimony.

Mr. Rowntree: If your Honor please, we will waive this

exhibit. I think the deposition pretty well explains what we wanted to get in.

The Court: All right.

(The reading of the deposition was continued.)

By Mr. Rowntree:

"A. To the best of my knowledge this does correctly set forth the buying program and problems associated with it as of that time.

* * *

"Q. Mr. Hill, I show you a sheet entitled 'Facts about TVA Steam Plants' and ask you if you recognize that sheet as being a publication put out by TVA? "A. Yes, I do.

"Q. And will you state whether or not that correctly sets forth the facts with respect to the steam plants of
1558 TVA as of May, 1960? "A. To the best of my knowledge it does set forth such facts but there is a lot of material on here that I am not directly associated with or wouldn't be in a position to say whether it was accurate or not.

"Q. It is a publication put out by TVA? "A. That is correct."

Mr. Rowntree: We offer that as the next exhibit.

If your Honor please, I would like to read five of these columns.

Mr. Kramer: This is which one of the exhibits?

Mr. Rowntree: It is the "Facts About TVA Steam Plants."

The first column reads: ------

Mr. Kramer: This is a paper published, as I understand it — I don't see the date on it — but I think the question indicated the date of publication is subsequent to December, 1958 and covered alleged facts subsequent to that time.

Mr. Rowntree: This pertains to facts over the whole period of the development of the TVA steam power system, and we offer it for the same purposes as was offered the contract award sheets, your Honor, showing the devel-

opment of the TVA steam plant system over the
1559 years. That portion after December 31, 1958 is offered only with respect to the question of conspiracy and on the question of monopolization or attempt to monopolize.

The Court: Did the witness file that as a part of his testimony?

Mr. Rowntree: Yes, sir.

The Court: And he verified what is in it?

Mr. Rowntree: This is a government publication.

Mr. Kramer: We are not attacking, your Honor, the accuracy of what has come from the TVA and TVA records. Frankly, I told the Court and jury that, but we do say, your Honor, statements contained herein as to dates which are subsequent to December 31, 1958 are irrelevant, immaterial, confusing and prejudicial, your Honor, and a number of these — for instance, the size of the plant and the unit, date of installation of generating units within various of these TVA plants. Of course, they show or have tendency to show coal consumption and dates long after the period.

Here is the witness' testimony, your Honor, "To the best of my knowledge it does set forth such facts" that he was asking a question about — he was asking about certain facts —"To the best of my knowledge it does set forth
1560 such facts but there is a lot of material on here that I am not directly associated with or wouldn't be in a position to say whether it was accurate or not." Then he asks the question if it is an official publication which is put out by the TVA and he answers.

That is the basis of our objection, your Honor.

Mr. Rowntree: We are, of course, trying to show the development of the TVA market over the years. The question of whether or not a market has a possibility of being monopolized under the state of facts proved in the record, cannot be determined without considering also the development of the market, the growth of the market.

For the period before December 31, 1958, we offer this

proof both with respect to damages and conspiracy. For the period after December 31, 1958, we offer it on the question of continuing conspiracy of the nature and existence of the conspiracy which existed throughout the period that we charge the conspiracy existed, and upon the question of dangerous possibility of monopolization of this market.

The Court: Overruled.

(Exhibit No. 92 was filed.)

1561 Mr. Kramer: May I just state one more thing?

Of course, your Honor hasn't seen this exhibit, but just as an example of what it contains and the basis for our objection to certain items on this exhibit, the last unit in commercial operation or scheduled, and the date shown is October 1962, and yet they are trying to project what the cost is per kilowatt basis would be of power — I mean of coal that will be used in that plant as late as October 1962, projecting it that far in the future. We think that sort of figure, your Honor, doesn't show anything with reference to conspiracy that they claim existed material to this lawsuit, but it is pure speculation, pure guess, and has no place in our judgment in the evidence in this lawsuit.

The Court: Well, I sustain the objection to the extent indicated by counsel in the last objection. Those projected figures are in the opinion of the Court too speculative to put into this record for the determination of the jury. But the actual figures during the period that is involved and the actual figures contained in the pamphlet subsequent to that period are received for whatever bearing they may have on the conspiracy during the period that is involved and the alleged damages incident thereto, and the

1562 figures are received after the period, namely those figures which relate to periods subsequent to December 31, 1958, on the question of the attempt to monopolize.

* * * * * * * * * * *

Mr. Rowntree: I will read from the first column which gives the name of the TVA plant and read from another

column estimated annual coal use at 80 per cent plant load factor.

I will read from another column, construction started, and another column headed first unit in commercial operation. And the next column, the last unit in commercial operation.

Colbert steam plant, estimated annual coal use, 3,600,000 tons.

Mr. Kramer: Now, your Honor, that is part of what I am objecting to. As I understood, your Honor sustained that objection. Now that is the estimated annual coal use based on a 80 per cent operating capacity when this plant is completed in October 1962.

Mr. Rowntree: We will omit that one. Strike 1563 the 3,600,000 tons.

Next column. Construction started October 15, 1951. First unit in commercial operation January 18, 1955. We will omit the figure on the last unit in commercial operation, as it appears after the date of the publication.

The next steam plant, Gallatin, estimated annual coal use, 3,000,000 tons.

Mr. Kramer: We object again to that one for the same reason that that is the estimated coal to be consumed when this plant is completed, which is given as August 9— a guess at the date of completion — August 9, 1959, and they are figuring on an 80 per cent capacity.

Mr. Rowntree: That occurs before publication of this, your Honor. That plant had already been completed when this was published.

Mr. Kramer: But it wasn't completed at the time of the termination of the period for which damages are sought, claimed to be under the conspiracy. I think both of those are out. This one is also out. Of course, your next one is within your period.

Mr. Rowntree: This is not an estimate.

The Court: Is this an actual figure?

Mr. Rowntree: Actual figure.

1564 The Court: Objection overruled.

Mr. Rowntree: The next column, construction started May 11, 1953. First unit in commercial operation November 8, 1956. Last unit in commercial operation, August 9, 1959.

Mr. Kramer: That has the same objection, your Honor.

The Court: Same ruling.

Mr. Rowntree: Next steam plant, John Sevier, estimated annual coal use, 2,000,000 tons. Construction started October 14, 1952. First unit in commercial operation July 12, 1955. Last unit in commercial operation October 31, 1957.

Next steam plant, Johnsonville. Estimated annual coal use, 4,000,000 tons. Construction started May 12, 1949. First unit in commercial operation October 27, 1951. Last unit in commercial operation August 20, 1959.

Next steam plant, Kingston.

Mr. Kramer: Wherever those dates are subsequent to December 31, I want our objection to show it is continuing and I will not repeat it.

The Court: That is all right.

Mr. Rowntree: The next steam plant, Kingston. Estimated annual coal use, 4,300,000 tons. Construction
1565 started April 30, 1951. First unit in commercial operation February 8, 1954. Last unit in commercial operation December 2, 1955.

The next steam plant, Paradise. Estimated annual coal use, 4,300,000 tons. We will strike that.

* * * * * * * * * *

Mr. Rowntree: That is right.

The next steam plant, Shawnee. Estimated annual coal use, 4,100,000 tons. Construction started January 6, 1951. First unit in commercial operation April 9, 1953. Last unit in commercial operation, October 12, 1956.

Next steam plant, Watts Bar. Estimated annual coal use, 730,000 tons. Construction started August 8, 1945.

First unit in commercial use March 16, 1942. Last unit in commercial operation April 8, 1945.

Next steam plant, Widows Creek.

Mr. Kramer: I thought that was one that was excluded.

Mr. Rowntree: We will omit the tonnage. Construction started March 28, 1950. First unit in commercial
1566 operation, July 1, 1952. And the next column goes beyond the date of this publication. That is the last.

The Court: How many steam plants are there involved?

Mr. Rowntree: There are nine on the list, your Honor.

The Court: Where are they located?

Mr. Rowntree: We have got a map. We will introduce it right now.

I might say for the record that the Shawnee plant —

The Court: Where is Shawnee?

* * * * * * * * * * *

Mr. Combs: Illinois.

Mr. Rowntree: It is across the river near Paducah.

The proposed Paradise plant is in Kentucky. The Johnsonville, Gallatin, Watts Bar, Kingston and John Sevier plants are all in Tennessee. And Widows Creek and Colbert are in Alabama.

I think that covers it.

* * * * * * * * * * *

1567 By Mr. Rowntree:

"Q. Is the Tennessee Valley Authority the largest coal buying consumer in the United States? "A. Yes, that is correct."

* * * * * * * * * * *

"Q. Mr. Hill, I show you a document which purports to be a copy of a contract between TVA and Clinchfield Coal Company Division of Pittston Company.

"Mr. Combs: What is the date of that?

"A. Dated July 8th, 1957.

"Q. Will you state, Mr. Hill, whether or not a
1568 contract was entered into by TVA and Clinchfield Division of Pittston Company about the time men-

tioned? "A. Yes, TVA did enter into a contract with the Clinchfield Company at about the time stated.

"Mr. Rowntree: It is stipulated by and between counsel that the document is a true copy of a contract entered into by TVA and Clinchfield Division of Pittston Company, with the exception that this copy does not contain the terms and conditions which were attached to the original."

Mr. Rowntree: I think that we have agreed now on those terms and conditions since we have gotten a copy of those and checked them with counsel.

Mr. Roberts: They have been attached.

* * * * * * * * * * * * *

"Q. Mr. Hill, can we have made available to us the other papers that are not attached" to that contract?

Mr. Rowntree: That is the ones we later got.

Mr. Kramer: That is the ones we are talking
1569 about now, your Honor.

Mr. Rowntree: That is right.

* * * * * * * * * * * * *

Mr. Rowntree: It might clarify localities and names. I offer that as the next exhibit, being a small scale map of the TVA system.

(Exhibit No. 93 was marked for identification and filed.)

* * * * * * * * * * * * *

1570 "Q. And does the map on the first page give a diagram of the Tennessee Valley region showing the location of the steam plants? "A. Yes, it does."

* * * * * * * * * * * * *

"Q. None of these steam plants were moved in between 1958 and 1960, were they, Mr. Hill? "A. Well, none of the major plants were moved nor are expected to be moved, but we have discontinued some very small steam plants just within the last few months.

1571 "Q. Can you state what those steam plants are? Are they steam plants or are they hydroelectric plants? "A. They are steam plants, but I don't see any of

those that have been rendered obsolete listed on here, so I think this publication takes care of that point.

"Q. I show you a map entitled 'TVA Power System' and ask you if that is a publication of the TVA? "A. Yes, this is a TVA publication.

* * * * * * * * * * *

"Q. Mr. Hill, is the same true with respect to this map entitled 'Tennessee Valley Authority Transmission System' dated July, 1958? "A. This is a TVA publication."

Mr. Rowntree: We offer that as the next exhibit.

(Exhibit No. 94 was marked for identification and filed.)

(The reading of the deposition was continued.)

1572 "Q. I show you one more map, Mr. Hill, entitled 'Tennessee Valley Authority Transmission System' dated July, 1958, this being a much larger map than the last one."

* * *

"Mr. Combs: Is it the same map?

"Mr. Kramer: Mr. Robertson has the other one.

"Mr. Rowntree: It is a different presentation, I believe.

"The Witness: It shows the same Southern states, but there is some information on the two maps that is different.

"By Mr. Rowntree:

"Q. This last map is a publication of the Tennessee Valley Authority? "A. That is correct.

"Mr. Combs: Just for my information, does the large map contain all of the information that is on the smaller map with some additions to it?

"The Witness: I really don't know."

Mr. Rowntree: We offer that map as next exhibit.

* * * * * * * * * * *

1573 (Exhibit No. 95 was marked for identification and filed.)

* * * * * * * * * * *

"Q. Mr. Hill, I show you Exhibit 1-A, the sheet headed 'List of awards, coal invitation to bid, Requisition No. 27.

Bids opened July 27, 1959', and refer you to the second item, 'Name of contractor — Inter-Mountain Coals, Inc., Shipping point — Morco, Tennessee'."

* * * * * * * * * * *

1575 "Is that coal coming from the Pocahontas Fuel Division of Consolidation Coal Company? "A. The award that you refer to was made as a result of bids opened in July, bids opened July 27, 1959. The award was made to Inter-Mountain Coals, Incorporated, as principal on the contract.

* * * * * * * * * * *

1576 "The source of the coal on that particular contract was contemplated to be produced by Pocahontas Fuel Company at mines near Morco, Tennessee, and Pocahontas Fuel Company is a division of Consolidation Coal Company.

"Q. Now, there are a number of other awards or bids in this exhibit with the same contractor named, with the same shipping point. Do those all include coal coming from the Pocahontas Fuel Division of Consolidation Coal Company? "A. I am sorry, I don't understand that question. This tabulation lists a number of awards that were made as a result of bids received on the July 27th bid opening, but there is only the shipping point listed as different for each award."

* * * * * * * * * * *

"Q. Mr. Hill, will you state whether or not you have received a number of bids from Inter-Mountain Coal Company designating Morco, Tennessee, as the shipping point of the coal? "A. We have received some bids from the Inter-Mountain Coal Company which offered coal to be shipped from Morco, Tennessee.

1577 "Q. Did those bids cover coal to be shipped by Pocahontas Fuel Division of Consolidation Coal Company from Morco? "A. Yes. All bids that we have received from Inter-Mountain for coal to be shipped from

Morco would have been produced by the Pocahontas Fuel Company.

"Q. Mr. Hill, you furnished us a copy of Southern Freight Association, Section 22 Rail Rate Quotation dated August 29th, 1960, is that a copy of it? "A. This appears to be a copy of the quotation that I furnished to you."

* * * * * * * * * * *

1578 "Q. Mr. Hill, when TVA makes a coal contract with the coal seller, does TVA frequently cancel that contract? "A. No. It would be very seldom that TVA cancels a coal contract.

"Q. Did you attend a meeting in Knoxville in the offices of the directors of the Tennessee Valley Authority about March 21st, 1958, with certain representatives of coal producers and a representative of the United Mine Workers of America?"

* * *

"A. I have attended some meetings in Knoxville at which our board of directors were present, and at which representatives of the United Mine Workers were also present, but as to a specific date of March 21st, 1958, I couldn't be exact on that.

"Q. Were representatives of coal producers also present or coal producers association? "A. In some of the meetings that have been held with our board in which a repre-
1579 sentative of the UMWA was present, members of various coal producing associations were also present.

* * * * * * * * * * *

"Q. Were representatives of coal producers also present or coal producers association? "A. In some of the meetings that have been held with our board in which a representative of the UMWA was present, members of various coal producing associations were also present.

"Q. At any such meetings that you attended, was
1580 the practice of TVA of cancelling contracts after they were entered into, was that matter a principal

part of any such discussion? "A. The TVA doesn't have a practice of cancelling coal contracts. If a contract is cancelled, it would be for cause, but I am not sure just the significance of your question as related to these meetings.

"As I recall, from such meetings that I participated in, the matter of cancellation of coal contracts was not the subject of discussion.

"Q. State whether or not this is so. Has TVA made a practice as follows: Awarding a bid of "X" cents per million BTU and before that coal was delivered TVA would cancel part of that coal and say that, 'We are probably going to take this coal after while, but if you want us to take it this week, our bids are lower.' Has any such practice as that been carried on by TVA? "A. Not to my knowledge.

"Q. Has any such question been raised at any of these meetings that you mentioned? "A. I don't recall any such question.

"Q. What was the subject matter of those meetings at which the United Mine Workers had a representative present? "A. As I said, there has been more than one meeting.

"Q. Yes. "A. The subject matter varied among
1581 some of the meetings. The purpose of the meetings, as far as I am concerned, was for discussion among interested people in the coal industry with TVA management to try to seek a means of developing better relations and to try to find a way of TVA accomplishing its objective of buying coal which would be well received by the industry in general.

1582 "Q. Was there any particular problem that called these meetings together? "A. I wouldn't be able to answer that in that the meetings were requested by the coal associations in general and I don't believe they ever told us specifically that they were quarreling with some particular phase of our program which made it desirable for them to have such a meeting.

"Q. You did not fathom from these meetings what the

particular problem was? "A. Oh, I think, as I said, in each case there was an effort being made to try to improve relations between the coal industry and TVA and to try to find a better way of accomplishing the job. That, as far as I am concerned, was the principal and the basic reason for the meetings, beyond that I don't know."

* * * * * * * * * * *

(The cross examination was read by Mr. Combs and Mr. Rayson.)

* * * * * * * * * * *

1583 "CROSS EXAMINATION

By Mr. Kramer:

"Q. Mr. Hill, in these awards of coal contracts, as I get your testimony, they are made upon three separate bases known as a spot contract, a term contract and a negotiated contract, is that correct? "A. That is correct. All of the spot and term contracts are made after advertising and awards are made to the low bidders.

"Q. Is there any difference in the method of advertising for bids on term contracts and spot contracts and, if so, explain? "A. Yes. I'd like to finish with my other statement first.

"Q. Pardon me. "A. That the negotiated contracts that you referred to in all instances have been made as a result of emergency conditions.

"Now, in response to your second question, our term contracts are made from bids which are received in sealed envelopes from prospective bidders. They are opened and read in public.

1584 "Our spot contracts are made from bids which are received from prospective bidders but they are not opened and read in public. That is the primary difference.

"Q. On the advertisements for term contracts, how do you select the people to whom notice is given that you are requesting bids for such term contracts? "A. We maintain

in this office a mailing list of prospective suppliers which we have developed over the years. This list covers responsible coal companies who might be interested in offering coal to TVA and we send to this list of prospective suppliers copies of our invitation notices.

"Q. Is that list revised from time to time so that new companies are added? "A. Yes, it is.

"Q. Even though you do not have the name of a coal producer on that list, if he requested such information, if the producer requested that he be listed, would he be listed and given an opportunity to bid? "A. If there was a reasonable chance that he could be competitive in our program he would be listed. Now, the reason I said "a reasonable chance" is that transportation rates have a strong bearing upon the supplier's ability to compete in our program, so any supplier in the Tennessee, Alabama, West Kentucky, Illinois or Virginia in all probability would be added
1585 to this list, but if someone operating a coal mine in Pennsylvania asked to be included it would be practically impossible for him to be competitive so that he would not be included.

"Q. Is the same true with reference to spot contracts so far as the persons to whom notices to bid are sent? "A. Yes. We use practically the same mailing list for both type of purchases. The only difference would be dependent entirely upon the interest of the suppliers themselves.

"Q. Now, on the negotiated contracts, which you say are emergency requirements, would you explain briefly how you handle those? "A. Well, our board of directors has established a policy which permits us, in the event the storage and stock-pile of coal at any of our plants get to a level of less than 60 days supply, that we may go into the market and make purchases through negotiation. Any such purchases are limited to a maximum term of six months and we would follow the same general practice in making emergency purchases as for regular advertised purchases inso-

far as contacting several suppliers for offering us coal, but we would not ask that sealed bids be received.

"In some instances it might be handled by tele-
1586 graphic quotations, in some instances it might be handled by telephone quotations, depending upon the real urgency of the situation.

"Q. Are those bids awarded in the same method as you have indicated that you awarded the others, that is, I don't mean procedure-wise but in the determination of who is the best bidder or determining the cost at the BTU level? "A. Yes. We use the same process of determining the destination BTU cost and we would buy from the low bidder who could furnish the coal.

"Q. When these bids are opened, I refer now to the term contracts which you say are opened publicly, that is, the bids on the term contracts, do, as a rule, a number of the operators attend the opening of those bids? "A. Yes. We have generally very good representation from the coal industry at these openings.

"Q. Now, I notice in the copies of the reports that are filed here as exhibits that the unsuccessful bidders for term contracts are not listed while the unsuccessful bidders for spot contracts are listed.

"Would you explain the reasons for that, if there is a reason? "A. Yes. The reason for the term contract bids not being listed and sent to the various coal producers or
1587 coal companies is that they are afforded the opportunity to sit in on the opening and take down any information that they might find desirable, whereas in the case of the spot bids they are not opened in public, it is a less formal program and the bidders are not permitted to see other bids of competitors, so, as a result of that, then at the end of each month we send to any bidder who offers us coal not only a listing of the awards but a listing of the other bids that were received which did not result in awards.

"Q. And that goes to every bidder? "A. Every bidder, yes, sir.

"Q. Who submitted a bid for a spot contract? "A. That is correct.

"Q. When did TVA begin the purchase of coal or about when? "A. It is pretty difficult for me to say just exactly when it began but it goes back for many, many years, I'd say 20 years ago at least, coal purchases by TVA became a pretty important factor in our program with the advent of the construction of these new steam plants which were placed into service during the fifties, but I think, as I recall, in the calendar year 1950 TVA's total coal requirements were only about a half a million tons whereas currently they are approximately 20 million tons.

"Q. All right. How about in '58, which is the
1588 last year involved in this litigation, about what would you say they approximated? "A. Our receipts in '58 were, as I recall, about 19 million tons, something on that order.

"Q. Can you, from memory, tell us about the amount of money that would be involved in that 19 million ton purchase? "A. I believe I will back up on that and say probably closer to 18 million tons and I would estimate 80 or 85 million dollars delivered.

"Q. This increase in consumption of coal has been brought about, of course by increasing generating facilities of TVA through steam plants. In other words, the addition of steam plants to your system and enlargement of the ones already in existence? "A. Well, it came about primarily by the building of new plants altogether, new steam plants altogether, although there has been some increases in the capacity of some of these distant plants.

"Q. To what do you people in the Tennessee Valley Authority attribute this increased demand for power which made necessary the increase in facilities? "A. Well, the principal factor to which we attribute this increased demand is the requirements of power of the federal govern-

ment, principally AEC.

1589 "Q. Can you tell us what proportion of power, roughly, in the years '54 through '58, I mean of the power generated, went to the federal government and its agencies? "A. Oh, I think I can be pretty specific with respect to '57 and '58. During that period about 50 per cent of our total generation went to government agencies.

"Q. Would that percentage be less or more if you went back to '54, '54 through '57? "A. As a percentage it would probably be a little less, be less and it grew during the period from about '53 up to '58. It grew pretty rapidly, say percentage wise. In '54 it was probably relatively a small part of the total generation but it grew each year and up until about '58 it was representing close to 50 per cent.

"Q. Being a sale to a governmental agency, I take it that you comply or required the producer to comply with the Walsh-Healy Act, do you not? "A. Yes. All of our contracts that exceed $10,000 are subject to the Walsh-Healy Public Contracts Act, which is the same for any purchases by any government agency.

"Q. Do you have some sales to other governmental agencies aside from the Atomic Energy Commission? "A. You are talking about power sales?

"Q. Power sales I mean, yes, sir. "A. Yes. We sell
1590 power to the installation at the Redstone Arsenal in Huntsville, Alabama; we sell power to the Army installation over at Tullahoma. There's a couple of other power customers who are governmental customers.

"Q. Can you give us for any year, say '56 or '57 or '58, the proportion of the coal purchases which were awarded to Tennessee producers? "A. Be pretty difficult for me to give you the actual award distribution but I think I can give you some figures on actual receipts.

* * * * * * * * * * *

"Q. (By Mr. Kramer) I am really interested back to

1954 running through '58, if you have those figures. "A. With respect to Tennessee and the total receipts?

"Q. Right. "A. All right. In '54 TVA received from Tennessee 4,291,000 tons of coal. This is coal actually produced in Tennessee. Our total receipts during that year was 10,196,000 tons.

In 1955 our total receipts from Tennessee was
1591 4,531,000 tons. Total receipts for that year was 14,377,000 tons.

"For 1956 TVA's total receipts from Tennessee was 6,901,000 tons. TVA's total receipts in that year was 20,354,000 tons of coal.

"Now, I might explain here at this point that during this particular year we added a tremendous amount of coal to our storage at various plants. We added, as I recall, something on the order of two to two and a half million tons, so that this may be misleading unless you understand that this is a received figure and not actually burned.

"Q. I see. "A. Now, in 1957 TVA's total receipts from Tennessee was 5,664,000 tons. Total receipts for the same year was 19, 581,000 tons.

In 1958 our total receipts from Tennessee was 4,763,000 tons. Total receipts from all sources was 17,033,000 tons. Now, in that year we made an adjustment in the stockpile and our consumption was considerably higher than the actual receipts.

"Q. That was one of the drought years when the hydroelectric power was not as available? "A. That was a drought year, yes, sir.

"Q. Now— "A. Might state that all of these fig-
1592 ures that I have given here are calendar year receipt figures, not fiscal year figures."

Mr. Combs: I will just read the comments to make it more clear.

"Mr. Rowntree: Now, Mr. Kramer, in order that we

might have it all in one place, we would like to have him go on. I take it you object.

"Mr. Kramer: You mean you want to ask for the other two years?

Mr. Rowntree: Yes, sir."

Mr. Combs: These are past the 1958 period. For that reason Mr. Kramer objected to that.

Shall I go ahead with the answer?

The Court: If you want to.

Mr. Kramer: Of course, we are objecting to them, and Mr. Rowntree asked that they be inserted to 1959. I think he said he did not have '60, and Mr. Rowntree has asked for the 1959 figures. Of course we let the witness put them in subject to our objection, and we continue our objection.

The Court: All right.

(The reading of the deposition was continued.)

Mr. Combs: "Mr. Kramer: You mean you want to ask for the other two years?

"Mr. Rowntree: Yes, sir."

* * * * * * * * * * *

1593 "A. For 1959 TVA's total receipts from Tennessee was 4,311,000 tons. Our total receipts were 17,808,000 tons. We made some further adjustments in stockpiling here and actually consumed more coal in '59 than we received.

"For 1960 I don't have that information.

"Q. In your study that you have made of the coal produced, if you have made such study in the respective states and the percentage of such coal that was sold to TVA by the producers, can you give us any figure for any of these years, '58 and beyond back of it, showing the percentage of the total coal produced in Tennessee which was actually acquired by TVA? "A. I think I have that information here.

1594 "Q. Would you start with 1954 and give us for the record the percentage of total coal produced in

Tennessee which was sold to TVA? "A. According to the information that we have compiled on TVA's total coal received from Tennessee versus the total production in the state, and we have used in connection with the total production in the state the figures published by the Bureau of Mines.

"Q. That is the Federal Bureau of Mines? "A. The Federal Bureau of Mines, that's right.

"Q. All right. "A. These are the comparisons for the years '54 through '59.

"Q. Fifty-nine. Well, I am going through '58."

Mr. Combs: Mr. Rowntree wanted him to go on.

Then go ahead with the answer.

(The reading of the deposition continued.)

"A. I am going to give you just the percentage figure of our receipts versus total production in the state.

"Q. Yes. "A. In 1954 TVA received 66.7 per cent of Tennessee's production."

* * *

"The Witness: In '55 it was 64.2. In '56 it was 77—well, 78 per cent.

1595 "Mr. Combs: That is '56?

"The Witness: That is '56.

"Q. (By Mr. Kramer) Do you have '55? I beg your pardon, go ahead, you have given that. Fifty-seven? "A. In '57 the percentage was 71.2.

"Q. Fifty-eight? "A. Fifty-eight, 70.2:"

Mr. Combs: Now Mr. Rowntree asked for the additional year of 1959. Would you go ahead?

Mr. Kramer: We continue, of course, our objection.

(The reading of the deposition continued.)

"The Witness: 1959, the percentage of TVA's total receipts versus total production in the state of Tennessee, TVA received 72.9 per cent of the state's production.

"Q. (By Mr. Kramer) Now, while you have your sheet open at that page, do you have your percentage from the

state of Kentucky? "A. If you had come yesterday I wouldn't have had this but today I do have it.

"Q. You will have to admit that I didn't call you and ask you to get this up. "A. No, I didn't develop it just for your purposes.

"Mr. Rowntree: May I ask if it is broken down
1596 between Eastern Kentucky and Western Kentucky?

"The Witness: Yes, it is.

"Q. (By Mr. Kramer) All right. Give it that way, I have no objection to that, beginning with '54, please. "A. You want the percentage figure of our receipts from each of the two fields, East and West Kentucky, versus the total production of those fields?

"Q. That is correct. "A. For each of these years, '54 through '58?

"Q. That is correct, sir. "A. For 1954 TVA received from East Kentucky 1.2 per cent of the field's total production. For the same year, 1954, from West Kentucky we received 17.2 per cent.

"For '55 receipts from East Kentucky amounted to 1.6 per cent of the field's production. From West Kentucky it amounted to 23.1 per cent.

"For '56 our receipts from East Kentucky amounted to 2.1 per cent of the field's production. From West Kentucky for the same year it amounted to 24.9 per cent.

"For '57 TVA's receipts from East Kentucky amounted to 1.8 per cent of the field's production. From West Kentucky it amounted to 27.1 per cent.

"For '58 TVA's receipts from East Kentucky amounted to 2 per cent of the field's production. From West
1597 Kentucky it amounted to 25.8 per cent.

"Q. All right."

Mr. Combs: Now Mr. Rowntree asked for 1959, subject to the objection.

(The reading of the deposition continued.)

"The Witness: For 1959 TVA received 2.4 per cent of

the production in East Kentucky and for the same year we received 25.8 per cent of the West Kentucky field's production.

"Q. (By Mr. Kramer) I wonder if those same figures that you have in front of you show the percentages from other coal producing states. As I understand the TVA area from which you acquire coal includes Illinois, Virginia, West Virginia and probably Ohio.

"Do you have similar percentages for those states for these respective years? "A. I have it from the states from which we did receive coal for—yes, I do have it for each of those years.

"Q. All right. Let's have you give us the state because I may have missed some of them. I thought Illinois, Virginia, West Virginia and Alabama were in your field. "A. All right. I will give it from each of the states from which we receive coal.

1598 "Q. Please, sir. "A. You have it already for Kentucky and Tennessee.

"Q. Correct. "A. Illinois is one of the states that supplies us with coal. In 1954 TVA receipts from Illinois amounted to 3.5 per cent of the state's production.

"For '55 it amounted to 5.4 per cent.

"For '56, 7.2 per cent.

"For '57, 8 per cent.

"For '58, 7.1 per cent."

Mr. Combs: Then Mr. Rowntree asked for '59, subject to our objection. Go ahead.

(The reading of the deposition continued.)

"The Witness: For '59, 7.5 per cent.

"For Virginia. In 1954 TVA didn't receive any coal from that state in that year but beginning in '55 we have received coal from that state.

"In 1955 TVA's receipts from Virginia amounted to 2.2 per cent of the state's production.

"For '56 it was 5.7 per cent.

"For '57, 4.3 per cent.

"For '58, 4.3 per cent.

"For '59, 5.5 per cent."

Mr. Combs: Then we made the same objection to '59, your Honor.

1599 Go ahead.

(The reading of the deposition continued.)

"The Witness: The receipts that we have from West Virginia have been such a nominal part of the state's production that I doubt if you would be interested in them. In each case they amount to less than 1 per cent and in most instances it is even less than .1 of a per cent.

"Q. Has there been any substantial up or down variation during this period, '54 through '58? "A. Well, we received none whatsoever from West Virginia in '54 and '55.

"Q. I guess we better go ahead with '56 and '57 and '58. "A. In '56 we received one-tenth of one per cent of the state's production.

"For '57 it was .07 per cent—"

Mr. Kramer: Just a moment. That is one one-hundredths.

Mr. Rayson: Yes, one one-hundredths.

Mr. Kramer: Let's go back with '56 again.

(The reading of the deposition continued.)

"A. In '56 we received .01 per cent of the state's production.

"For '57 it was .07 per cent of the state's production.

1600 "For '58 it was .01 per cent."

Mr. Combs: Then Mr. Rowntree asked for '59, subject to our objection.

(The reading of the deposition continued.)

"The Witness: For '59 it was .003 per cent of the state's production. We received a total of 4,000 tons in '59."

"Q. Go ahead. "A. Our receipts from Alabama have been relatively small always but they are a little more significant than the receipts from West Virginia.

"Q. I guess we better have them. "A. In 1954 TVA received 1.5 per cent of the state's production.

"In '55 it amounted to .23 per cent of the state's production.

"In '56, .25 per cent.

"In '57, .11 per cent.

* * * * * * * * * * *

"In '58, .09 per cent.

1601 "In '60, .08 per cent.

"Mr. Combs: You mean '59."

* * *

"The Witness: It was .08 in '59. Our receipts from Indiana have been rather nominal always. I will give them to you.

"Q. (By Mr. Kramer) Please. "A. In 1954 TVA's receipts from Indiana amounted to .03 per cent of the state's production.

"In '55 it amounted to .44 per cent of the state's production.

"In '56 it was .36 per cent of the state's production and we have received no coal from Indiana since 1956.

"Q. The Tennessee Valley Authority has been interested in the power load, the energy that is disposed of in the Tennessee Valley area for fuel purposes, during the period of 20 years or a little more, 25 years that it has been in operation, has it not? "A. I am not sure I understand that question.

"Q. The use that is being made of electrical energy for heating or fuel and for energy purposes in industry has been a matter of considerable interest to the Tennessee Valley Authority, has it not? "A. Yes, it has.

1602 "Q. What can you tell us about the use of electrical energy for house heating purposes during the years '54 through '58 compared with the use of coal or the previous use of electrical energy for that purpose in the TVA area? "A. I am afraid I wouldn't be able to give you much of an answer on that question since that is out of my territory.

"Q. Who connected with the Tennessee Valley Authority does accumulate those statistics? "A. Your best source would be Jim Watson, who is director of TVA's marketing division.

"Q. What is Mr. Watson's full name and his location? "A. Mr. J. E. Watson, he is located in the Power Building in Chattanooga.

"Q. With reference to the preparation of coal for marketing do the TVA's requirements make necessary greater treatment or more intense treatment or more thorough treatment of coal in order to market it to the TVA than it does to the usual coal market or less treatment in preparation? "A. The 'usual coal market' I suppose can cover a lot of territory, but if you are comparing our specification requirements with the requirements of retail coal suppliers,
our specifications are rather liberal and there would
1603 not be near the necessary preparation for selling coal to TVA as might be required for such a market as might be offered by retailers.

"Q. What about the quality of the coal that would be required for a normal retail market as compared with the quality of the coal that you people would require for your market or your use? "A. Of course, we get a lot of coal that is of satisfactory quality for retail sale or home use in house heating, but I wouldn't want to use some of the coal we get for that purpose. Our specifications are rather liberal in that regard.

"Q. Isn't it true that your purchasing policies and your expansion of coal buying has had the effect of making merchantable very substantial quantities of coal that was not merchantable before you entered this market or entered it so extensively? "A. That is my understanding.

"Q. Under the setup of the federal government during the recent years, during the years '54 through '58, there is and has been or was and has been an agency known as the Small Business Administration and which affects, as I understand, the purchase of coal by governmental agencies as

well as purchases of other materials or substances.

"Does it enter into your picture? "A. Yes. The
1604 Small Business Administration is interested in our coal purchases as it relates to the requirements of their program, but it has never been a problem in that the small business firms producing coal have always been able to obtain a very large percentage of TVA's coal purchases."

* * * * * * * * * * *

"Q. (By Mr. Kramer) Would you go a little further and explain that answer to us, please, sir? "A. Well, the Small Business Administration classifies a firm as small or large on the grounds that if the total employment of that particular firm is less than 500 then it is classified as a small business and if it amounts to more than 500 then it is classified as a large business.

"Many, many of the suppliers from which we obtain coal have a total employment of substantially less than 500 employees.

"Q. I believe that there is some sort of an agree-
1605 ment, isn't there, between the Tennessee Valley Authority and the Small Business Administration, was during the years we are interested in here, under the provisions of which agreement TVA is authorized to set aside some of its procurements for awards, particularly to the producers who qualify under the Small Business Administration? "A. I am not familiar with that particular agreement. We have never set aside any coal purchases for specific small businesses. There may have been some occasions for setting aside such purchases of other commodities that are required in TVA's operations.

"Q. And the reason it hasn't been necessary is that you do buy a large part of your coal from people who qualify under the Small Business Administration Act? "A. That is correct.

"Q. Do you recall or do you know whether or not there are such agreements, even if it hasn't been necessary to use

the same, agreements with reference to setting aside? "A. Such agreements have existed with respect to other agencies and I am not sure whether there has been one actually effective with TVA or not.

"Q. In your opinion, are the short term spot orders advantageous to the small operator or permit him to have greater leeway in getting into the coal sales to TVA? "A.
1606 I think they are advantageous to the small operator and also they offer some advantages to the larger operator, too, to develop a mine.

"Q. To the small operator they offer him what
1607 type of advantage or opportunities? "A. Well, there is a greater market through which he does not have to make long term — any commitment over an extended period of time, gives him an opportunity in his developing the mine to more or less feel his way and not take on obligations which would require a lot of speculation as to what he might be able to do several months or a year in advance.

"Q. Has TVA, in connection with its coal purchases, made any study of mine closures, the closing down of mines that were in operation over various areas during the period '54 through '58 so that you have any definite knowledge you could give the Court with reference to closures of mines in Tennessee or in this immediate area compared with the closing of mines elsewhere? "A. I don't know of such a study.

"Q. You don't know of such a study? "A. No.

"Q. You stated in your direct examination, I believe, that TVA was, during the period '54 through '58, the largest consumer, at least the latter years, '57 and '58, of coal in the United States? "A. No, sir.

"Q. Did you not? "A. No, sir.

1608 "Q. What was your statement? "A. I didn't make such a statement. I said we were the largest buyer of coal.

"Q. I mean buyer of coal. "A. We were not the largest

consumer in that some of the steel companies did consume more coal than we did, but they produced a pretty substantial part of it themselves.

"Q. In their own mines? "A. Yes, that's right.

"Q. But, as far as the purchases of coal, you were the largest purchaser during those years? "A. To the best of my knowledge that is correct.

"Q. Has the Tennessee Valley Authority, during the years '54 through '58, been offered in bids substantially more coal than was necessary to fill its demands? "A. Yes, we have. I don't recall of an instance where we were not offered more coal than was needed to fill our requirements. Generally there is substantially more coal been offered than was necessary.

"Q. That has been true throughout this entire period of '54 through '58? "A. That's right.

"Q. What are the methods of delivery of coal to the various TVA steam plants? In other words, what methods of transportation are used for the delivery of coal? "A. Well, the three modes of transportation that are employed in some of the plants — some of the plants are limited to two, and we have some plants that are limited to only one mode of delivery, but the three modes that are made, for instance, at Kingston, where we were receiving some barge coal, currently we are not, we are currently receiving truck coal, and we also receive rail coal.

"Q. Is that plant so equipped, though, that it could receive all three methods of delivery, barge, truck, and railroad? "A. Yes, it can receive all three modes of delivery.

"Q. Now, you referred to one or two plants that did not have the equipment for receiving coal from all three methods of delivery. Would you go into that and explain that a little bit for us, please? "A. Our John Sevier steam plant is equipped to receive rail coal only. Our Gallatin steam plant is in the same capacity, it is equipped to receive rail coal only.

"Q. Now, before you go further, the Court will not be

familiar with the location and while they will appear on some of these exhibits, would you identify the location and general area of these various plants as you go
1610 through? "A. Our Gallatin steam plant is located in Northeast Tennessee, it can be served only by rail deliveries. The Kingston steam plant is also in East Tennessee, but not as far east as the Sevier plant, but it is equipped so that it could receive either rail, truck or barge deliveries.

"Q. I think you confused two plants there. You were talking about Gallatin and now we are referring to Sevier as compared to Kingston. "A. All right. Our Gallatin plant is located in — roughly I'd classify it as Middle Tennessee — it is on the Cumberland River, and it can be served only by, at this stage at least, by rail deliveries.

"Q. Yes. "A. No, you want me to go ahead with the rest of them?

"Q. Go ahead with the rest of them. "A. Kingston we covered. Our Widow's Creek plant, which is located in Northeast Alabama, can be served by three modes of delivery — truck, rail or barge.

"Our Colbert steam plant, which is located in Northwest Alabama, can be served by barge or rail deliveries.

"Our Shawnee plant, which is located in West Kentucky, can be served by rail or barge deliveries.

Mr. Rowntree: Did you cover Widow's Creek?
1611 "The Witness: Yes. Those are all of the major plants, steam plants in the TVA system, and all of those plants are currently in operation, and most of them were in operation during the period '54 through '58. I believe that the Gallatin and John Sevier plants didn't come into service as early as '54, but they came in within that period.

"Q. So which plants are equipped for receiving, and were from '54 to '58, for receiving truck deliveries? "A. Widow's Creek and Kingston plants.

"Q. Your entire system is operated on an integrated

basis, is it not, among the various power plants? "A. Yes, it is.

"Q. And I believe you have tied into your integrated system not only your own plants that you have referred to a moment ago, but some plants that are owned by private industry and which are operated by TVA in connection with its integrated system? "A. That is correct. We are tied into some hydro plants which are operated as an integrated part of the TVA system.

"Mr. Rowntree: May I ask at this point what an integrated system is?

"Mr. Kramer: Go ahead, you may answer it.

"The Witness: I will try to answer it. What we
1612 mean when we say 'an integrated system' is that the power load at any particular location may not be served necessarily just from the closest generating statement to that location, and all of the system is considered as a whole to finally develop the most economical power that could be moved to that particular installation, which actually might be generated at a further distant plant than one which is near the particular load center.

"I don't know whether I answer you properly but that is the idea.

"Q. (By Mr. Kramer) In other words, you try to handle it so as not to lose any more line load than is necessary in the transporting of power? "A. And to also take into consideration the cost factors as to producing the power. As an example, we will say that the Shawnee steam plant, which produces power more economically than any other steam plant in our system, you might be able to serve a load which was substantially distant from that plant and sustain some of the losses in transmission because of the lower fuel cost to that particular location as versus some other plant which might be closer to the load center.

"All those factors are taken into consideration, line

losses, of course, but fuel cost of generating the pow-
1613 er is also important, and the efficiency of the equipment that is available is important.

"Q. That suggests another question. What percentage do you think of your fuel or coal, rather, is purchased under term contract and what would you think is purchased, just approximately, on the spot contracts? "A. Well, our board of directors has established a policy which requires that we buy at least seventy-five per cent of our coal requirements on term contracts.

"Q. I don't believe we got from you just what we mean by 'term contract' on duration. We may have, but I have forgotten. What is the length of a term contract? "A. Well, most of our term contracts run from one to three year terms, but we do have some as short as six months, and some as long as seventeen years, but a term contract must be at least six months in term to be so classified.

"Q. Now, does the bidder have some options with reference to the length of a term contract at the time of submitting bids? In other words, do your specifications always call on term contracts for a definite three or five-years period or eighteen months, or does the bidder have some options when he is bidding? "A. No, we give the bidder the option of specifying which term is most desirable to him with a certain range.

1614 "Q. In other words, you fix a maximum and minimum and let him bid within that range? "A. That is right.

"Q. What about these term contracts dealing with rate of delivery, do they always specify a definite amount when the bid is advertised per week or per month, or is the bidder given the option of fixing his own rate of delivery to some extent? "A. Well, our invitation terms specify a quantity of coal which we are interested in contracting for, and the bidder is afforded the opportunity to specify what quantity he might want to cover within certain limits. He has the option to specify what is most desirable for

him to move to us. As a general rule, we say that we are not interested under our term contracts in making awards for more than ten thousand tons a week from a single source. We do not want less than five hundred tons a week from a single source, so within that range, the bidder has the option as to specifying what quantity he might like to deliver.

"Q. The award then would not be based upon the amount he delivered per week or per month, so long as he stayed within those limits? "A. The award would be based on what he specified as the rate of delivery.

"Q. But if a bidder submitted a bid to deliver seven hundred tons a week and one a thousand tons a week,
1615 if both of those figures were within those limits specified in the notice of bids, the difference in that amount per week would not have anything to do with the award, would it? "A. No, we would—Well, we say we would prefer generally, we say we prefer offers in the range of a minimum of a thousand tons a week, up to usually this maximum level of ten thousand tons a week Anyone offering with that range is considered equal for that particular phase.

"Q. How frequently, as a rule, do you advertise for long-term bids? Is it once a year or ten times a year? That is what I am getting at. "A. Well, your reference to long-term bids—

"Q. (Interposing) I call it term contracts. Simply change the phraseology. "A. Well, we normally issue invitations to bid about three times a year for term contracts.

"Q. Equally spaced throughout the year of—"A. (Interposing) Not necessarily. As a matter of, I guess, general practice, they would be reasonably spaced within the year, but we follow no set pattern in that respect, and in some instances, we may issue two invitations in a year for term contracts, others we might issue as many as four. I don't believe we have ever issued more than four in a

single year, but generally it will run around there.

1616 "Q. As I recall it, in the coal industry there are what is known as contracts which in effect are declarations of intent, indicating the intent of the person asking for bids to buy a certain amount of coal within a certain period of time, and the other is a direct or binding contract. Which form do you people follow? "A. We follow the form of making direct contracts.

"Q. Not simply a declaration of intent to buy a certain amount, but a direct contract for a specified quantity of coal? "A. That is correct.

"Q. The spot purchase contracts, I take it, or at least the request for bids, are submitted at irregular times, are they not? "A. The spot invitations to bid?

"Q. Yes, sir. "A. Are issued at regular intervals. We, as a practice, issue spot invitations to bid each month. Normally they are issued, oh, between the 20th and the 25th of the month, and they are issued every month, as a general rule.

"Q. What controls or guides you in the amount of coal that you are going to ask for on a spot bid? "A. Well, our spot program is set up as—Our spot program is established primarily, we will say, for the purpose of

1617 gearing our coal receipts more closely to our actual consumption, so the quantity we specify on a spot invitation, to a large degree, is established by the difference between what coal we already have moving in on term contracts and what we need to fill the gap between receipts and expected consumption.

"Q. Suppose that your coal supply has been substantially depleted because of drought, thereby your hydroelectric generation was lowered, more coal is needed because of more generation by your steam plants, is the filling up of that deficit in your stock pile done by short-term or spot contracts, or is it done on term contracts, and would you explain, please? "A. It would be done under both programs. The duration of a heavy load burn would have

a large degree in determining the method that might be employed to restock the storage supply. If it was a very short duration or very heavy consumption, probably we would use the spot program, but if it lasted for several months, we would employ our term program also to refill that deficit if it came through heavy usage during a drought period.

"Q. I take it from that, then, there is an advantage to both the seller and to TVA in, at times, using the spot purchase or spot bid arrangement rather than the long-term?

1618 "A. We think there are some definite advantages to our sources of supply in using the spot program.

1619 "Q. Would you mind explaining briefly why you think your suppliers are benefited so by the spot program?" "A. Well, as we discussed earlier, the spot program helps not only the small but the larger producers too in developing new operatons, but also helps established operations to dispose of what we might classify as distressed coal, coal for which there is no other ready market, or coal, in some instances, such as the resultants from a more premium market production such as the sale of carbon and screenings during periods of production of larger quantities of coal for the domestic market. Those are some of the ways in which the industry, I feel, can benefit through use of the program because it can be utilized for a short period of time. There is no obligation to commit a supplier for several months or a year to dispose of this tonnage which may be of short duration in their actual operation.

"Q. Then, in awarding a contract, either for spot delivery or term delivery, you do not take into consideration at all the size of the bidder, whether he is large or small, if he shows himself qualified to furnish the coal? "A. No, sir, we do not make any differentiation whatsoever between the size of suppliers if they are capable of performing, according to the way they offer their coal.

"Q. I take it you don't take into consideration at all whether a mine is operated by union labor or non-
1620 union labor, do you? "A. Well, I wouldn't know that information. We don't ask for it in our bid program.

"Q. You make no effort to find out, do you? "A. No, sir.

"Q. What about these bid forms that you sent out, are they complicated and difficult to fill out or not? "A. That would be a matter of opinion. We try to make them as simple as we can so that they won't be classed as complicated.

* * *

"Q. I believe that it is true that a great many larger coal consumers or purchasers in the market do not require competitive bidding such as TVA does, or, why does TVA require competitive bidding on its coal awards? "A. TVA is required by law, by the Act which created the Authority, that its purchases be made in general compliance with other government agencies.

"Q. You have established procedures which you feel are open and fair to all potential suppliers, have you not? "A. We feel they are, yes.

"Q. Now, a while ago on direct examination, Mr. Rowntree was asking you something about some protest meet-
ings or something of that sort, I don't know just
1621 what they were, and you stated that you had attended some meetings in which, as you recalled it, a representative of the United Mine Workers of America was present. Do you recall who that was that was present representing the United Mine Workers? "A. Mr. Michael Widman is the representative of the United Mine Workers who participated in the meeting with our Board of Directors that I attended and which we discussed a little earlier.

"Q. Do you recall how many meetings that he did attend? "A. No, I am not sure, two or three or something of that nature.

"Q. Could you give us any idea of the approximate dates and the places where such meetings were held, Mr. Hill? "A. Oh, all the meetings were held in Knoxville, and I believe about the earliest one was '57 sometime, '57 or '58, I'd think are probably the dates, although I believe some were held, one possibly was held in '59.

"Q. Now, on the '57 or '58 meetings, do you recall the names of any of the operators that were present at those meetings, or representatives of operators? "A. Well, there were some different meetings, and the same parties were not always present in every meeting. I recall, I
1622 believe that Tom Tarsy of the United Electric Coal Company was present in one meeting; Pat Smith of the Inter-Mountain Coal Company was present in another one; Jimmy Love of the Blue Diamond Coal Company I believe was in one meeting; Lou Jewell of Peabody Coal Company was in one meeting. Those are some of the producing company representatives who were present. There was also Bill Bayfield of the National Coal Association and someone from the Southern Coal Producers Association, Joe Moody, I believe, was present representing the Southern Coal Producers Association in one of the meetings.

"Q. Do you recall what kind of notices were given to coal operators or representatives of the industry with reference to these meetings when they were held? "A. Well, I don't know what kind of notices the industry may have circulated itself, but the meetings were requested by different individuals. I think in most instances probably the meetings were requested by the National Coal Association, or in the earlier days actually they were the American Coal Sales Association which has been merged with N.C.A., and the correspondence between our offices and the A.C.S.A., I believe, was between General Vogel, who is Chairman of our Board, and Bill Bayfield.

"Q. There was no effort made to exclude any particular

operator or operators, so far as you know, from
1623 these meetings, was there? "A. I don't know of any, but as I say, the meetings were requested by certain groups or certain individuals representing the industry and the U.M.W.A. As to what kind of distribution of the notice of the meetings that may have been made by the Association or the U.M.W.A., or the industry, I really don't know.

"Q. Something was asked you in the direct examination about cancellation of contracts after bids had been awarded, where a bid was awarded to an individual and they failed to deliver in accordance with the contract. I am speaking now quantitywise rather than qualitywise of coal. Are the awards sometimes cancelled? "A. There have been a few instances where contracts have been terminated for failure to perform according to the contract requirements.

* * * *

"Q. Is the policy that has been followed by the Tennessee Valley Authority in its coal purchases, has it been the effort of the Tennessee Valley Authority to give all producers of coal within the area who were interested in furnishing coal to TVA, an equal opportunity to sell coal to TVA if they would meet the competitive market and competitive price? "A. Yes, that is a true statement."
1624 (The Redirect examination was read by Mr. Rowntree and Mr. Robertson.)

"REDIRECT EXAMINATION

"By Mr. Rowntree:

"Q. Mr. Hill, this 75 per cent of the coal purchased to term contracts, how long has that policy been in effect? "A. Since the beginning of the program. Now, the 75 per cent now does not mean that we buy 75 per cent on term contracts and 25 on spot. The policy that we must buy at least 75 per cent on term contracts, in many instances it exceeds 75 per cent.

"Q. Do you know if anybody kept minutes of these

meetings up there in Knoxville that the operators had representatives at that you attended? "A. There was no formal minutes, to my knowledge. There was, I think, some record or reports written following the meetings.

"Q. Would that be in the office of the Directors of the Authority? "A. There should be a copy in the office of the General Manager.

"Q. Was that a summary or report prepared by TVA or by the meeting jointly? "A. As far as I know there was never a joint report prepared. There was a
1625 report prepared by someone in TVA.

"Q. You don't have a copy of it? "A. Oh, I have copies of some reports around here, but you would have to tell me specifically which meeting you had in mind so I could dig it out.

"Q. That meeting of March 21, 1958, or in that vicinity. "A. (The witness made a telephone call.)

"Q. We will go on while we are waiting on that. Talking about this integrated system, how can you determine where to draw the load or draw the power in order to reach the most economical use of the steam plants? "A. Well, I am not qualified to answer that question. You would have to talk to someone who was more directly associated with it.

"Q. I was trying to avoid an extra deposition if we possibly could. "A. As I understand, you plan to talk to Martin Hochdorf. He would be able to answer it.

"Q. As I understand, there is a machine that measures that purpose, is that right? "A. TVA has a machine which is supposed to be used for the purpose of determining the most economical loading of the system."

1626 Mr. Rowntree: We will skip down to the bottom.

By Mr. Rowntree:

"Q. Mr. Hill, if you locate the report of the meeting of March 21, 1958 that we were talking about before, will you kindly give it to the reporter and mark it as Exhibit 11?

* * * * * * * * * *

"A. I don't know, now. I don't know what is in that report, but there may be some things which our people would not agree to have it filed either.

* * *

"A. I have a copy of a report that was prepared following a meeting which was held between the TVA Board and staff members and certain representatives of the coal industry, such meeting being held on March 20, 1958, according to the first paragraph of this report. The meeting was held at the request of the coal industry, and during the meeting certain suggestions were offered by the coal
industry for some modification in our coal buying
1627 program which the industry considered apparently
constructive, and that was the whole purpose of the meeting, was an effort to develop closer working relations, and to try to work out some kind of a system which, apparently, the industry felt would be helpful to it if we did make some modifications in our buying program or
buying procedures. This report was not prepared
1628 by me.

"Q. Does the report refresh your recollection as to the specific questions raised for modifying TVA's coal procurement program? "A. Well, apparently, the industry offered certain recommendations for modifications of our term buying program, and a separate set of recommendations for some modifications in our spot buying program. I believe there was a total of five suggestions, or, in substance, there were five suggestions relating to the term contract program and—"

* * * * * * * * * *

"Q. (By Mr. Rowntree) Will you state what modifications were requested with respect to the spot coal contracts?"

* * *

"Q. (By Mr. Rowntree) I will ask you if the memorandum refreshes your recollection with respect to sug-

gestions made in regard to the spot coal program? A. Yes, I definitely recall these suggestions as having been offered in the particular meeting referred to, suggestions made by the industry.

"Q. And what suggestions were made with respect to the spot coal program? "A. Well, the industry suggested
1629 that we limit our spot purchases to approximately ten per cent of our total requirements. They also suggested we issue separate invitations to bid for each specific plant for which we desired coal, and to specify exactly how much tonnage we desired for each plant. They made some suggestions about the timing of the announcement of awards of spot contracts. As is our practice, we announce the awards or we publish a tabulation which formally announces all spot awards at the end of each calendar month. The industry suggested that any coal that was unshipped on a spot contract at its expiration would just be automatically cancelled. That was the substance of the suggestions."

* * * * * * * * * *

1630 Mr. Rowntree: If Your Honor please, we would like to introduce the contract as the next exhibit.

(Exhibit No. 96 was marked for identification and filed.)

Mr. Rowntree: We will read extracts from that contract, your Honor.

This is the long-term contract for purchase and sale of coal.

"This agreement, made and entered into this eighth day of July, 1957, by and between Tennessee Valley Authority, a corporation organized and existing under an act of Congress (hereinafter called 'TVA'), and Clinchfield Coal Company, of Dante, Virginia, a division of The Pittston Company, a corporation organized under the laws of the States of Delaware and Virginia (hereinafter called 'Contractor')."

Mr. Kramer: We are continuing our objection to this line of evidence, not as to evidence because this is within

the period, but for the other reasons heretofore given, which I take it is not necessary to restate.

1631 The Court: That is right. Overruled.

Mr. Rowntree: "Coal to be Furnished: Contractor shall produce (or arrange to have produced) and sell coal to TVA, and TVA shall purchase said coal from Contractor as provided herein. The source, weekly amount to be delivered from that source, and location at which the coal is to be delivered by Contractor to TVA, are as follows:

"Source: No. 3 Mine near Monterey, Tennessee.

"Weekly Tonnage: 7,500.

"F. O. B. Point: Rail cars, Monterey, Tennessee."

* * *

"Price: The following definitions are applicable in determining the price to be paid for the coal under this contract:

"(1) The 'Base Price' shall be the sum of the 'Fixed Fee' and the current 'Bonus Point.'

"(2) The 'Fixed Fee' which is deemed to include all of the Contractor's indirect expenses (i.e all general expense such as, but without limitation to, insurance premiums, dues and subscriptions, travel expenses, and property and income taxes) and any profit shall be 55 cents per ton."

* * * * * * * * * * * *

1632 (Thereupon, Mr. Robertson and Mr. Templeton read the following deposition.)

"MARTIN HOCHDORF

a witness called at the instance of the defendants and cross plaintiffs.

* * * * * * * * * * * *

DIRECT EXAMINATION

By Mr. Robertson:

"Q. State your name, please, sir." "A. Martin Hochdorf.

* * * * * * * * * *

1633 "Q. What is your occupation, Mr. Hochdorf? "A. I am Chief of the Computing Center of TVA."

* * *

"Q. Would you just state very briefly your duties as Chief of the Computing Center? "A. Yes. I supervise the operation of the TVA computer which is an IBM 704 electronic data processing machine, and I also provide assistance in the analysis and programming of computer problems to those TVA divisions that do not have facilities to provide this for themselves.

"Q. What kind of computations does this IBM 704 computer make? "A. There are two general categories. It carries out scientific and engineering calculations, and the other category is business applications, that is applications in accounting and record keeping.

"Q. Does this machine take facts of the costs of the production of power at the steam plants in the system of TVA and come out with an answer, giving you a result of the cheapest power of the system as a whole that it can produce, telling you which plants can produce at a given time at the cheapest rate? "A. This is one of the factors. You
1634 mentioned the production costs at the plants is one of the factors the machine takes into account in determining the loading of the TVA power plants to come up with the lowest total cost of generating power. There are other factors, that is the relative location of the generating plants in relation to the load.

"Q. If a steam plant is located farther from the place which is to use the electricity than some other steam plant, could you use the elements of cost and put them into this machine and it would give you an answer as to which plant could be increased in production and the other plant decreased in production and produce the electricity at the cheapest cost as between the two plants?"

Mr. Kramer: Now, your Honor, we are going to object

to this line of testimony because it affects only as TVA's own operation and its cost of production. We don't see where it can have anything whatsoever to do with this lawsuit and we object to it as being irrelevant and immaterial.

The Court: What is the purpose of that?

Mr. Robertson: The purpose of the testimony, your Honor, on Mr. Hill's deposition this morning, he testified that the TVA system, its various steam plants located in the western part of the system and in the east, are
1635 all an integrated system. And we are showing here by this testimony that coal put into the western system can affect the market prices in the entire system.

The Cour: Motion is overruled.

(The reading of the deposition continued.)

"A. Yes, you can. Now, may I rephrase this to make sure I understand what you said?

"Q. Sure. "A. You are talking about two plants now, two generating plants?

"Q. Yes. "A. That would supply electricity to loads, and they may have different production costs. Then the 704 program would take into account the different production costs and the distance between the generating plants at the load, and balance these factors so as to come out with the lowest cost generating schedule.

"Q. And, likewise, the information, the cost information, of each of the plants in the entire TVA system can be fed into the machine and give a result as to which plants can be drawn on and the other plants the production slowed down? "A. That is right. The example that we mentioned as expanded to the entire TVA system within the machine.
There are more than two plants involved, but this
1636 principle applies to the determination of generating schedules for the entire TVA system.

1637 "Q. The figures which you use, do they result in

cost per million BTU, or what figure does it result in? "A. I might perhaps state one general fact concerning our organization, and that is that while I have general knowledge and perhaps because of my profession somewhat detailed knowledge about this particular application, I do not have a complete knowledge of all the programs that are being run here.

"We operate what is known as an open shop, so that primarily the users have responsibility for the programs that they execute, and I am not sure that I can answer all questions in detail, but the cost figures for the steam plants would be in the nature of so many mills per kilowatt hour.

"Q. I probably didn't make my question clear a minute ago. Are the figures used as to the cost of producing the power which would be fed into the machine, would that be in terms of million BTU, speaking now of the coal which is used in the production of power at these steam plants? "A. Well, I believe that the figure which is needed by the program, which is mills per kilowatt hour, would be arrived at by using the mills per BTU for the coal, and then also using the number of BTU required by the turbine to produce a given output, so if you multiply the rate of the mills per BTU by BTU per kilowatt hour, you would arrive
1638 at the mills per kilowatt hour, and I believe there is a provision in the program to fee these factors in separately.

"Q. Mr. Hochdorf, do you know when this machine was first installed and put into use by TVA? "A. Yes. It was installed in June of 1958.

"Q. And it is here in this building in Chattanooga? "A. It is in this building.

"Q. Do you know what method or methods were used prior to the installation and use of this machine to determine the cheapest production cost for the TVA system which this machine now accomplishes? "A. This was not part of my work prior to my becoming chief of the computing center.

However, I believe that runs similar to the ones that we make on this machine, although in greatly simplified form, were made on a much more rudimentary model of computer, however, it was not done as frequently and more for a guide for general loading conditions on the system, but I have no personal knowledge of this, I was not connected with this work.

* * * * * * * * * *

"Mr. Kramer: All of the foregoing testimony is objected to as being irrelevant and immaterial.

* * * * * * * * * *

1639 "CROSS EXAMINATION

"By Mr. Kramer:

"Q. What I understood your testimony to be is that you feed certain facts into this mechanical device, known as IBM Computer 704, and you get certain answers, is that it? "A. That is correct.

"Q. It doesn't tell you where to buy the coal or what kind of coal to buy, does it? "A. No, it does not.

"Q. Doesn't reflect anything about the name of the operator or the location of the operator from whom the coal should be purchased, does it? "A. No, not to me, certainly. Perhaps —

"Q. (Interposing) Maybe somebody else might get something else out but as far as we are concerned it is what you get out of it. "A. Well, to begin with, I have no responsibility for purchasing coal, and I do not obtain this

1640 information from the machines.

"Q. Well, as far as you know, all of the information that you are aware of that comes from the machine is that for a disposition of a certain quantity of electricity at a certain point the plant at one location is cheaper in operation than a plant at some other location, is that right, is that it? "A. The machine takes the production costs at

the various plants into account in order to determine where the electricity is to be generated.

"Q. I notice hanging on the wall right behind me a graph that says something about the IBM 704 utilization? "A. Um-mmm.

"Q. I see down here in the bottom of it is a red indication marked 'computing hour' and it next says 'debugging hour' and it next says 'unscheduled maintenance.'

"Is the 'debugging hours' a part of your duty at this facility? "A. Yes. 'Debugging' is a term that indicates testing of programs, computer programs. When they are first written, they will have errors in them which we call 'bugs'. The process of getting the errors out of the program is called 'debugging'. This is a term that is used in the computing field and well understood by computer people.

* * * * * * * * * *

1641 "RE DIRECT EXAMINATION

"By Mr. Robertson:

"Q. Can you give us some idea, Mr. Hochdorf, of the size of this 704 computer? "A. Yes. It has a storage capacity of 16,000 numbers, 16,000 ten-digit numbers may be stored inside of this computer. Ordinarily when you talk about the size of a computer, this is the information that you mean. It can carry out additions at the rate of forty thousand a second, multiplications at the rate of four thousand a second. These are some of the major characteristics of the machine.

* * *

"Q. When you speak of 'programming' you refer
1642 to feeding the information to the machine and making a certain pattern from which it can ultimately reach a result?"

* * * *

"Q. (By Mr. Robertson) Can you explain to us briefly what you mean by the term 'programming'? "A. 'Programming' refers to writing the instructions which tells the

machine what calculations you want it to carry out. The program is a sequence of instructions. These instructions are detailed arithmetical operations calling for information printing information out and so forth.

"Q. With respect to this load factor, what do you do with the data which you receive from this machine? "A. You are referring to the loan schedule that the machine produces?

"Q. Yes. Going back now to the information which you get on the cost of production at the various plants within the system. "A. The load schedule is transmitted to the Power Building to the load dispatcher office over telephone lines and is printed out over there automatically on an electric typewriter.

"Q. Do you happen to know what they do with it once it is typed out in the Power Building? "A. Presumably they use it for instructing the generating plants how
1643 much load to run, but they have the opportunity to override the information if there is some good reason for it."

* * * * * * * * * * * *

"Q. (By Mr. Robertson) This testimony as to the machine giving you the answer as to the cheapest production of electricity of the system as a whole, is that not the principal function of the machine? "A. It is the one that consumes the largest part of the time for which the machine is used. There are other important functions that the machine carries out."

* * * * * * * * * * * *

Mr. Rowntree: May it please the Court, we have the deposition of Mr. Taylor Maddox, taken December 8, 1960, at Knoxville.

Mr. Kramer: Now, Your Honor, this was a witness whose testimony the plaintiffs — I mean the cross-defendants, United Mine Workers, took. It is in this case, filed in
1644 this case, and the cross-plaintiffs seek to read this deposition, which as I understand under the rules,

they have the right to do, but inasmuch as the direct examination was taken by us, we prefer to read it ourselves, and they may read their cross.

The Court: All right.

1645 "TAYLOR MADDOX, SR.

being first duly sworn, testified as follows:

"DIRECT EXAMINATION

"By Mr. Rayson:

"Q. State your name. "A. Taylor Maddox, Sr.

"Q. Where do you live? "A. Middlesboro, Kentucky.

"Q. What is your present occupation? "A. I am a district representative of the United Mine Workers.

"Q. Just what district are you a representative? "A. District 19.

"Q. How long have you held that position? "A. Nineteen years. It will be 20 next March.

1646 "Q. Prior to the time you worked for District 19 as safety director, or as district representative, what did you do? "A. I worked in the mines.

"Q. Mr. Maddox, from the period 1953 to 1958, what were your duties as district representative of District 19 with reference to territory? In other words, what territory did you look after. "A. I had about ten counties that I worked in, and — you said with reference to territories?

"Q. That is right. Now, that is counties. Did these counties remain the same during that period? "A. I don't understand you.

"Q. Did they remain the same from 1953 to 1958, or were you assigned to different territories during that
1647 period? "A. No, sir. I was assigned to that territory fully, I believe. There was a time I had part of it and moved to all of it during that period back to 1953.

"Q. Can you tell us what those counties were? "A. Well, I believe I can name most of them. I would go to Whitley County over at Stearnes, and that county over there, and in Kentucky. I can't call this county now.

"Q. McCreary County? "A. McCreary County, and Scott County and Morgan and Fentress, a little in Cumberland, some in White, some in Picket, some in Pulaski County, Kentucky, and some in Campbell. That must be nearly ten.

"Q. Were there other district representatives working in those counties besides you? "A. Mr. Daniels helped in that. We worked all that section ourselves. I would say I traveled most of it. He stayed mostly in Campbell County.

"Q. Do you have any idea how many mines you looked after in these counties? "A. I believe there must have been around 200 scattered around in those counties.

"Q. Mr. Maddox, do you recall where the Pennington tipple and mine was located. I think it was known as the Phillips Brothers mine. "A. Yes. That was out there
1648 between Jellico and Pioneer, on what we call Pioneer Mountain, I believe.

"Q. Is that where the mine was located? "A. The tipple was there. The mine was on the mountain behind there. I don't know which direction it was, to say directly, but it was back behind the tipple.

"Q. Did you have occasion to go to the mine site proper? "A. I was up there one time where they were deadlifting the coal. I just went up to see if they were in production, and I believe Mr. Daniels was with me at that time.

"Q. Do you recall when that was? "A. No, sir, I don't. I just don't recall that.

"Q. Did you go there on any other occasion or to the tipple on any other occasion that you recall? "A. Yes, we went down there, Mr. Daniels and I did. He got me to go down with him. We went down and met with the men, and

we had an officers election and we set the local up and got the officers installed.

"Q. Do you recall when this was? "A. I believe it must have been maybe along in May of 1955.

"Q. Do you recall any people who attended this meeting?
"A. I can't name a one of the men that were in the
1649 meeting. It was the fellows, it was their employees, and Mr. Jim Pendleton was around there. He didn't, of course, attend the meeting. Of course he had some of the contracts.

"Q. You say "Pendleton." You mean Pennington? "A. Pennington.

"Q. Was he present? "A. He was at the mine at the tipple.

"Q. Did you talk to him? "A. Yes, I talked with him and Mr. Daniels did also.

"Q. Do you recall anything of the conversation? "A. Well, I don't recall anything that was said particularly as to the words. He was very friendly with us. It was a very congenial meeting we had.

"Q. Was there any harsh words or anything like that at that meeting? "A. No, not a thing.

"Q. Do you know who arranged the meeting? "A. Mr. Daniels told me they had called for us to come down, for him to come down, and he asked me to go with him. That is all I know of the setup of the meeting.

"Q. How long were you there? "A. We stayed about an hour that time, I believe. "Q. Do you recall any other
1650 occasion that you went to the Phillips Brothers mine or tipple? "A. I went down with Mr. Daniels after that. I just don't recall the date. It has been a good while ago. And I am kind of hazy on that. But we went down and waited on the men to come off of the hill, and we talked to them about something or another, I don't know just what it was.

"Q. Was this after the meeting you mentioned in May 1955? "A. That was after, yes.

"Q. Do you recall how long after that it was? A. No, sir. I don't. I drove by this place — I might explain this. I drove by this place going down ordinarily to Huntsville to get down that way to southern Tennessee, and there was a few times I would see Jim there and stop and ask how he was getting along.

"Q. You mean Jim Pennington? "A. Yes. I don't remember any other contacts we had outside of that, that I participated in. It was Mr. Daniels' mine that he looked after.

"Q. Did you ever sign them up on a union contract? "A. Not that I remember.

"Q. Have you told us all of the contacts that you have had with Mr. Pennington or the Phillips Brothers with reference to the Phillips Brothers mine? Do you
1651 recall any others? "A. I don't recall any others.

"Q. Did you testify Mr. Daniels was present on this occasion when you and he waited for the men to come off of the mountain?, "A. Yes."

Mr. Combs: Cross examine.

CROSS EXAMINATION

* * * * * * * * * * *

By Mr. Rowntree:

"Q. Mr. Maddox, I believe you testified that you went up to the Phillips and Pennington mine one time before this time when you signed the men up, is that right? "A. I believe that is right.

"Q. One time? "A. Well, I wouldn't confine it just to one. That is just the best I remember about it.

* * *

"Q. And on one occasion do you remember exactly who was present, who you saw up there? "A. I don't remember the names of any of those men, Mr. Rowntree. As I say, Jim Pennington was the man I do remember talking with about every time I stopped there; or the few times I did stop there,

Jim would be there.

1652 "Q. Do you remember how much mining had been accomplished at that operation on that visit, at the time of that visit, the first visit? "A. Of the first visit?

"Q. Yes. "A. Well, they worked some time there trying to get, looked like, getting the operation started, to me.

"Q. Had they taken any coal out at the time? "A. They had some but it wasn't too heavy.

"Q. Do you remember how many men were there? "A. I would say there was enough to operate one strip shovel and a bulldozer, maybe a tipple man.

"Q. Do you remember what equipment they had? "A. I saw them move in the shovel there, or move it out to work on it, I am not sure which way they moved it. I did see a shovel and I think they had a bulldozer, and they probably had a loading shovel, a small one to load with.

"Q. Do you remember what date this was? "A. No, sir, I don't.

"Q. Do you remember what period of the year it was? "A. No, sir, I can't confine it to that. "Q. Do you remember who was talked to up there? "A. I would say every time I stopped I talked to Jim Pennington.

1653 "Q. Do you remember what was said? "A. No, sir.

Q. How many times did you see Jim Pennington between that time and this time when you and Mr. Daniels came down and signed the men up? "A. Well, I don't know, Mr. Rowntree.

"Q. You don't remember? It has been some time ago. "A. It has been some time ago, and it is something that I never had to keep in my mind.

"Q. All right, Mr. Maddox, how many large mechanical mines are in this area that you have acted as a representative of the union in? "A. You mean then?

"Q. Yes, at the time you were a representative of the union in this ten-county area.

* * * * * * * * * * *

1654 "A. The best I remember, we had three large mechanical mines in the Monterey area. Now that is strip, auger, and deep mines you are talking about?

"Q. That is right. And I am talking about mines that employ 50 men or more. "A. Yes. Well now, in Scott
1655 County—getting over across the line there—the others I am thinking about down the other way are small, Mr. Rowntree, and in Scott County we had a large strip mine up that fork there, and the mine at Glenmary was working. Mr. Gilchrist had a strip mine around Robbins there, and there were some over in near Williamsburg over there. Mr. Osborne had mines above there, up near Corbin. We had around Jellico, we had some big mines, and at Morley the mine was working at that time, and down at Caryville the Bledsoe people had two mines down there. I am liable to skip some, but a rough estimation I am giving you. The Hickey is pretty near Caryville. They operated that mine. Vaspar and Eagan over in Campbell County was operated by the Blue Diamond people at that time, and in the area of Williamsburg there I would say there were two or three more strippers. They were good productive places, maybe what you would like, but they didn't employ that many men. Over at Stearns, the Stearns people had two deep mines over there, also B. R. Campbell had a strip mine in that section, and there were four or five more strip mines of small type in Scott County at the time. I don't remember that fellow's name. We had a deep mine at Straight Fork.

"Q. That pretty well covers them? "A. There are more but it is hard to think them out right now, not being prepared on it.

1656 "Q. These three mines in Monterey you mentioned, what were their names, do you remember? "A. I will try to give you the names they operated on. Allred had one, Allred and Brown, A & B we call that. And the Fentress mine was operated by Fentress people, I will say, out of Knoxville. Then the mine Bill Turner Ray operated—I

believe his last name is Ray — we called him Turner Ray.

"Q. That last mine you mentioned, is that the mine that was purchased by the Clinchfield Division of Pittston Company? "A. That is right. That was the Bill Turner Ray mine.

"Q. That mine was still operating? "A. Yes.

"Q. What about the Fentress mine?"

* * *

"Q. The Fentress mines were closed? "A. Yes.

"Q. What about the A & B mine? "A. I don't think it was operating. I heard it is subject to be started, but I don't believe it was operating.

"Q. Over in Scott County, you mentioned a large stripping operation. Whose stripping operation was it?

1657 "A. McCoy's.

"Q. Where is he now? "A. He left that section there, and I understand he is back in Alabama. He has an operation down there.

"Q. The Glenmary mine, do you know the present status of that mine there? "A. No, sir, I don't. They were down and they may have gotten started. I don't know whether they are or not.

"Q. Does the United Mine Workers have a contract with them? "A. No.

"Q. Did they have a contract at one time? "A. Yes, sir, several years.

"Q. The Gilchrist operation at Robbins, is that in operation now? "A. No. They moved from there. They went up about Jellico and operated up there after that.

"Q. Are they operating at Jellico now? "A. I don't know. They may be. I can't answer that.

"Q. Does the United Mine Workers have a contract with them at Robbins? "A. Yes.

"Q. Do they have a contract with Gilchrist or G & R

1658 now? "A. I couldn't answer that. I don't know whether we have them signed up or not, or if he is operating.

"Q. Now the Williamsburg — is that in Kentucky? "A. Yes.

"Q. You mentioned the Osborne operation near Williamsburg. That is Osborne Mining Company, is that right? A. Yes.

"Q. Did you try to sign Osborne Mining Company up? "A. Yes, we tried to sign them up.

"Q. This was back before 1955, is that right? "A. Yes, sir.

"Q. And in 1955; 1954-1955, was Osborne Mining Company operating in the region of Jellico, Tennessee? "A. Yes, I guess they were. It must have been they were up at Gatliff at that time, maybe loading their coal.

"Q. Do you know what happened to that operation? "A. At Jellico?

"Q. Did they continue at Jellico? "A. No. They quit there and I think Gilchrist took their tipple over.

* * *

"Q. Gilchrist had a contract with the United Mine Workers at that time? "A. Yes."

1659 Mr. Kramer: Your Honor, I don't know the materiality. We let them go on with these. They take a lot of these individual mines and attempt to prove whether they are operating or not operating, without any basis of why or what may have happened, and I think it is wholly irrelevant and immaterial.

I have let them go on with it this far, but it is typical of some additional proof that they are seeking to prove, and we object to it as irrelevant and immaterial. The mere fact that the mine happened to be down and the circumstances surrounding it closing, I think it has nothing to do with it, your Honor.

Mr. Rowntree: We say the mines of Tennessee have closed and are closing because of conspiracy.

The Court: Overruled.

Mr. Kramer: Of course, your Honor, in that same connection I want the record to show — your Honor indicated it

may show the reasons for our objection without repeating them, but you can't establish conspiracy by these acts themselves. The conspiracy must be shown by something outside the conspiracy before it is admissible.

(The reading of the deposition continued.)

"Q. You stated there were two or three more strippers operating around Williamsburg. Do you recall who
1660 they were? "A. A man named Bobo had a mine out there, and got killed in an airplane, and it changed hands to that county — what I mean, they set it up. I think one of the Penningtons did that under another hand there.

"Q. Any of those three strippers you mentioned, are they operating around there? "A. It is my knowledge, the best I have on it, that they are not. They are all out of business now.

"Q. What about the mine at Morley near Jellico? "A. Morley has worked out. They have pulled the inside equipment out. They did for a while operate the tipple and buy truck coal around there, but I understand they stopped doing that.

"Q. When was the last time you were down in that mine? "A. That I was down in the mine?

"Q. Yes. "A. In Morley?

"Q. Yes. "A. I was in there one time when I was on safety. That was some time prior to 1952.

"Q. Were they worked out at that time? "A. No.

"Q. How do you know they are worked out? "A.
1661 I was told that by the superintendent that they worked it out."

* * *

"Q. That mine is closed? "A. That is right.

"Q. The Bledsoes operated two mines near Caryville, I believe you mentioned those. Do you recall what the names of those mines were? "A. We have a name for one of them; we called it Hickey, and the other Vaspar. But what the company names were that they operated under, I don't have them.

"Q. That is good enough. Are those two mines operating? "A. No.

"Q. The Campbell mine at Eagan, formerly operated by the Blue Diamond people, is that mine in operation? "A. It has been abandoned.

"Q. Did the United Mine Workers have a contract with that mine? "A. Yes.

"Q. Did the United Mine Workers have a contract with the Morley mine? "A. Yes.

"Q. That we talked about at Jellico? "A. Yes.

1662 "Q. What about the Hickey and Vaspar mines? "A. We had contracts there.

"Q. The two deep mines at Stearns, what were their names? Do you recall what their names were? "A. Co-operative was one, and one was Blue Herron.

"Q. Where is that Blue Herron mine? "A. About 10 miles out of Stearns, back straight to the left as you get in town from the west.

"Q. And Campbell had a strip mine in that area? "A. B. R. Campbell did.

"Q. Is he still stripping over there? "A. I don't know whether he is or not.

"Q. Now, Mr. Maddox, how many small operating companies were operating in this 10-county area we have been talking about back when you were representative? "A. We named most of the large ones, and I would say that I had up around, Mr. Daniels and I did in this territory, had around 200 contracts.

"Q. That would be the balance of those? "A. That would be the balance of them.

"Q. Are there a good many small operators still in operation up there? "A. Well, they come and go. Sometimes they don't stay. There are several.

"Q. There are a number of small operations?

1663 "A. All over that territory, I would say yes.

"Q. What size would these operations be that are operating up there, say, in the past two or three years?"

• • •

"Q. Mr. Maddox, will you sort of describe for us a typical one of those small operations, underground, in this area? How many men they would have? What they would do to get the coal out? I take it you have been there many times? "A. Well, they worked—there are different ways of working a mine, big or little, you work it on what they call shooting on the solid, or undercut the coal with a machine, then shoot the coal down, which is what they do where they have power. A man that didn't have any equipment would go in with his powder and drill and shoot on the solid and try to get a little coal that way, and probably get it in a car and push it out. A man with equipment would go in and take a machine and motor, and he would load this coal after it had been undercut with a machine, then, of course, he had to shoot it down, and lay tracks, and do that kind of work, and timber, and he would dump his coal maybe out in the tipple and it would be hauled away with a truck. I would say that would be a typical mine. That is roughly describing the two kinds.

"Do these small mines up in that area have conveyor belts? "A. They had one up there in Scott County,
1664 I know of, had a conveyor setup. It was above Robbins that I am thinking about. There are some more with truck transportation in the mines. That is, rubber-tired cars. They run a car on the track on rubber tires.

"Q. Where are they? "A. We have them up in Kentucky in Bell County there.

"Q. Have you been in any of those? "A. I haven't been inside in those mines. I have been to it, but I haven't been inside.

"Q. Have you seen any continuous mining machines in those small mines? "A. Not in small mines. They have them up at Lynch, which is the smallest in this area. They run about 15,000 tons a day."

Mr. Rowntree: I think that should be "which is not in this area". Do you agree?

Mr. Kramer: Yes, that is right.

1665 "Q. Where is Lynch? "A. In Harlan County in Kentucky.

"Q. They have thicker coal than we have in this ten-county area? "A. Yes, the coal will average six feet, I expect, what I have seen of it.

"Q. Have you seen any of the really large stripping shovels that are in the industry at the present time? "A. No, only a picture of it. We don't have it in our field here. About a five-yard dipper is about the largest we have here. I understand some are fifty-five.

"Q. And have you got any of the great big trucks that they have in some of these other areas for hauling the coal with? "A. I would say just the average size truck is about all we have. We don't have any large ones.

"Q. Some of the roads at the strip pits are pretty muddy and rough? "A. Yes.

"Q. And the terrain pretty uneven? "A. Yes..

"Q. Did Mr. Bill Clontz previously operate as the union field agent in the area we are talking about before you came into it? "A. Mr. Clontz had part of the sec-

1666 tion that we have discussed.

"Q. What would be the average number of men that operated these small mines we have been talking about? "A. There is no average to it, I wouldn't say. I would say two up to twenty.

"Q. Two to twenty? "A. Maybe twenty-four or twenty-six.

"Q. Did the district president tell you each day what he wanted his field representatives to do that day?"

* * * * * * * * * * * *

"A. No, we are not directed daily by the district president. We are given a section maybe that comprised several counties, and we were put out there to organize it, service the local union.

"Q. What was your primary object as a field representative? Wasn't it to carry out the directions of the president of the district? "A. Yes, sir.

"Q. What did he tell you to do when you went out there? "A. I don't understand your question.

"Q. Was it to organize the unorganized mines? "A. Oh, yes, that is our job. We are supposed to organize,
1667 representatives of the union, and the union is in the organizing field.

"Q. He didn't tell you each day which mine to go to? "A. We were not directed that way."

* * * * * * * * * *

"Q. Who was Ray Thomason? "A. He was district president.

"Q. And we are talking about when you represented— "A. District 19. Well, sir, I wouldn't say all the way through, but he was president.

"Q. And he was president in 1953 or 1954 and 1955, wasn't he? "A. He was sick there for about one year. I don't remember just the period. That would have to be excluded.

"Q. I will ask you then, did the district president assign you as a field agent of the union to the territory and leave it to you to outline your work in carrying on your duties as a representative of the United Mine Workers of America? "A. Yes. The answer would be yes on that. I would like to say a little more in explaining my answer. In some
cases we would refer back to him for advice. He
1668 was, after all, the president of the district.

"Q. Was it your job, and were you instructed to attempt to organize any unorganized mines that might be in the territory? "A. We would find those places ourselves and just go ahead and try to organize them. We weren't sent and instructed there to do that. It was our job.

"Q. And the mines of John Jones or Joe Smith or Clifford Osborne were not specifically designated to you to

go out and organize? "A. No. We weren't just sent to that one place to stay and organize it before we left. If that is what you are thinking.

"Q. Are most of the organizers of the United Mine Workers pretty experienced men in the labor organizing field? "A. I am not one to pass on their experience.

"Q. You know them very well, don't you? "A. Yes, I do:

"Q. And you know most of them have been in the business a long time, including yourself, in this particular field we are talking about in this period? "A. Yes, I would say they generally were experienced men.

"Q. The same is true for Mr. Daniels? "A. That
1669 is right.

"Q. It wasn't necessary for the district president to sit down with you and talk with you and detail your activities in your organizing work? "A. No, sir, generally it wasn't.

"Q. Now, Mr. Maddox, how did you go about this organizing? Suppose a mine could not be signed up by you and Mr. Daniels going and talking to the operators. Did you ever carry on picketing activities at these small mines we have been talking about? "A. Well, we never had a great deal of trouble at the small mines we are talking about. We never did a great deal of picketing.

"Q. Well, what do you mean by picketing, now? "A. Well, now, picketing and riding up and down the road in a car with a motorcade, in my view, are two different things. I say picketing, we would go there to the mine and we would peacefully picket the place according to the law.

"Q. And where would the pickets be situated? "A. No set rule on that.

"Q. Some of these mines are pretty isolated, aren't they? "A. Yes, sir.

"Q. In wild territory? "A. Yes, sir.

1670 "Q. In the woods, it that right? "A. Some of those strippers get a way back.

"Q. And some of the small deep mines are pretty far back in the hills, too? "A. Yes, sir."

"Q. Mr. Maddox, are you still a representative of the United Mine Workers? "A. Yes, sir.

"Q. You are still on the payroll of the United Mine Workers? "A. I hope so.

"Q. Now you have gathered together some men and gone in automobiles to some of these small mines from time to time, have you not? "A. In some cases. I don't just recall any specific incident. We would go to get the men signed up on checkoff card, or something like that.

"Q. Or to organize the mine? "A. Well, that would be organizing, signing up the man.

"Q. That was your job to organize the mines, is that right? "A. Yes.

1671 "Q. And when you would go on these trips sometimes you would pay for the gasoline on these trips? "A. If I took a bunch of men and let them take their cars, yes, I would.

"Q. And sometimes you would buy food and things at the restaurant for these men, and pay the restaurant charge? "A. I think that is in the record that we have done that.

"Q. And you would get a refund on these expenses from District 19? "A. That would be organizing expenses."

* * * * * * * * * * * *

"RE DIRECT EXAMINATION

"By Mr. Rayson:

"Q. Mr. Maddox, you referred to a number of mines by name or location during your cross-examination as being large, strip, auger, or deep mines. "A. Yes.

1672 "Q. Do you know as a matter of fact whether all of the mines you referred to had more than fifty employees, or did some of them have less than fifty employees? "A. Some of the strips would have less than fifty, and the auger mines would.

"Q. So you did not mean to have your testimony understood that all those so-called large mines to which you referred had more than fifty employees? "A. No. That is a mistake, if that is the way it was understood. I believe I stated that the strip would have less. Did you understand that?

"Mr. Rowntree: Yes."

* * * * * * * * * * *

1673 I. E. SCHMIDT

called as a witness by and on behalf of the defendants, cross-plaintiffs.

* * * * * * * * * *

DIRECT EXAMINATION

By Mr. Robertson:

Q. What is your name? A. Schmidt. I. E. Schmidt. S-c-h-m-i-d-t.

* * * * * * * * * *

Q. What was your occupation before your retirement? A. I was office manager for Royal Fuel Company at Knoxville.

Q. Did Royal Fuel Company submit bids for operating coal companies, mining companies? A. Yes, we did, to different locations.

Q. Did Royal Fuel submit bids for Phillips Brothers Coal Company? A. They did, yes.

* * * * * * * * * *

1674 Q. Mr. Schmidt, could you tell what the factors are that would be considered in making—in determining the amount of particular bids which would be submitted by Royal Fuel on behalf of operating mining companies? A. What we took into—you mean what we took into consideration in making the bid to the TVA?

Q. Yes. A. The analysis of the coal and the freight rate, and the current price of coal you were paying for at different plants.

Q. You mean the price of the successful bids just prior to that? A. The price of successful bidders prior to the date we put in the bid. Yes.

Q. Was your reliance on this substantial or not? A. We received from TVA weekly reports of their purchases for the preceding week on spot bid coal which gives the price they paid for the coal.

1675 Q. Was that for the plants which you submitted bids to? A. We considered only the Kingston and Watst Bar and John Sevier, the eastern plants.

Q. Did Phillips Brothers Coal Company ever authorize Royal Fuel to submit bids on the TVA term market? A. I was never authorized by Phillips Brothers to submit bid on term market; no, sir.

Q. But you did submit bid on the spot market? A. On the spot, yes, we did.

Q. Do you have copies of the Royal Fuel Records with you as pertains to Phillips Brothers Coal Company? A. I do. These are also my writings. I made these up for Royal Fuel.

Q. Does this record show the prices, the bid prices of— A. It shows the bid price, the commission and the net price paid to Phillips.

Q. Does it show the TVA contract number? A. Contract number, yes. And the bills of lading under which the coal was shipped and the car numbers of the coal.

Q. And also the destination of any other purchaser other than TVA? A. We show different purchasers, yes,

1676 sir, besides TVA.

Mr. Robertson: I wish to introduce this as the next exhibit, being the Royal Fuel Company records pertaining to Phillips Brothers Coal Company beginning March, 1956, and going through December, 1958, as a collective exhibit.

(Exhibit No. 97 was marked for identification and filed.)

By Mr. Robertson:

Q. I will ask you, Mr. Schmidt, to look at the column showing the net price to Phillips Brothers and ask you

if there is any trend so far as the price received by Phillips Brothers from TVA? A. During the years 1956, '57—

Mr. Kramer: Wait just a moment. I understand this instrument speaks for itself. What are we seeking to do now, Mr. Robertson?

Mr. Robertson: All right, your Honor: I would like to read these net prices then.

This is beginning in March, 1956, and I would like to point out for clarification, that there is a gross price and then the commission which Royal Fuel charged Phillips Brothers for submitting the bids and then it shows the net price paid by Royal Fuel to Phillips Brothers out of what it received from the TVA.

1677 In March, 1956, to TVA, price $4.15 a ton. April, 1956—

The Court: Was that net or did that include the commission?

Mr. Robertson: That is net.

The Court: Net to Phillips?

Mr. Robertson: That is net to Phillips.

The Court: All right.

Mr. Robertson: On that particular one the gross price was $4.49, the net price was $4.15 per ton.

* * * * * * * * * * *

1678 By Mr. Robertson:

Q. To clear this up, Mr. Schmidt, what account books of Royal Fuel do these come from? A. These are accounts payable.

* * * * * * * * * * * *

1679 Mr. Robertson: That first one in April was April 19th.

Again April, April 21st, gross price $4.49; net price, $4.15, to TVA.

April 27, the gross price, $4.49; net price, $4.15, to TVA.

May 19th, Gross price, $4.49; net price $4.15, to TVA.

1680 That first figure was May 9th. This is May 14th. Gross price $4.49; net price $4.15, TVA.

May 18th, gross price, $4.49; net price $4.15, TVA.
May 23rd, gross price, $4.49; net price, $4.15, to TVA.
June 7th, gross price $4.30; net price, $4.05, to TVA.
June 5th, gross price, $4.30; net price, $4.05, to TVA.
June 8th, gross price, $4.30; net price, $4.05, to TVA.
June 13th, gross price, $4.30; net price, $4.05, to TVA.
June 15th, gross price, $4.30; net price, $4.05, to TVA.
June 19th, gross price, $3.85; net price, $3.65, to TVA.
June 20th, gross price, $3.85; net price, $3.65, TVA.
June 22nd, gross price, $3.85; net price, $3.65, to TVA.
June 27th, gross price, $3.85; net price, $3.65, to TVA.

July 14th, gross price, $3.85; net price, $3.65, to
1681 TVA.

July 20th, gross price, $3.72; net price, $3.52, to TVA.

July 24th, gross price, $3.72; net price, $3.52, TVA.
July 26th, gross price, $3.72; net price, $3.52, TVA.
August 1st, gross price, $3.72; net price, $3.52, to TVA.
August 9th, gross, $3.72; net, $3.52, TVA.
August 13th, $3.72 gross; net, $3.52.
September 5th, gross $3.60; net, $3.45, TVA.
September 10th, gross, $3.60; net, $3.45, to TVA
September 12th, gross, $3.60; net, $3.45, to TVA.
September 13th, gross, $3.60; net, $3.45, to TVA.
September 14th, gross, $3.60; net, $3.45, to TVA.
September 15th, gross, $3.60; net, $3.45, to TVA.
September 21st, gross, $3.52; net, $3.37, to TVA.

September 26th, gross price, $3.52; net price, $3.37,
1682 TVA.

September 27th, gross, $3.52; net, $3.37, TVA.
September 28th, gross, $3.52; net, $3.37, to TVA.

October 3, gross, $3.52; net, $3.37, to TVA.

1683 To make this more brief, September 21, the figure changed gross $3.25 and net $3.37; and at that price there are seven combined entries or seven entries at that figure.

November 2, gross $3.62. Net $3.47, to TVA. And there are three entries at that price.

Then December 4, gross $3.25. Net $3.37 to TVA, and there are four entries at that price, going through February 1957.

March 12, 1957, gross price $3.57. Net $3.42 to TVA, and there are four entries there, through the rest of March at that price.

Then the next entry is August 8, 1957, and this coal is Love & Amos Coal Company on it, the destination being Tampa Electric Company. The gross price on that is $3.75. The net price is $3.50.

Mr. Kramer: Now, your Honor, we are going to object that the sales to TVA were competent — the fact that they sold coal at a certain price to the Tampa Electric Company, your Honor, and we are showing simply that they sold coal at a certain price and received a certain net amount per ton for the coal sold to Tampa Electric Company. The fact that they made sales to some concern at a given price we do not think is evidence of any conspiracy or acting within any conspiracy that could be competent in this lawsuit, and we object to it as being irrelevant and immaterial.

1684

Mr. Robertson: Of course, your Honor, we are showing here the fact that the price of the coal going to Tampa at that time was above the price that they could get at TVA.

The Court: Is that the only purpose of the testimony?

Mr. Rowntree: If your Honor please, there will be some testimony a little bit later about Tampa Electric Company and what these people did down there.

The Court: Well, is the only purpose of this testimony so far is to show that the price paid by Tampa was a price higher than paid by TVA?

Mr. Rowntree: It is also offered for the purpose that we had a market in Tampa, a market that we very much needed and a market which has been taken away from us.

The Court: Overruled.

Mr. Kramer: If I may state, your Honor, I can't see what difference five cents a ton, or whatever the amount may be—suppose they had a market and Tampa Electric is
1685 willing to pay a little more. I can't follow where this is competent and relevant.

The Court: Mr. Kramer, it may have some bearing. The Court is not indicating what bearing, if any, it has on this monopoly feature of the lawsuit. Under Section 2 of the Sherman Act, the charge is made that these defendants, along with some of the large coal companies, combined to monopolize or to attempt to monopolize the market in the coal industry.

Now this testimony, the Court is not indicating it is of probative value, if any, but the Court does feel that it should be admitted as bearing on that subject, for whatever weight it may have, if any. That is the theory upon which the Court holds that the testimony is competent.

With that explanation, the objection is overruled.

Mr. Robertson: The first entry here was August 8, at the price of $3,75 gross and $3.50 net to Tampa, and there are 13 entries going through the month of September, 1957, at the same prices, that is $3.75 and $3.50 to Tampa.

Beginning with October 12, shipments to TVA, gross price $3.05. Net price $2.90, TVA. There are five entries at that price to TVA.

1686 On November 4, 1957, to TVA, gross price $2.98.

There are four entries at that price up until the latter part of November and on November 26, 1957 the gross price to TVA is $2.95, the net $2.80.

There are four entries there going through December '57 at those prices.

Beginning January 3, 1958, coal to TVA, gross price $3.07. Net price $2.92.

The Court: Gross how much?

Mr. Robertson: $3.07. There are five entries at that price, going through January 1958.

Beginning with February 7, gross price $3.18. Net price $3.03, to TVA. Eight entries at that price go into April of 1958, and then on April 21, 1958, gross $3.20. Net $3.05 to TVA. There are six entries at that price of coal going to TVA into May 1958, and on May 27, 1958 coal going to Love & Amos on the Tampa contract, the gross price $3.75. Net $3.50. Then on May 22, an entry on TVA coal at the gross price of $3.20. Net $3.05.

Mr. Kramer: Tampa Electric, we are still continuing subject to our objection, without repeating.

The Court: Yes.

Mr. Robertson: On June 2, 1958, coal to TVA, gross price $3.19. Net $3.04. There are eight entries at that price, and then on July 14, 1958, gross price to TVA $3.15. Net price $3. There are three entries at that price, until
1687 July 21, 1958, coal going to Love & Amos from the Tampa Electric — one the Tampa Electric contract, entry July 21, 1958, gross price $3.75. Net price $3.50.

July 30, 1958, upon coal going to TVA, gross $3.44. Net $3.15. There are two entries at that price.

Then on August 8, 1958 to Duke Power Company the gross price $3.65.

Mr. Kramer: The same objection with reference to Duke that we made with reference to Tampa Electric.

The Court: Same ruling.

Gross how much?

Mr. Robertson: Gross $3.65. Net $3.30.

And the balance of 1958 is to Duke Power Company at the last price I gave. That is the gross of $3.65. Net $3.30. With the exception of one entry on September 27, which appears to be Kentucky Cumberland Coal Company at a gross price of $3.75 and a net price of $3.30.

* * * * * * * * * * *

1689 By Mr. Robertson:

Q. Mr. Schmidt, have you analyzed the spot award announcements by TVA for the years 1956, '57, and '58, and made any charts as to what those awards sheets show? A. I have, yes, sir.

* * * * * * * * * *

Q. I'll ask you have you prepared a chart showing the bid activities, bidding activities, of Phillips Brothers Coal Company during the years '56, '57, and '58? A. Yes, sir.

Q. And what does that chart show? A. That chart shows the date of the bid, the bid number, the bid price, the commission, and the net price to Phillips Brothers, and the plant to which the coal was sent. It also compares the average spot bid price at this plant at that time.

Is that clear?

Q. All right, now, from what records were these figures taken? A. From the photostatic copies of the TVA?

Q. And did you use any other records other than
1690 these to make these charts? A. I used the sheet, a certain part of this sheet over here that you just read.

Q. What columns there did you take from the Royal Fuel— A. That is on the bid price, the commission, and the net price.

Mr. Robertson: We offer this first chart, Your Honor, as Exhibit—as the next exhibit, comparing the Phillips Brothers Coal Company bidding activities with the average prices paid at the particular TVA steam plant that month with the price Phillips Brothers received on their bid on that particular month for the years '56, '57, and '58.

* * * * * * * * * *

Mr. Robertson: For purposes of clarification, Your Honor, I believe I used the term "price" a few minutes ago, and actually, it is "cost per million BTU's" on both the Phillips Brothers activity and the averages as reflected on these TVA awards for all companies.

Mr. Kramer: Are you talking about cost to TVA, is that

what you mean when you use the word "cost"?

1691 Mr. Robertson: Cost to TVA.

* * * * * * * * * * *

Mr. Rowntree: We want to show, Your Honor, that Phillips Brothers wasn't underbidding the market just to sell coal. It was bidding at a figure that is pretty close to the market average in order to stay in the market, and it was not damaging itself by bidding too low or way below the market price. That is the purpose of that.

Mr. Kramer: Of course, it is our position that the market had to be met, or it couldn't operate. Market price cannot be a basis for conspiracy. If the market goes down on anything, you have to take the consequences. If the price of shoes goes down, I pay less for the shoes. TVA did the same when it bought coal.

(Exhibit No. 98 was marked for identification and filed.)

Mr. Robertson: If Your Honor please, I would like to read from this exhibit beginning with March, 1956. I have already read from the Royal Fuel records some of these figures, and so I will omit the prices, commission,

1692 and so forth, and the contract number, and read it only by months, tons which Phillips Brothers either offered or were awarded, the cost per million BTU to TVA on that award, and the average BTU cost to TVA for all the awards for that month at that plant.

Beginning with March, 1956, a successful bid, or an award to Phillips Brothers for six hundred tons, at the cost of .2349—that is twenty-three cents carried out to the fourth place, .2349—that is true of all of these figures. They carry them out to the fourth place.

The Court: That is the price of twenty-three and a half cents?

Mr. Robertson: Yes, sir.

The average at Kingston that month—

Mr. Kramer: You mean that was a Kingston sale?

Mr. Robertson: That was consigned to Kingston.

Mr. Kramer: All right.

Mr. Robertson: The average to Kingston that month for all awards, all spot awards, was .2303.

April '56, an award to Phillips Brothers of one thousand tons at .2349, to Kingston, the average for all awards, spot awards, at Kingston that month, .2343.

May, 1956, fifteen hundred tons to Phillips Broth-
1693 ers, .2349, at Kingston, the average at Kingston, .2335.

June, 1956, fifteen hundred tons to Phillips Brothers at .2373, the average at Kingston that month, .2152.

Another award in June of fifteen hundred tons at .2094, and the average at Kingston that month, .2152.

July, 1956, fifteen hundred tons to Phillips Brothers at .2042, to Kingston, the average at Kingston that month, .2049.

August, 1956, fifteen hundred tons to Phillips Brothers, to Kingston, at .1994, the average at Kingston that month, .2006.

September, 1956, one thousand tons, to Kingston at .1962, the average at Kingston that month, .1950.

In October, 1956, one thousand tons offered but was not awarded at .1947, the average that month at Kingston, .1944.

December, one thousand tons awarded to Kingston at .1952, the average at Kingston that month, .1943.

November, '56, one thousand tons awarded, .1967, cost to
Kingston, the average cost at Kingston that month,
1694 .1954. January, 1957, one thousand tons offered, but
not awarded, the cost at Kingston, .1940, the average at Kingston that month, .1955.

Also offered to John Sevier at .2021, the average at John Sevier that month, .2030.

In March, 1957, one thousand tons awarded to John Sevier at .2043, the average cost at John Sevier that month, .2022.

One thousand tons offered in March but not awarded, to Kingston at .1962, the average at Kingston .1904.

To John Sevier, .2043, the average at John Sevier that month, .2022.

April, 1957, four hundred fifty tons awarded at Kingston at .1849, the average at Kingston that month, .1870.

Also in April, five hundred tons awarded at .1851 to Kingston, the average that month at Kingston, .1870.

May, 1957, fifteen hundred tons awarded to John Sevier at .1933, the average cost at John Sevier that month, all spot awards, .1968.

In May, fifteen hundred tons awarded to John Sevier at .1953, the average at John Sevier that month, .1968.

1695 In June, 1957, fifteen hundred tons awarded to John Sevier at .1933, the average that month, .1962.

July, 1957, fifteen hundred tons awarded to John Sevier at .1990, the average that month at John Sevier, .1973.

August, '57, twenty-five hundred tons awarded to John Sevier at .1912, average that month at John Sevier, .1920.

September, 1957, five hundred tons awarded to Kingston at .1770, the average at Kingston that month, .1796.

October, fifteen hundred tons awarded to John Sevier at .1831, the average at John Sevier that month, .1857.

* * * * * * * * * * *

1696 By Mr. Robertson:

Q. Mr. Schmidt, I believe I neglected to ask you, how long you were with Royal Fuel Company, from what date to what date? A. I was with them in the spring of 1951 until August, 1959.

Q. To August of ------ A. 1959.

Q. During the years 1956, '57 and '58, while you were with Royal Fuel Company, was there any pattern which you noticed in the TVA market? A. Seemed that the TVA market was on the decline pretty bad, especially '57, '58.

Q. Did you know why this decline ----A. No. At that time we did not know.

* * * * * * * * * * *

1697 Q. Since you have recently had access to the TVA award announcements, the spot award announce-

ments, have you also constructed a chart which would compare teh average BTU cost of the eastern plants, steam plants of the TVA, with the average BTU cost of the TVA system as a whole? A. Yes, I have.

Q. Do you have that chart? A. I have that chart, yes.

Q. And from where did these figures come? A. They come from the photostatic copies of the TVA reports.

Q. Do you know which steam plants are in the eastern section of the system and which ones are in the western section? A. In the eastern section they have — we cover Kingston, John Sevier, Watts Bar, and in the western section it covers the Shawnee, Johnsonville, Colbert,
1698 Gallatin and Widows Creek.

Q. All right, and are the award announcements in the spot made according to east or western plants? A. Yes, they do. They distinguish between eastern and western plants.

Mr. Robertson: We offer this as the next exhibit, which shows the average BTU cost per month at the three TVA eastern steam plants. That is the average for all three of the plants, Kingston, John Sevier and Watts Bar, as compared to the average BTU cost per month of the coal purchased for the TVA system. That is the average of all of the steam plants. And this chart also shows what that average is per year for the eastern as compared with the TVA system, and this chart covers the years 1956, '57, and '58.

Mr. Kramer: May it please the Court, we object to the introduction of this exhibit. In the first place, your Honor has already heard the proof that the difference between the locations of the east plants — east Kentucky plants so-called, the west Kentucky plants so-called — has an effect on the BTU's, your Honor, the delivered price. Your Honor recalls that testimony.

This does not take into consideration, in an at-
1699 tempt to make a comparison, you don't have here a showing as to distance — that is, the transportation

cost — at all. And these figures would be absolutely valueless.

It does not take into consideration, your Honor, as Mr. Hill said this morning, the manufacturing cost, which is the type of machinery. Some of these TVA plants are more modern than others, therefore they require less fuel than others require. And they are wanting to compare here the BTU cost in an antiquated plant and an antiquated history of electrical development of 10 or 12 years ago and some very recently constructed modern plants where the cost of production would be much less than under the older systems and older machinery than can be produced in a more modern plant.

They are trying to compare modern plant to an old plant and between the east and west with transportation costs different and many elements in a comparison of that kind to get the BTU cost for a plant in the east and in the west Kentucky plant. And we say it is irrelevant, immaterial, prejudicial and has no probative value in this case.

The Court: What is the purpose of this testimony?

1700 Mr. Robertson: The chart shows a pattern of the cost per BTU for the coal acquired by the TVA during those three years.

It is our contention in this case that large tonnages at cheap prices were being dumped on the western end of the TVA system, and we have shown by the testimony already of the TVA officials that this is an integrated system and that they do compare prices in order to know which production to speed up at one plant and slow down at another.

It is our contention that the prices of this cheap coal being dumped on the western end of the market dragged the entire TVA market down during these three years.

Mr. Kramer: May I state this, your Honor. Mr. Hill this morning testified in this deposition that in order to ascertain the BTU cost you had to take into consideration the type of machinery — the machinery they had in all of these plants, and therefore you couldn't say that the sole

difference in cost was due to the fuel difference. Therefore, your Honor, there are large differences between the east and west plants — the condition of the plants is so much different, and that has to be taken into consideration in determining the effect on coal prices.

1701 The Court: The Court is of the opinion that the objection goes to the weight of the testimony rather than the competency, and therefore the Court overrules the objection.

Go ahead.

* * * * * * * * * * *

Mr. Robertson: I offer this as the exhibit previously described, the chart as the next exhibit.

(Exhibit No. 99 was marked for identification and filed.)

Mr. Robertson: I won't read this entire chart but I might point out the average BTU cost per year for the TVA eastern plants in 1956 was .2103; the average BTU cost per year for all TVA steam plants for 1956 was .1971.

1702 In 1957 the average BTU cost for the eastern plants was .1908 cents, a decline there of almost a cent and a half. For the TVA system the average BTU cost for 1957 was .1848. In 1958 the average BTU cost for the eastern plants was .1878 cents. The average for 1958 for all TVA steam plants was .1779. A decline in each of those years from 1956.

I will ask that this be passed to the jury.

(The exhibit was passed to the jury.)

This, I might point out, is again the spot coal market.

By Mr. Robertson:

Q. Mr. Schmidt, have you taken from these TVA awards, spot award sheets, the total tonnages purchased on spot bids for each of the years 1956, '57 and '58 for the eastern steam plants as compared to the western steam plants? A. I have; yes, sir.

Mr. Kramer: We are going to continue our objection for the same reasons. We all know, it is a matter of common

knowledge, that of course a concern operates its more efficient plants. The Aluminum Company does that — and operates its older, lesser efficient plants the lesser number of days and perhaps uses a lesser amount of fuel, and this doesn't prove anything at all, and we object to it and
1703 to its introduction for any purpose whatsoever.

The Court: Same ruling.

Mr. Robertson: I offer this as the next exhibit. It contains for the years 1956, '57 and '58 total tons per year purchased by TVA for its eastern plants as compared with the total tons purchased for its other plants.

(Exhibit No. 100 was marked for identification and filed.)

Mr. Robertson: This again, your Honor, is the spot market.

The total tons for the eastern plants in 1956 were 2,074,061 tons.

In 1957 that declined to 1,605,384.

In 1958 that declined to 1,478,651.

For the western plants in 1956, 1,906,490 tons were purchased for the western plants. That figure was increased in 1957 to 2,549,001 tons.

In 1958 the western total tons for the western plants was 2,506,588.

I ask that be passed to the jury.

(The exhibit was passed to the jury.)

By Mr. Robertson:

Q. Have you gone through the TVA spot award announcements to find what operating companies bid
1704 tonnages of 10,000 tons or more on the TVA spot market for the years 1956, 1957 and 1958, and have you made a chart of the bidding activities of these companies? A. Yes, I have.

Q. And what charts do you have there? A. Three.

Q. How many charts, three charts? A. I have three charts, yes, sir.

Q. Just describe what companies are on the chart denominated 3A? A. The Chart 3A covers the Pittsburgh-

Midway mines. It covers the Paradise Mine, the Colonial Mine. The Peabody mines, it covers the Vogue Mine, Skibo Mine and Graham Mine.

Q. Do you find any pattern there? A. There is a downward trend.

Mr. Kramer: I don't know what you mean by "pattern". What do we mean by "pattern"?

The Court: I don't know, but I think we ought to get this — you are going to file this in the record?

Mr. Robertson: Yes.

The Court: I think it ought to be gotten in the record, and instead of referring to it as 3A it ought to be referred to as the exhibit number.

1705 Mr. Robertson: I will ask then that the three charts be filed, not collectively, but as individual charts or exhibits.

The first chart shows the bidding activities in terms of tons of 10,000 tons or over and the BTU cost of those bids and awards for Pittsburgh & Midway Coal Company and Peabody Coal Company for the years, 1956, '57 and '58.

Mr. Kramer: Before we file this, are we talking
1706 about spot or term bid?

Mr. Robertson: That is spot.

Mr. Kramer: Wait just a minute.

The Court: Is that the exhibit to which his testimony refers at the present time?

Mr. Robertson: Yes.

The Court: You have heretofore referred to as 3-L?

Mr. Robertson: Yes, your Honor.

(Exhibit No. 101 was marked for identification and filed.)

Mr. Robertson: The next chart that we offer as an exhibit —

Mr. Kramer: Before you pass from the other one, your Honor, I will call attention that this is not in the field at all where Phillips Brothers were interested. This is in the west Kentucky field, and we continue our objection as being irrelevant and immaterial for any purpose.

The Court: Overruled.

Mr. Kramer: In addition to the other objection.

Mr. Robertson: The next chart shows the bidding activities, which shows both the awards and the unsuccessful bids of West Kentucky and Nashville Coal companies for the years 1956, '57 and '58, broken down by mines, the Atkinson mine, the Homestead mine, the East Diamond mine, and the Uniontown mine.

1707

Mr. Kramer: These are all still in the west field, your Honor, and we continue our objection.

(Exhibit No. 102 was marked for identification and filed.)

Mr. Robertson: And the third chart we offer is the bidding activity for the years '56, '57 and '58 of DeBardeleben Coal Corporation and Truax-Traer Coal Company.

(Exhibit No. 103 was marked for identification and filed.)

Mr. Kramer: Your Honor, I want counsel to state the purpose. These people aren't claimed to be conspirators in this field at all. No averment or allegation of it. We don't want to take every coal company in the country — that is something else. We object.

Mr. Robertson: Your Honor, the witness has gone through these spot awards, and all three of these charts are on the spot market, and picked out the companies that have bid 10,000 tons or more. In other words, large tonnages on the TVA spot market, operating companies, and have made charts of their activities. These last two companies to which Mr. Kramer refers happen to be two operating companies, other than the conspirators charged, who bid large tonnages.

1708

Mr. Kramer: May I ask a question? When you say 10,000 tons or more, are you figuring on a single bid and were a single award, or are you figuring a group of bids taken together and added up to 10,000?

Mr. Robertson: Single bids and single awards.

Mr. Kramer: We continue the objection, your Honor.

Mr. Rowntree: If your Honor please, it is our position

that this spot coal market had some limitations. It wasn't a very big market. It is the market that was left after Walsh-Healey to the small company that could not pay Walsh-Healey wages. The market amounted to roughly five million tons a year for the whole system; that a 10,000 ton bid, bid repeatedly, was a large bid on this market and had effect on the market, and that is why we picked out the 10,000 ton bids, the big bids.

The Court: Well, what relation do you contend that that ten — ten what?

Mr. Rowntree: Ten thousand tons.

The Court: Ten thousand ton bid had to the Phil-
1709 lips Brothers Coal Company? What was the relationship, causal connection, if any?

Mr. Rowntree: Our client was selling on the spot market. We have shown the drastic decline in that market in the period '56, '57, '58. We say something was happening to that market. We are trying to show here what was happening.

We believe that the proof will show that there is a dumping of coal in large amounts by certain companies on the spot market. We pick out those tonnages — the witness has — and the next question is, is there any pattern or trend or is there a showing of declining price, one right after the other.

We are getting at the question of cutting prices on the TVA spot market, and the effect on that market, and we have shown the effect on our client and his price already.

The question is whether or not there was a wilful intention to depress this relatively small TVA spot market, which was participated in by those producers who could not pay the Walsh-Healey wage.

Mr. Combs: May it please the Court, of course your Honor knows we don't accept the proposition that the Walsh-Healey Act prevented anybody from selling coal to

the TVA or government activities. I might also
1710 point out that the 10,000 ton range has got nothing to do with selling to Walsh-Healey. It is dollars instead of tonnages.

I don't think just because somebody didn't sell coal, just to say that they weren't able to sell it because they couldn't pay the wage scale. We get back to the proposition that the Walsh-Healey Act did not set a minimum scale; it set a prevailing wage scale that it found in the industry, and that is the only requirement under Walsh-Healey, that they do pay the prevailing wage scale as found by the Secretary of Labor.

Mr. Robertson: I think, your Honor, you will find that the companies, if they don't pay this wage, and they do sell to a governmental agency, over $10,000 worth, that they do have to go back and pay back wages.

Now you can call it a minimum wage or anything else, but it actually works as a minimum wage.

Mr. Combs: Well, I just want to point out, your Honor, that it is not a minimum wage under the law. Actually the impression gets around sometimes that the Walsh-Healey Act set some kind of a wage scale under the order. That isn't true at all. The purpose of the Secretary of Labor in having the hearings is to determine what wages are
1711 paid. It has nothing to do with the minimum. It becomes a minimum to people who sell the products to the government, that is true. But they set the areas, they set the industry, they name the product, and then from that they go and find out from evidence what wages are the prevailing wage scale in that industry, and I think it is misleading to say that it is a minimum scale that somebody has to pay, if they are going to deal with Walsh-Healey, as if it is the government or somebody else at fault if that happened to be the wage scale in the industry.

Now there is one more thing that I wish to point out — for the first time, we have found that the DeBardeleben Coal Corporation and Truax-Traer Coal Company are in

here and say that they are investigating their activities to see if they had something to do with it.

Mr. Robertson: The testimony will clear this up, if we can go into these charts, your Honor.

I would say this on Mr. Combs' statement there, the statement of the Secretary of Labor is already in this record that the minimum wage was set under the Walsh-Healey Act for the purpose of running these smaller companies out of business. That is already in the record.

1712 Mr. Combs: I don't want to quibble on words, but I think even the proof he is talking about, the secretary was talking about a prevailing wage. That is what the law says, that is what the facts state, that is what the order recites, that that is the finding of the secretary, that this is the prevailing wage.

Mr. Kramer: And not the minimum wage.

Mr. Combs: And certainly is not the minimum wage. It is not the average wage. It is the prevailing wage. It is not the average wage. It is the prevailing wage in the localities that they designate for the particular area that they are talking about.

Mr. Rowntree: If your Honor please, we have already in the record the statements of Mr. Lewis severely criticizing the TVA for carrying on the spot market. He said it was an evasion of the Walsh-Healey Act, whereas the law is clear that it was very proper procedure for the TVA to follow.

Mr. Lewis made a speech, which we have read into the record sometime back — several days ago.

Also the meaning of TVA to reduce that spot market. There is pressure on TVA to eliminate this market which was left available for these small coal companies that are left in Tennessee. And here we are seeing what they

1713 are doing to the price on the spot market. That is the purpose of these charts.

* * * * * * * * * *

1714 The Court: I overrule the objection.

By Mr. Robertson:

Q. Mr. Schmidt, looking at Exhibit 101, the exhibit covering the activities of Pittsburgh and Midway and Peabody Coal Companies, is there any pattern or trend? A. There is a slight trend — —

Mr. Kramer: We object.

The Court: Mr. Kramer wanted you to explain to him what you mean by pattern, the word "pattern".

Mr. Robertson: I mean by that, your Honor, whether or not there is any trend either up or down in the cost per million BTU that these companies were offering their coal to the TVA. Are they offering it at progressively lower prices or progressively higher prices. Is there any

1715 trend or are they high one time and low the next time and so forth.

* * * * * * * * * * *

1716 Mr. Robertson: All right. I can do it by briefly— I was wanting to get around as much of this as possible, but I will run down through this briefly.

I point out that the Paradise Mine of Pittsburgh-Midway Coal Company, in January, '56, the coal offered and actually awarded from time to time to the Johnsonville Plant of TVA, January, '56, it was .1786, and over that three-year period—

The Court: Now, .1786 per what?

Mr. Robertson: Per million BTU. That is a little more than seventeen and three quarters per million BTU.

Mr. Kramer: Seventeen cents and eight-tenths mills.

The Court: Well, we have got enough trouble without getting into mills.

Mr. Kramer: I agree with Your Honor.

Mr. Robertson: Anyhow, the cost of million BTU went from .1786 in January, 1956, to .1683 in December, 1958, and I will just point that one out. They are that way throughout the activity.

I will pass this exhibit to the jury.

I point out again that these charts cover only large tonnages, ten thousand tons or more, and it is all on the
1717 spot market.

Mr. Kramer: I point out, Your Honor, that it refers to a particular company, or two or three companies that are listed on there. Trends in the market, Your Honor, cannot be proved, as I understand the rule, by prices by one particular, or two or three particular companies.

If we are trying to get into the rule of trends in the market, you have got to go broader than one, two or three companies. We object to it, as being incompetent for that reason, Your Honor.

Mr. Robertson: We are showing the costs at which these companies were offering coal to the TVA and these are companies charged as being conspirators.

The Court: Overrule, go ahead.

Mr. Robertson: In Exhibit 102, the bidding activities of West Kentucky and Nashville Coal Companies, broken down by mines, and I will point out here as an example of the tonnages and the price decline, just the Uniontown mine here, in September, 1957, they offered sixty thousand tons to Shawnee at .1675. Large tonnages, anywhere from eighteen thousand to sixty thousand tons were offered throughout the period and the cost per million BTU goes from September of '57 of .1675, to .1586 in April, 1958.

* * * * * * * * * *

1718 By Mr. Robertson:

Q. Mr. Schmidt, is there any—what is the significance?

A. The underscoring means they were given the contract, and not underscored, they were not.

Mr. Kramer: In other words, those underscored were given the contract, and those not underscored, regardless of whether they were above or below did not get the contract?

The Witness: That's right.

Mr. Kramer: Only the ones underscored were awarded the contract on these figures?

The Witness: That's right.

Mr. Robertson: The Exhibit 103, covering the DeBardeleben Coal Corporation and Truax-Traer Coal Company for the years, 1956, '57, and '58, we point out that the cost per million BTU of the coal offered to TVA through that period were extremely high—

1719 Mr. Kramer: We object to that comment "extremely high", Your Honor.

The Court: Sustained.

Mr. Robertson: To Colbert, they offered at the price of .3176 in January, 1956, per million BTU, and those costs increased to .3501, and finally in April, 1957, the DeBardeleben ceased to offer any coal to TVA. The last bid was ten thousand tons at .3735 offered to Culvert.

Truax-Traer offered coal in March, 1956, ten thousand tons to Shawnee at .1997, and the cost of the coal which they offered to TVA increased during that period.

Now, I would also point out to the jury that with both of those companies bidding during that period, neither one of them received awards on their bids.

* * * * * * * * * * *

By Mr. Robertson:

Q. Mr. Schmidt, have you gone through the TVA term award sheets? A. Yes, sir.

Q. For each of the years, 1956, through October, 1960?

1720 A. Yes, sir.

Q. And have you picked out the companies which we have charged with being conspirators in this case and made a chart in regard to their term contracts? A. Yes, sir.

Q. I ask you what the term—the information on the term contracts on that chart, what are they compared to?

Mr. Rayson: Your Honor, we are going to object to the introduction of any evidence concerning term contracts. To

introduce information about term contracts here in relation to Phillips Brothers Coal Company is like comparing cheese and chalk. Phillips Coal Company wasn't in the term market. Evidence could be introduced showing that the partner of this company, Royal Fuel Company, said that never in his experience in representing Phillips Brothers Coal Company, long prior to 1955, that he ever submitted a term bid for them. They weren't equipped to handle that.

The Court: Well, your objection would be good on the question of alleged damages sustained by Phillips Brothers, but would it be good as bearing on these other questions? Isn't it a part of the whole picture, this term contract?

Mr. Rayson: Your Honor, we think that it is just
1721 an entirely different business, the term business. In order to bid on a term contract, a company would have to have reserves known to itself to deliver coal for at least a six-months period, for at least a thousand tons a week. This company simply wasn't in that category. It couldn't see in the term market, had it had any intention of doing so, and therefore, we say that this information is of no relevancy in this case.

The Court: It is not on the question of damages, the Court so holds.

Mr. Rayson: and we think that it goes beyond the questions of damages, Your Honor.

* * * * * * * * * * *

The Court: The Court holds it is competent evidence on the conspiracy phase of the case, but is it your con-
1722 tention that the Phillips Brothers could have ever made term bids, or that they could have ever gotten into the term market?

Now, if it is, then the Court will change its ruling on the damage phase of the lawsuit. The Court has held, insofar as the Court can see at the present time, it has no bearing on the question of damages, because Phillips Brothers were not in the term market.

Mr. Robertson: Of course, Your Honor, I can't speculate as to whether or not they would have been had the Walsh-Healey not gone through in October, 1955. My own personal opinion is I see no reason why they couldn't have been in the spot market, but—

The Court: Well, up to this point, the Court sustains the objection as to the testimony bearing on the damage phase of the lawsuit. The Court cannot see at the present time how such testimony could have any probative value on the question of damages since it is not shown up to the present time, so far as the Court can determine, that Phillips Brothers was in the term market.

Now, if it later appears that Phillips Brothers were in the term market, or that they were prevented from going into the term market on account of the alleged wrongful
1723 acts of one or more of the defendants in this case, then the Court will reconsider its ruling on that point.

Now, if you object on that point, Mr. Rowntree, if you have any evidence on the question as to whether or not Phillips Brothers intended to, had the potential of getting into the term market, then the Court will reconsider its ruling on that point, but unless there is some proof on that question, then the Court holds that it is not competent on the question of damages.

Mr. Rowntree: I don't think our people ever got around to anything about the term market, Your Honor.

The Court: All right, then, it is too remote on the question of damages. The Court holds to its ruling on that point.

Mr. Robertson: We ask that this chart be introduced as the next exhibit. It covers the years 1956, '57, '58, '59. This chart shows the company awarded the term contract, the destination—that is the TVA steam plant to which the coal was consigned—the term, the tons per week to be furnished under the contract, the cost per million BTU, and this cost per million BTU under the term contract is compared with

the last column which is the average spot cost at the
1724 plant at that particular month that the contract, the term contract, was awarded.

We offer this as the next exhibit.

Mr. Kramer: Now, Your Honor, because of the statement that is at the bottom of this exhibit, which we would like Your Honor to look at before it is given consideration. We think it is further objectionable, and inadmissible. After Your Honor has read it, I will state the basis for it.

(The proposed exhibit was handed to the Court.)

The Court: All right.

Mr. Kramer: That talks about a steam plant projected out yonder in the future, and Your Honor has already ruled that evidence in reference to this is objectionable, and this last three lines remaining on the exhibit in addition to all other objections disqualifies the entire exhibit. Your Honor ruled on that.

Mr. Rowntree: If Your Honor please, Your Honor permitted the evidence. We put the contract from the Peabody Coal Company for sixty-five million tons into evidence. Your Honor admitted it, and I don't understand counsel's statement. This was a contract made in 1959, Your Honor.

1725 Mr. Kramer: On which delivery was not to begin and the plant was not to be completed until sometime in 1962, and as I recall Your Honor's ruling on it, it was that that was an imagination extending into the future, and was not admissible.

Your Honor admitted the other of that evidence, but to that extent, this is a contract that is not yet effective; the plant is not completed; there is no delivery on it; they haven't started delivering the first ton of coal on it.

1726 Mr. Rowntree: It wasn't imagination. It was a firm contract. The contractor agreed to sell the coal; the TVA agreed to build the plant at the site of the coal company.

The Court: What was the last point involved in the dates

after December 31, 1958? We had a point up here this morning that is different from this point.

Mr. Kramer: Yes, there is.

Mr. Rowntree: The point is dangerous possibility of obtaining a monopoly of the TVA market. Now here we have a coal contract for 65-million tons, which is a three and a half year supply of the whole TVA system, and this thing has culminated, your Honor, in the last two years because the records—

The Court: Well, I have held that is competent where the contract was signed, but I also held this morning that you could not bring in testimony about plants that were to be erected as late as 1962.

I don't remember the point that was involved.

Mr. Rowntree: The question was speculative or estimates or assumptions.

The Court: What was the purpose of this testimony? I sustained the objection to it but what phase of the—

Mr. Rowntree: That was in connection with the
1727 growth of the power plants of the TVA and the estimated completion of the last units in the plants.

Mr. Kramer: Also your Honor had before you the question of the type of machinery going to be used out in the future which had not been built but they were talking about building. Counsel says three years' supply of TVA, but remember that contract which Your Honor looked at the other day did not call for delivery over a three-year period.

The Court: That is my understanding, that this exhibit made by the witness refers to the contract that was in existence whereby one of these companies agreed to furnish within a certain period of time.

Mr. Rowntree: That is right.

The Court: The Court holds that is competent and overrules the objection.

Go ahead.

(Exhibit No. 104 was filed.)

Mr. Robertson: I would like to just summarize, point out a few things on this particular chart. The terms which these companies, which we have charged as being conspirators, were getting under these contracts were of a matter of months during the years 1956, '57 and '58 with the exception of one contract which went into the record, I believe
1728 this afternoon, to Clinchfield Coal Company division of Pittston Company which was awarded on July 8th, 1957 for a period of six years. Total tons 7,500 tons per week until 1959.

And here several companies, which we charged as being conspirators, have been awarded contracts for a number of years calling for large tonnages.

I point out a contract that was awarded to Peabody Coal Company for consignment to Shawnee steam plant for a term of five years at the rate of 20,000 tons per week. Calculations of that shows a total of 5,200,000 tons. That was at a price of, or a cost per million BTU to TVA of .1884.

On September 17th, 1959, term contract awarded to West Kentucky Coal Company to the Shawnee plant for 15 years at the rate of 16,347 tons a week for 15 years. The calculations shows a total tonnage there of 12,750,660 tons.
1729 A contract on September 17, 1959 to Inter-Mountain Coals, which it has been pointed out by Mr. Hill was selling coal on these contracts of Pocahontas Fuel Company, division of Consolidation Coal Company.

This contract, the coal was consigned to Kingston. It was for 5,000 tons per week for five years, or a total of 1,300,000 tons.

On September 17, 1959, the term contract to Kentucky Oak Coal Company for coal consigned to Kingston, at the rate of 8,500 tons per week for a period of 10 years.

On October 30, 1959, a contract to Kentucky Oak, coal consigned to Kingston, at the rate of 4,000 tons per week for 36 months.

At this time, your Honor, for a matter of clarification, we

have not charged Kentucky Oak as such as being a part of this conspiracy, but as your Honor will recall, that is the company engaged—holding the lands from North Fork Coal Company to whom the union pledged $1,500,000.

Mr. Kramer: North Fork isn't claimed to be a conspirator. Neither one are claimed to be conspirators, and, of course, we are continuing our objection to this line of testi-
1730 mony.

Mr. Robertson: Yes. Well, North Fork isn't on here.

Mr. Kramer: But you were referring to it just now.

Mr. Robertson: Your Honor, TVA has furnished us with a recent list of awards for term contracts and this shows an award on April 3, 1961 to—

Mr. Kramer: Just a minute. Now we are going down now to even 1961 in this proposition, two years and a half nearly after termination date under your Honor's rule of when damages could be alleged, long after the institution of this suit, subsequent to the taking of practically all the proof in this case.

We, your Honor, do not think it is competent for any purpose. It is irrelevant. We think, your Honor, it may be prejudicial, and we object to the introduction of this testimony. This goes way beyond anything that your Honor has had before you before. These things are just now put in for the first time.

We received copies of these—counsel furnished us copies last Wednesday—maybe it was, or Tuesday, I don't remember, but one day last week—but we insist, your Honor, that it is not competent for any purpose and should not be introduced.

1731 Mr. Rowntree: If your Honor please, upon the question of dangerous possibility of obtaining a monopoly in a market, we think the best and most competent evidence is to look at the situation as it is immediately prior to the trial. And this situation is that TVA puts out term

awards for 16½ million tons of coal and makes of that 16½ million—

Mr. Kramer: We object to these figures, until they are introduced. That is what our objection is, to the figures. I do not object to counsel's argument, but it is to the admissibility. I object to quoting the substance of it.

Mr. Rowntree: The amount of the tonnage awarded out of that to the West Kentucky Coal Company would be the clearest evidence of the dangerous possibility of these companies obtaining this monopoly.

1732 Mr. Kramer: Let's take the other side, Your Honor.

Suppose that there were a condition that changed the other way, entirely the other way. I don't want to repeat what it might be, it will occur readily to Your Honor—the jury is here—would that be competent from our standpoint to show that there is not a conspiracy? If it wouldn't then what has happened since is not admissible now to show that there was a conspiracy.

We object to it. We think that that rule could not work both ways, and therefore could not work either way, and we object to it.

Mr. Rayson: We want to point out that the TVA witness, Mr. Hill, who testified this morning by deposition, testified the TVA term market was, had been, and going to be seventy-five per cent, and we are talking about the term market again, which Your Honor has already declined admission on the grounds of damages, so it seems to me that this is completely irrelevant, not only from the standpoint of time, but also from the standpoint of its connection with the term market, rather than the spot market. You get so many imponderables in here, the evidence loses whatever weight or validity it might otherwise have.

Mr. Robertson: I might add this, Your Honor, I am
1733 not standing on this completely, but it certainly shows the ability of the companies to take part in a con-

spiracy to monopolize, that is, it shows a monopolization ability.

The Court: Well, the question running through the Court's mind is when is this period involving the imminent possibility or dangerous possibility of a monopoly to end? Can you go on ten years from now?

Mr. Rowntree, there must be a stopping place somewhere.

Mr. Rowntree: In a continuing conspiracy, Your Honor, the more the parties charged with the conspiracy attain their objective—

The Court: Then you want this to go in the record on the theory that there is a continuing conspiracy?

Mr. Rowntree: Yes, sir.

The Court: Well, the objection is overruled. It may go in on that point.

Mr. Robertson: Your Honor, I point out that since this was only recently furnished us, this particular award, it does not appear on this chart. It is a term contract to West Kentucky Coal Company awarded April 13, 1961. It calls for 19,250 tons for one hundred and twenty months or ten years.

1734 The Court: Now when you get to a stopping place, let me know.

Mr. Robertson: Yes, sir.

The total maximum commitment by the TVA on this group of awards was sixteen million, five hundred and sixty-three thousand, eight hundred eighty tons, sixteen and a half million tons.

West Kentucky alone on this was awarded a total of ten million, ten thousand tons.

* * * * * * * * * * *

1738 DIRECT EXAMINATION (Cont'd.)

By Mr. Robertson:

Q. Mr. Schmidt, referring now to the charts which were introduced yesterday as Exhibits 101, 102 and 103 covering

the large tonnages of 10,000 tons or over, certain
1739 companies were listed on those three charts.

Were those the only companies that you found that ever bid more than 10,000 tons? A. Those were the only operating companies that bid over 10,000 tons. There was one exception. Old Ben bid in 1958.

Q. Did it bid very much? A. No, just a few times. All the rest were sales agencies handling other coals.

Q. Handled different people's coals? A. That's right.

The Court: What three companies bid over 10,000 tons? I haven't seen these exhibits? Just what three companies are they?

Mr. Robertson: They are Pittsburgh & Midway, Peabody and West Kentucky and Nashville Coal companies. And we also introduced the exhibit on the DeBardeleben and Traux-Traer who also bid over 10,000 tons.

On Exhibit 104, the last exhibit introduced yesterday concerning the term activities of those companies who we charge as being conspirators in this case as compared to the spot activity of the particular plant at the particular time they got the contract, has not been passed to the jury, and

I will ask the Marshal to do so.

1740 (The exhibit was passed to the jury.)

Mr. Robertson: If the Court please, on the term awards that were introduced as exhibits to Mr. Hill's depotion on yesterday, they went through October, 1960. There have been two award sheets put out by TVA since that time which TVA has furnished us, and one of which contains the contract referred to yesterday to West Kentucky Coal Company.

We have these two award sheets and offer them as exhibits to complete the term list.

Mr. Kramer: Of course, we continue our objection both as to date and the ones heretofore given, immateriality and irrelevancy. But we also call attention of your Honor to the fact that counsel admitted yesterday that they were not

claiming that they ever participated or attempted to participate in any term awards.

They are limiting their claims to spot awards, spot bids, and we think for the further reason that these are irrelevant and immaterial for that reason.

The Court: These exhibits will have no bearing on the question of alleged damage involved in this case and the jury will not consider such exhibits as bearing on
1741 damages because they are outside of the period that is involved in this suit.

The Court receives these exhibits as evidence for whatever bearing, if any, they may have on the alleged continuation of the alleged conspiracy.

1742 Mr. Robertson: The first one of these is entitled "List of Awards, Coal Invitation to Bid, Requisition Number 35. Bids Opened September 1, 1960."

(Exhibit No. 105 was marked for identification and filed.)

Mr. Robertson: The second is entitled "List of Awards, Coal Invitation to Bid, Requisition Number 37. Bids Opened February 14, 1961."

(Exhibit No. 106 was marked for identification and filed.)

Mr. Robertson: We just point out that the first two pages of this award sheet are already in this list, but it contains a supplemental list of awards on the third page of that. Those awards include an award to Clinchfield Coal Company, division of The Pittston Company, awarded October 14, 1960, 5,000 tons per week for 12 months.

And Exhibit 106, the total maximum purchased on this list, 16,563,880 tons, of which West Kentucky Coal Company was awarded 10,010,000.

* * * * * * * * * *

1743 CROSS EXAMINATION

By Mr. Rayson:

Q. Mr. Schmidt, I believe that you worked for Royal Fuel Company during 1951 up until the time of your retirement, is that correct? A. That is right.

1744 Q. What is Royal Fuel Company? A. It is a sales agency.

* * * * * * * * * * *

Q. Is this a partnership? A. No, it is owned by Hubert Baldwin.

Q. Was there not a man named Pennington in this business for a while? A. Yes, he was at first, yes.

Q. How long was he with the business? A. I would say—probably six or seven years, I imagine.

Q. He was with it up until at least '58 or '59, wasn't he? A. He was with it through '56, '57, '58, '59, yes.

Q. Isn't he some relation to the cross plaintiff James Pennington? A. He is a brother.

* * * * * * * * * *

1745 Q. Now do you sell coal for a number of small companies? A. Yes, sir, We do.

Q. And I take it that you have sold a good amount of coal to the TVA? A. That is right.

Q. Who are your other customers? A. Well, it depends on the coal. TVA uses nut and —

Q. Uses what? A. Uses the crushed coal. We sell crushed coal to Duke, Tampa, various places like that.

Q. Is this an inferior coal? A. No, it is used for steam coal, called steam coal. It is a crushed coal.

Q. You can't use it for domestic purposes? A. For domestic purposes, they want block, egg and stoker, which is taken from this coal, which is made into block, egg and stoker.

Q. The steam coal is quite often a by-product of producing the domestic coal? A. In some cases it is, yes.

Q. Now in selling your coal, I suppose that you would always try to place the coal with the highest bid that
1746 you could get, is that right? A. Yes, naturally.

Q. And you would sell it to TVA, if TVA were paying a high price for it at that particular time, and you would sell it to somebody else, if you could? A. That is right.

Q. If it was paying a higher price than the TVA, is that right? A. That is right.

Q. Is that why that you sold certain of Phillips Brothers coal to Duke Power Company during a portion of this period? A. That is right.

Q. Duke Power was paying more for it than the TVA? A. We sold both to Duke and Tampa.

Q. For the same reason you sold certain coal to Tampa, is that right? A. Yes, sir.

Q. TVA wasn't paying as much as Tampa then? A. That is right.

Q. But then at the times that the TVA, you were selling to TVA, you either didn't have bids from Duke or Tampa or they were paying less than the TVA, is that correct? A.

1747 Some freight rates were involved in this shipping to Tampa and to Duke. We had to come off of the Southern and L. & N. Some of the TC coals were not what Tampa and what Duke would want. TVA goes up to 16 per cent ash and the power companies probably 14.

Q. In other words, TVA will take a coal with more impurities in it? A. Up to 16 per cent ash, yes.

Q. Now in some of the exhibits that you have filed, Exhibits 98 through 104, you have a figure after the TVA bids showing a cost per BTU's. You know what I refer to? A. Yes.

Q. Now would you explain that figure? For example, on your Exhibit 98, you show that in March of 1957 Phillips Brothers made a bid to the Kingston steam plant on coal for .1962. Would you explain just what that figure means? A. It is hard to explain. It is the TVA's figures for the cost of the coal to their plant per million BTU, which is based on the analysis of the coal.

Q. Is that the only point that that figure takes into consideration, the analysis of the coal? A. The analysis, the freight rate, yes, that is covered, the freight rate and analysis of the coal.

Q. The freight rate and analysis of the coal? A. Yes.

1748 Q. Does the coal have an inherent amount of BTU's in it as it sits in a given location? A. No, coal varies. It is hard to tell exactly a perfect analysis of the coal.

Q. What makes it vary? A. The location.

Q. Well, what makes a given — A. The seam of coal changes. The seam of the coal changes. Different seams of coal have different analyses.

Q Are there more or less impurities in the coal, ash? A You mean as a seam? Well, there is one seam that has very good analysis and another seam that has a very poor analysis. Is that what you mean?

Q. That is right. Why does it have a good analysis at one place and poor in another? A. I imagine in the original composition of the coal in producing that — I don't know. I am not a chemist, understand.

Q. The greater the impurities, however, the less the BTU's, is that right? A. The poorer the coal.

1749 Q. And of course the greater the distance from the mine — A. That's right.

Q.— the more it costs to transport the coal to the mine? A. That's right.

Q. And so taking those two factors into consideration, the TVA, as I understand you, comes up with a price per million BTU's delivered to a given steam plant? A. That's right.

Q. Now, do you submit your bids on the basis of these — of the cost to TVA per million BTU? A. Whenever we have — we have the prior bids, the successful bids they had the week before, and from those — we are governed on bidding coal from those records ahead of us.

Q. What I asked you, do you submit a figure to the TVA per million BTU, or do you submit simply a tonnage figure? A. They figure the BTU's.

Q. Now, do you submit — A. Before I submit it.

Q. Do you submit a tonnage figure? A. Before I submit the bid, I figure the BTU.

Q. Did you submit a tonnage or BTU — A. I sub-
1750 mit a price figure to TVA, a tonnage price.

Q. A tonnage price? A. Yes.

Q. All right. A. I don't now. You see, I have been out of this since 1959.

Q. I understand, Mr. Schmidt. A. By the way, before we submit that tonnage or the price figure, we figure this out ourselves to see that we are in line with what TVA has been paying.

Q. You try to keep your prices in line with what happened the week before insofar as the spot market is concerned? A. If you want coal, you have to.

Q. If you want to sell, you have to keep your price in line with what happened before? A. Yeah.

Q. Is that generally true? A. Yeah.

Q. As a matter of fact, in 1957, isn't it true, Mr. Schmidt, that you sold Pennington coal to the TVA in most instances below the average market price? A. Uh huh.

Q. That's correct, isn't it? A. What the chart
1751 shows. I can't remember off hand.

Q. Do you have any independent recollection of that? A. Well, the price — one or two cents makes quite a difference in the cost per ton of coal.

Q. One or two cents per million BTU's? A. Yes, uh huh.

Q. My question is, did you sell your Pennington Coal, Phillips Brothers coal to TVA in 1957 below the average TVA market? A. The average TVA market is based on the lowest cost, and the highest cost. We were within that range of cost. You have only the average shown there, you see. On my weekly reports, I have both the high and the low. I should be within that line.

* * * * * * * * * * *

Q. I have handed the witness Exhibit 98, and I will ask him to look at the figures for '57. A. Yeah.

Q. Shown on that exhibit. A. Yes.

1752 Q. As I understand it, you submitted a bid for Phillips Brothers in January of nineteen and four-tenths cents per million BTU's. A. It wasn't — we didn't get the bid.

Q. But what was the average bid to the Kingston Plant in that time? A. .1955.

Q. In other words, it was one and five mills per million BTU higher than your bid for that month? A. That's correst, yes, sir.

Q. Now, in April, what was your bid to TVA? A. In April for TVA, our bid to Kingston was .1849, and .1930 for John Sevier.

Q. And that also was below the average bid to the TVA for that month? A. That's right.

Q. And this holds true, I believe, in the months of May, June, August, September, and October, is that not true? A. Uh huh, that's true.

Q. In other words, Phillips Brothers was below the market? A. May I say something on that first, please? We received from TVA each week their analysis or their

1753 breakdown of their successful bids. Well, it gives a low bid and a high bid that we try to stay — to be sure to get the coal, we try to stay close to that low bid.

Q. You try to stay within what happened in the preceding week? A. That's why the variance there on that, because we were staying on the low figure.

Q. Mr. Schmidt, you brought with you a number of pages — A. Yeah.

Q. — from the records of your company. A. Yes, sir.

Q. Yesterday, showing that the sales of Phillips Brothers Coal Company to the TVA and other installations for March of 1956 through the year 1958. Do you have any of your company's records — A. No, sir.

Q. For the years prior to that? A. That's all I have. That is all I have with me.

* * * * * * * * * * *

Q. I show you what purports to be a photostat of your company's records. A. That's my writing, yes.

1754 Q. Beginning in 1955, October of 1955? A. Uh huh.

Q. Now, would you start there and starting with October 18, and tell us at what price you were selling Phillips Brothers coal both the gross price and price after deduction of Royal's commission. A. It starts down here in November. This is all Duke Power up here.

Q. Well, start with the Duke Power figures in October, October 18, 1955, and proceed through March, 1956, where you started yesterday afternoon. A. I didn't get that.

Q. What was the price at which you were selling coal to Duke Power Company? A. Okay.

Q. In October, 1958, both the gross price and the net price? A. All right, Duke Power Company in 1955 was gross $3.35, and the price was $3.055, net. And that continued on to the end of the month.

October the 1st, we shipped —

Mr. Kramer: Are we in 1955?

The Witness: '55.

* * * * * * * * * * *

1755 Q. October 1st, are you going to— A. October 1, 1955, the TVA price on S-84 was $3.53 against $3.28. Q. How long did that price continue? A. We have two shipments on that, but on the — we shipped — this is private here — that is not a steam coal. That price continued — it is hard to read that sheet — that price continued to the end of the month.

Q. To the end of what month? A. To the end of October, I believe it was. End of November.

Q. And what does the—what do your records show after that? A. Then in the month of December, we had the price $3.53 against $3.28.

Q. Is that also to TVA? A. That is also to TVA, yeah, S-84, that is the order number.

* * * * * * * * * * *

1756 Q. Does this exhibit show whether Phillips Brothers produced any coal during that time, December to March? A. During the month of January — this is 1956, is it?

Q. That's right. A. January, February, and March, until the 23rd of March, Phillips Brothers were down.

Q. And that's where you started yesterday afternoon in your explanations? A. That's right, and this is '56.

Q. That's right. A. I was reading '55.

Q. You were reading '55? A. That's right.

Q. And it wasn't to '56 that the price of TVA coal suddenly jumped up, is that right? A. That's that?

Q. What was the price at which you started selling coal for Phillips Brothers in 1956? A. $4.49 in 1956, March, yes.

Q. And prior to that time, it had been substantially below that figure had it not? A. On those figures I read, yes.

1757 Q. Well, as a matter of fact hadn't it been substantially below that $4.00 figure for a long time before 1956? A. No. We were getting up four, four and a half to four-sixty for TVA coal prior to 1956.

Q. But you were selling coal at the average price to TVA prior to 1956, weren't you? A. At that time, yes, which is a dollar more than shown here.

Q. Mr. Schmidt, are you telling us that you sold coal to the TVA prior to 1956 and that you got around $4.00? A. Yes. 1953, 1954, '55, all through there; yes.

Q. What would you say would be— A.I would have to go to the records to get it exactly, the exact figure, and it was over $4.00.

Q. What would you say that would be in terms of an evaluated price to TVA? A. I couldn't say without the analysis of the coal and the freight rate and all that stuff, and I don't remember that long ago. I need the analysis of the coal to figure any kind of a TVA price.

Q. Are you telling us that the TVA prices were
1758 higher before 1956? A. Yes, sir, they were.

Q. Than they were in 1956? A. They were very good in 1952 and '53.

Q. What about just prior to 1956? A. Prior to 1956?

Q. Yes. Say, 1954, 1955. A. You get me in the records here that I—I have handled a lot of coal in these last years, and I can't get you the exact figures on those away back there.

Q. Do you have any general impression? A. If I had the books here I could tell you exactly.

Q. What? A. I said if I had a copy of these I could tell you exactly. You are not talking about Phillips Brothers. You are talking about the over-all picture?

Q. General TVA market on spot coal. A. That's right. We were getting over $4.00 in those years, 1952 and '53.

Q. Mr. Schmidt, it would be a simple matter for you to find by looking at those records, wouldn't it? A. Yes.

Q. You are quite familiar with those records? A. Yes.

Mr. Rayson: Your Honor, we have taken those rec-
1759 ords and have starting in February, 1954, we have taken the weighted averages of each of these plants, and it seems to me it would unduly burden this gentleman to make him go through those records. May I just simply read those figures to the jury?

The Court: Yes, subject to their checking.

Mr. Rayson: In fact, we have some charts here we can hand to the jury that they might follow.

Mr. Marshal, will you hand the witness a copy of the exhibit, please.

Your Honor, we show in this exhibit the average weighted price of spot coal for the periods given.

* * * * * * * * * * *

Mr. Rayson: We show on this exhibit the average weighted prices for the sale—or for purchases of spot coal by the TVA per million BTU at the Kingston and John Sevier steam

plants. These of course, were the steam plants—the only steam plants to which Phillips Brothers sold coal.

Now you will recall that yesterday afternoon an exhibit was introduced showing the pattern of bids started in 1956 through 1958. This exhibit shows what happened
1760 prior to 1956.

In other words, it starts two years before that and shows the development in the price of TVA coal up to 1956. And I think that the Kingston plant weighted averages alone will show what we are getting it.

Thus in February of 1954 at Kingston the average price was 17 cents and 6 mills per million BTU to everybody that sold coal and delivered it to that plant, and that price continued in the 17's through May. And then it went to the 16's in June of 1954 through the balance of that year.

Then in 1955 it went back up to the 17's until August. Then it went to the 18's for September and October, going up; then it went to the 19's, still going up—and in the early 1956 period through August of that year it got to the 20's, and that was the only time during this entire period that it reached that point at the Kingston plant.

Then it descended again although it never reached the level after 1956 as shown on this exhibit that it was during the two-year period prior to 1956.

Your Honor, I would like to introduce this exhibit.
1761 The Court: All right, you may do so.

Mr. Rayson: As an exhibit to Mr. Schmidt's testimony.

(Exhibit No. 107 was marked for identification and filed.)

By Mr. Rayson:

Q. Mr. Schmidt, as I understood you, you prepared certain of these exhibits showing the bids that certain companies made to the TVA on the spot coal market; is that correct? A. Yes, sir.

Q. You did that on one company. For example, the West Kentucky Coal Company. A. That is right.

Q. Now I would like you to look at the exhibits you prepared on West Kentucky Coal Company and explain a few things to us. A. Yes.

Q. What exhibit number is that, please? A. 102.

Q. I also hand you Exhibits 82, 83, and 84 —

Mr. Rayson: Exhibits 82, 83 and 84, your Honor, are the bids submitted to the TVA on spot coal and the awards made by the TVA.

The Witness: This is a term bid. You got the wrong one here, I believe.

1762 Mr. Rayson: All right.

By Mr. Rayson:

Q. I believe the other two cover the period we are interested in. I would ask you to refer to the bids shown on your exhibit from the Uniontown mine. A. Yes.

Q. When do those bids start? A. They start in March, 1957.

Q. And what was the evaluated price? A. Of March, 1957.

Q. On that bid. A. They bid on Colbert .2180 on the evaluated price. 12,500 tons.

Q. How many bids did they have at that price? A. They made three bids at that price through the month of March.

Q. Do you have any idea, Mr. Schmidt, what the highest bid that the TVA made an award on for that period? A. I don't know.

Q. Would you mind looking through those exhibits and tell us? A. You mean through here?

Q. Yes, sir. A. It would take a long time to go through those things. You mean the highest award made during that period?

1763 Q. I am talking about, for example, one of the bids made by West Kentucky that you have just referred to on March 13, 1957.

Now it made an evaluated bid of 21.8 cents per million BTU — A. Which they did not get.

Q. Which they did not get. A. That's right.

Q. I want you to examine those records and tell us whether anybody bid lower than that at that time? A. During the month of April —

Q. That would be March or April. I don't know which it would be in.

Mr. Rayson: Your Honor, I realize this will take a little time but I think it is a matter of importance.

* * * * * * * * * * *

1770 Q. Actually, Mr. Schmidt, if it is the same coal, wouldn't the entire difference be in the cost of transportation? A. I don't believe there is that much difference in the cost of transportation between those plants.

Q. Do you know where the Uniontown mine is located? A. No, I don't. They are in the same general vicinity, I think, as far as I know. I don't know. I wouldn't say about the cost of transportation. I wouldn't know.

Q. You know where the Shawnee plant is located? A. I know where the Shawnee plant is located, yes.

Q. It is on the Ohio River, isn't it? A. Yes, but I don't know where these mines are, I don't know.

* * * * * * * * * * *

1772 The Court: Mr. Rayson, I don't want to tell you how to try the lawsuit or examine the witness. May I suggest to you that you can do this much faster if you will just prepare those figures and introduce them. These records speak for themselves.

Mr. Rayson: All right, I have them here.

The Court: Instead of having this man thumb through these papers. I know this can be done much quicker. If you have the figures, show them to your adversary counsel and they will have a right to examine them and you can read them in the record, Mr. Rayson. This is too tiresome to sit here and wait. It is an imposition on the jury.

Mr. Rayson: All right, I will simply read these.

* * * * * * * * * * *

1773 Mr. Rayson: Your Honor, these then, what I shall read, I shall start with the first bid shown on Mr.

Schmidt's exhibit with the Uniontown mine, which I have under date of February 28, 1957, and will proceed through all of the Uniontown bids, these being the major bids submitted by West Kentucky that they have been talking about.

* * * * * * * * * * *

1774 The Court: What records do you say, TVA? I guess TVA has more records—at least they claim they have — than any other concern in this whole area.

Mr. Rayson: We are willing to admit that they do, your Honor.

I am talking about Exhibits 82 through 92.

The Court: Gentlemen, if you don't understand any of these figures, you may ask Mr. Rayson where he obtained them so you will have a chance to examine them yourself, and you will have a chance to point out if there are any inaccuracies in these figures.

Go ahead.

Mr. Rayson: All right, starting again, February 28, 1957, West Kentucky Coal Company submitted a bid on
1775 12,500 tons at an evaluated price at the Colbert steam plant of 21.8 cents per million BTU's. No award was made on this bid.

1776 Mr. Rowntree: I think we should establish that the Colbert Plant is in Alabama.

The Court: All right.

Mr. Rayson: That's right, and I might say this, Your Honor, in connection with what I was asking Mr. Schmidt. I don't believe there would be any dispute about the fact that the Uniontown Mine is on the Ohio River. Coal is taken by barge from that mine. The Shawnee mine — the Shawnee Steam Plant of the TVA is about a hundred miles down the river from the Uniontown Mine. The Colbert Plant requires the Uniontown coal to be barged down the river, across Tennessee, into Alabama.

I might explain, too, that sometimes the TVA will evaluate bids at more than one market, and the difference in the price results in the difference in the freight rate. For ex-

ample, at one point here, there is a bid at Colbert of .1804, and at the same time, there was one to Shawnee of .1675. It is the same coal, the difference is the cost of transporting a greater distance to Colbert than it is to Shawnee.

Now after being unsuccessful in the February, 1957, bid at .2180, a bid at the same price was submitted by West Kentucky in March for the same amount of coal. This
1777 bid was also unsuccessful.

Again in March, on the same amount of coal, West Kentucky submitted a bid at .2180, and the bid was again unsuccessful.

Now, during — on each of these bids, there were people who bid lower than West Kentucky to whom awards were made.

Now, in March, in the latter part of March, 1957, after those three unsuccessful bids at .2180, West Kentucky submitted a bid on twenty thousand tons at .1961. Nineteen cents, six and one-tenth mills per million BTU's. This bid was also unsuccessful.

The same bid, the same amount of coal, the same price was made in April of 1957. This bid was also unsuccessful.

The same bid was repeated later in April of 1957 at the same price. It was also unsuccessful.

At that time, West Kentucky's bid was .1961, and the highest bid was in the neighborhood of .1829. In other words, over a cent, about a cent and a quarter below West Kentucky.

Now then, West Kentucky, in September of 1957, submitted a bid which was evaluated at Colbert at .1804, and at Shawnee at .1675 on sixty thousand tons. This bid was unsuccessful.

1778 Mr. Rowntree: Could we point out, Your Honor, at that point, that this was a bid for sixty thousand tons at almost four cents below the first price quoted by Uniontown Mine in this series?

Mr. Rayson: This is true, Your Honor. However, it is

delivered to a different steam plant, where the transportation factor was much less.

Mr. Rowntree: I am talking about BTU cost at Colbert on that bid.

Mr. Rayson: That's correct, and it was still substantially above the market at that time. The market —

Mr. Rowntree: Our point is, it was a drop of almost four cents below the first bid in this series.

Mr. Rayson: I don't happen to have off hand the highest successful bid figure at Colbert at that time. However, the same bid was evaluated at .1675 at Shawnee, that is the West Kentucky bid. The highest successful bid to Shawnee at that time was .1617, more than one half a cent below West Kentucky's bid.

Again in September of 1957, West Kentucky submitted a bid on sixty thousand tons which was evaluated at Shawnee only. This bid was at a price of .1668. At that time the highest successful bid at Shawnee was .1613, approximately one-half a cent below West Kentucky.

1779 On September 27, 1957, West Kentucky submitted a bid at the same price, .1668. At that time, it was unsuccessful on eighteen thousand tons of coal, and this is the point at which we had arrived with Mr. Schmidt when I asked Mr. Schmidt was this the highest successful bid awarded by TVA at that occasion, and the records show that at that time, West Kentucky's bid was the highest bid on which the TVA made an award.

After that successful bid, in October of 1957, West Kentucky repeated the bid on from eighteen to sixty thousand tons of coal. Again at the same price, .1668. It was unsuccessful. There were people who bid less than West Kentucky and got the awards.

Aagain in October, that bid was repeated, and it again was unsuccessful. At that time West Kentucky's bid was .1668 as it had been, and the highest successful bid was

.1635, approximately one third cent per million BTU's below West Kentucky.

This is 1957.

Now again in October, 1957, West Kentucky made a bid of .1668, and it again was unsuccessful.

It made a bid following those three unsuccessful bids at .1649, and it received an award for eighteen thousand
1780 tons. This was on October 25, 1957. At that time, the bid submitted by West Kentucky was the highest bid upon which TVA made an award. In other words, there were several other bids lower than West Kentucky's on that occasion.

Mr. Rowntree: Do you recall, counsel, off hand the size of those successful awards?

Mr. Rayson: I do not.

Following that successful bid, West Kentucky submitted a bid for .1651. It was unsuccessful.

It then submitted a bid in November of 1957 at .1649, and that, too, was unsuccessful. At that time, the high successful bid was .1630, approximately a quarter of a cent below West Kentucky's bid.

After losing on the .1649 bid, West Kentucky submitter another bid at .1649 in November of 1957, on which an award was made by the TVA on eighteen thousand tons. At that time, the West Kentucky bid was the highest bid on which TVA made an award. Again there were several bids lower than the West Kentucky bid.

West Kentucky repeated its .1649 bid again in November, on thirty-six thousand tons, and again it was awarded a contract.

Following that successful bid in November of 1957,
1781 it repeated its .1649 bid and was not awarded a contract.

It submitted another bid at the same price, .1649, in December of 1957, without success, was not given a bid — was not given an award rather.

Then again in December of 1957, after having submitted bids at the .1649 level unsuccessfully, it submitted a bid at .1616, on which it was given an award for thirty-six thousand tons. We would point out that on this occasion there were no unsuccessful bidders to the Shawnee Plant.

After receiving an award on a bid of .1616 —

Mr. Rowntree: We would like to point out at this point that that was a drop of thirty-three hundredths mills in that price from .1649 to .1616.

Mr. Rayson: That is correct, after they had bid unsuccessfully at the previous level twice.

Then in December, after having received an award at .1616, they bid again at .1616, and they were not granted any award at that price.

After losing out at that price, and in January of 1958, West Kentucky submitted a bid at .1599 per million BTU's, on which it was awarded the contract for fifty thousand tons.

It repeated—

1782 Mr. Rowntree. I would like to point out at that point, Your Honor, that that was a drop of .17 for fifty thousand tons.

Mr. Rayson: That was after it had been unsuccessful at .1616, Your Honor.

After having been given an award at .1599, it submitted another bid at .1599 on which no award was made, and there were others lower at that time. The highest successful bid was .1576.

They repeated a bid in January of 1958 at .1599 on which no award was made, and at that time the high successful bid to the Shawnee Plant was .1555, approximately one-half a cent below West Kentucky's bid.

After bidding unsuccessfully at .1599, West Kentucky submitted a bid on January 29, 1958, of from eighteen to fifty thousand tons at .1586, a drop of thirteen mills—one and three-tenths mills. They were still unsuccessful. They did

not get an award on that bid, and at that time the high award was .1555, approximately a third of a cent below West Kentucky's bid.

West Kentucky then submitted two bids to Shawnee at .1777, both of which were unsuccessful.

And then, in March of 1958, they submitted another bid at .1586 on eighteen thousand to fifty thousand tons
1783 of coal which was unsuccessful.

And that concludes the bidding that was made on the Uniontown Mine to TVA as shown on that exhibit.

Mr. Robertson: If Your Honor please, I would like to point out at this time that those figures for the Uniontown bids which Mr. Rayson read are set out in our chart which was filed yesterday. I believe it is 102, isn't that correct, Exhibit 102?

Mr. Rayson: I believe that's correct, Your Honor, and of course, Your Honor, we point this out to show that by and large West Kentucky's bidding was unsuccessful, and that when it was successful, it generally was at the top level of awards made rather than at the bottom level.

Mr. Rowntree: Your Honor —

Mr. Rayson: Now, Mr. Schmidt, one or two questions.

Mr. Rowntree: Your Honor, our point on that is that they were bidding on exceedingly large tons on the little spot market, and dropping their price all the way.

Mr. Rayson: I assume that anybody who wants to sell has to have their price competitive with what the market will stand, and I think, as what I have just said, shows, Your Honor, West Kentucky was at the high range
1784 and was on a falling market, and was not on the low range of a falling market. I don't see how it could be construed any other way.

1785 The Court: Now members of the jury, you have seen and heard what has taken place during the cross examination of this witness. In order to save time, and in order to save this witness from anxiety and a lot of work,

the Court requested Mr. Rayson to read into the record for the benefit of the jury the figures which have been taken from the records of the TVA and which have been filed in this record.

The jury will find that these figures that Mr. Rayson has read to you are correct unless before this trial terminates Mr. Rowntree and Mr. Robertson point out to you some inaccuracies in the figures. They will be given that opportunity before the trial ends.

* * * * * * * * * * *

By Mr. Rayson:

Q. Mr. Schmidt, you have been handed Exhibit 100 which shows tonnage purchased at the TVA eastern plants and western plants for the years 1956, 1957 and 1958.

1786 Now first would you explain whether these figures are for spot coal only? A. Spot coal only; yes.

Q. Does this exhibit take into account whether or not TVA was developing its stockpile or depleting its stockpile during the years. A. That I don't know. I took the figure only out of the book. Let me say in passing here, that 1956 the eastern plants included Watts Bar.

Q. Did it not in 1957 and 1958? A. No. They quit using Watts Bar in 1957 and 1958.

Q. That would account for some of the decrease in the eastern plant purchases, is that right? A. In the following year, yes. In the year 1957 it would, but not in the year 1958.

Q. But it would account for the drop in the year 1957 as far as the purchases at the eastern plants? A. Yes.

Q. In order to calculate the amount of coal used by the TVA in its eastern division and the western division, you would actually have to take into account both the term deliveries to the eastern plants as well as the spot deliveries to the eastern plants, would you not?

1787 Is your answer to that yes, Mr. Schmidt? A. Yes, you would.

Q. These figures would have no significance in themselves? A. This is spot bid only.

Q. That's right, and so if the TVA had term contracts expiring at certain places, or if they had term contracts delivering coals to other plants, that would have an effect on the amount of spot coal that it would buy, would it not, at a given plant? A. I don't know. I don't know. I never tabulated the term bids.

* * * * * * * * * * *

Mr. Rayson: During Mr. Schmidt's cross examination I referred to two pages from his company's records and neglected to put them into evidence.

Mr. Rowntree and I have agreed that they may be
1788 put in evidence as exhibits to his testimony at this time.

The Court: Yes, sir.

Mr. Rowntree: That is correct.

(Exhibit No. 108 was marked for identification and filed.)

JOHN H. AMOS

called as a witness by and on behalf of the defendants and cross-plaintiffs, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Rowntree:

Q. This is Mr. John H. Amos? A. Yes, sir.

Mr. Rowntree: For the record, your Honor, Mr. Amos was designated in our pre-trial list of witnesses. Saturday we received from opposing counsel a request that we have Mr. Amos have with him a number of items of documents pertaining to Tampa Electric Company, other companies' correspondence with reference to Tampa Electric Company, records of Love & Amos Coal Company with respect to Nashville Coal, Inc., West Kentucky Coal Company, Peabody Coal Company, and all papers relating to rail shipping rates to Tampa, Florida.

1789 I would like the record to show that Mr. Amos has brought all those papers over with him and that they

have been made available to counsel.

Mr. Kramer: We admit they were made available to us yesterday and we had an opportunity to do some work. We did not request them at the last minute. We may not have gotten it all done, but counsel complied with request of counsel.

We have had no trouble with either side during this entire lawsuit, your Honor.

The Court: You gentlemen never have any trouble with each other. That makes it so good for the Court.

By Mr. Rowntree:

Q. Where is your residence, Mr. Amos? A. Franklin, Tennessee.

Q. When did you first get into the coal business? A. In the early part of 1918.

Q. What was your position at that time? A. I went to work in the office of one of Jewitt, Bigelow & Brooks' mines on First Creek in Perry County, Kentucky.

Q. Is that in the Hazard field? A. Yes.

1790 Q. Did you work in the office there? A. Yes, sir. I worked as a bill clerk to start. And at that time the World War I was going on and there was a big manpower shortage and so they permitted anybody that wanted to to work in the mines at night. And I loaded coal in the mines for a while at night.

Q. Did you become a foreman of a section? A. Later on I did; yes, sir.

Q. Did or were you moved to Cincinnati some period later on in the office of Jewitt, Bigelow & Brooks about 1920? A. Yes, sir. I think that is right. About 1920 they had been using me as a trouble shooter at some of their other mines. Send me in at times when they had some trouble. So they moved me to Cincinnati so I would be centrally located. Their mines were scattered all the way from Tennessee to the Clarksburg field. They were putting in a new mine in the Clarksburg field at that time. That is West Virginia.

Q. How many mines did they have? A. I think at the top they had 21.

Q. What was your job in Cincinnati? A. Well, I gradually, from doing the trouble work of the president of the company, who was too busy to get around all the time, I gradually was in charge of all mines.

1791 Q. Will you talk a little louder, Mr. Amos, so the jury can hear you. A. Yes.

Q. About 1923 did you go to Crawford, Tennessee? A. Yes, sir, I did.

Q. And what was your job there? A. I was in charge of the Briar Hill Collieries on the Tennessee Central Railroad.

Q. What size mine was that? A. It was a thousand to 1200-ton-a-day mine.

Q. And in 1928, I believe, you started a sales agency, Love & Amos Coal Company? A. That is correct; yes, sir.

Q. Have you had interest in coal producing properties since you started Love & Amos Sales Agency? A. Yes, sir, I have.

Q. And did you have an interest in the Crescent mine in West Kentucky? A. Yes, sir. I own a half interest in the Crescent mine.

Q. What size mine was that? A. We produced around a million tons of coal a year.

Q. And was it a mechanical mine? A. It was the first

1792 completely mechanized mine in West Kentucky.

Q. Does that have a union contract? A. Yes, sir.

Q. Did you have an interest in the A B & C mine at Monterey, Tennessee, subsequently? A. Yes, sir. I own one-third of that mine.

Q. Did you have an interest in the Fentress mine at or near Monterey subsequently? A. Later on, I believe it was 1956.

Q. What size mines were those? A. Well, neither one of those mines ever actually got into full production or any-

thing like full production. Both of them were being put in to serve the Kingston steam plant of the TVA. They had had freight rate to Kingston and both of them were intended to be mined on about 2500 ton daily production, each. But they never got — The Fentress mine was a completely mechanized mine.

Q. Did you have a TVA contract at Fentress? A. Yes, sir, and at ABC.

Q. When did that contract terminate? A. It was terminated December 31, 1957.

Q. And what happened to the mine at that time? A. The mine's being liquidated and is now — the equipment is being sold off.

1793 Q. Did you have a union contract at that mine? A. Yes, sir, at both of those mines.

Q. Have you had connection in this period of time after Love & Amos was started, the sales agency, have you had connection with small mines in Tennessee? A. Yes, sir.

Q. Whereabouts? A. Virtually all over the state.

Q. Did you have some loading ramps on the Crawford Branch of the Tennessee Central in Fentress and Overton Counties? A. Yes, sir.

Q. And what sort of business did those loading ramps do? A. They assembled coal from small mines.

Q. Where did the people come from that worked in those mines? A. They were local people who had formerly worked in the large mines there on the Tennessee Central, on the Crawford Branch of the Tennessee Central.

Q. What had happened to those large mines? A. All of them had gone out of business. There were three large mines there on that branch.

1794 Q. Did you have an interest in an operating company in northeast Tennessee? A. Yes, sir.

Q. In or about Campbell County and that vicinity? A. Yes, sir. The coal was actually over the state line in Kentucky, but it was being loaded at Jellico.

Q. Did you have any interest in a company in southeast Tennessee? A. At one time I did, in the Saradeana Coal Company, yes, sir.

Q. Did it buy coal from small mines? A. It stripped and bought coal from small mines.

Mr. Rowntree: If your Honor please, we would like to turn to the Tampa Electric Company situation and would offer in proof as the next exhibit a certified copy of the record of Tampa Electric Company v. Nashville Coal Company, Nashville Coal, Inc. and West Kentucky Coal Company.

Mr. Kramer: We seem to have misplaced it at the moment.

Mr. Combs: In connection with this exhibit offered, your Honor, the exhibit does not take into consideration the Sixth Circuit Court's or the Supreme Court's opinion on this.

* * * * * * * * * * *

1795 The Court: You are entitled to have those in the record.

* * * * * * * * * * *

1796 (Exhibit No. 109 was marked for identification and filed.)

Mr. Rowntree: The principal purpose of this, your Honor, is to state the position of Nashville Coal Company with respect to the complaint that was filed against it in this case, as a judicial admission by that company of its attitude and position upon this contract. And rather than reading a lot of pages, I would like to just state it, if it is agreeable with counsel.

Mr. Kramer: Your Honor, we don't object to the introduction of this entire record of this case. Now this is a matter of some prior litigation and statements made therein. We do not think it would be binding for any purpose in this present case. We think this is irrelevant and immaterial.

Now, of course, I recognize the rule, your Honor, with reference to statements made in pleadings where it becomes

material, but I don't see where this is material to this present lawsuit.

* * * * * * * * * * *

1799 (Thereupon, the jury retired from the courtroom and the following proceedings were had in the absence of the jury.)

Mr. Kramer: I think, your Honor, counsel ought to state fully what he expects to prove in this record and the reasons.

Mr. Rowntree: The only purpose I have, your Honor, is to show that West Kentucky Coal Company reneged on its contract. The statement of Mr. Mark Eastin in his prior deposition—

Mr. Kramer: That is the one read here.

Mr. Rowntree: I did not understand it at the time he made it, and it may be there is some explanation for it, and I don't believe that Mr. Mark Eastin intentionally mistated something.

The questions were these: "Did West Kentucky Coal Company ship coal on the contract that you referred to to Tampa Electric Company?

"Answer: No coal was ever shipped on that contract."

And I asked him: "Was the contract rescinded?

1800 "Answer: It has been cancelled by letter from Tampa Electric Company."

I think there might be some explanation for that answer.

* * * * * * * * * * *

Mr. Rowntree: The pleadings in this case clearly show that West Kentucky Coal Company and Nashville Coal Company decided not to ship coal on that contract because they say—

The Court: Violation of the anti-trust laws.

Mr. Rowntree: That is right.

The Court: Can't you men stipulate on that?

Mr. Combs: It seems to me we should be able to, your Honor.

* * * * * * * * * * *

1805 (Thereupon, the jury returned to open Court and the following further proceedings were had in the presence of the jury.)

Mr. Rowntree: Ladies and gentlemen of the jury, it is stipulated by and between counsel that there was a contract assumed by West Kentucky Coal Company to ship coal to the Tampa Electric Company in Florida; the original contract having been made back in 1955; the assumption of the contract being made at the end of 1955; the contract calling for the shipment of the requirements of the Gan-

1806 non Steam Plant of Tampa Electric Company; the coal to be of a quality of 11,800 BTU; the term of the contract to be twenty years; the price of the coal to be $6.85 per ton delivered at the Tampa unloading dock; that a lawsuit was filed by Tampa Electric Company, September, 1957, in the Federal Court at Nashville, Tennessee, suing the West Kentucky Coal Company, and its affiliate companies for breach of contract in not shipping coal to Tampa; and the West Kentucky Coal Company and its affiliates took the position in that lawsuit that the contract was illegal because it was in violation of the anti-trust laws.

Mr. Kramer: Now, I think Your Honor was going to state what happened to the lawsuit, and then we were going to read the decision of the Supreme Court.

The Court (To the Reporter): Do you have that?

The Reporter (Reading): The West Kentucky Company claimed that Tampa, binding them over a period of twenty years to ship coal at a certain price, and that that was fixing the price over that period of time and monopolizing the market over that period of time, and the Court at Nashville held that West Kentucky was correct in its contentions.

The Court of Appeals, by a two to one decision,

1807 the majority opinion being written by Judge Shackleford Miller, affirmed the lower Court. Judge Weick wrote a strong dissenting opinion, and the case reached the Supreme Court of the United States, and the Supreme

Court, by an opinion, I believe of Justice Clark, held that the Circuit Court was wrong, the majority opinion was wrong, that the minority opinion was right, although they gave different reasons. Some of the reasons given by the Supreme Court were different from the reasons given by Judge Weick.

The Court: The whole point in the description of the case through the Courts is that the final Court, which is the Supreme Court of the United States, held that that contract did not violate the anti-trust laws, that the Western Coal Company was required to perform the contract since it was a legal and valid contract.

Mr. Kramer: Your Honor meant West Kentucky.

The Court: Yes, that's right.

Mr. Combs: Now, as a part of the stipulation, ladies and gentlemen of the jury, I am going to read part of the facts as found by the Supreme Court of the United States with reference to this particular contract we are talking
1808 about.

Your Honor, I would like to point out to the jury for clarification, before I read that, that this contract was originally made by Nashville Coal Company, one of the subsidiaries, a towing company, before it became a part of the West Kentucky Coal Company. West Kentucky Coal Company did not negotiate this contract. The records will show that.

Now, picking up, Your Honor, a description of the contract we are talking about:

"The original contract was with Potter Towing Company, and by subsequent agreements with Tampa Electric responsibility thereunder was assumed by respondent West Kentucky Coal Company."

. . . . .

"The agreement, dated May 23, 1955, embraced Tampa Electric's 'total requirements of fuel . . . for the operation of its first two units to be installed at the Gannon Station

. . . not less than 225,000 tons of coal per unit per year,' for a period of 20 years. The contract further provided that 'if during the first ten years of the term . . . the Buyer constructs additional units (at Gannon) in which coal is used as the fuel, it shall give the Seller notice thereof two years prior to the completion of such unit or units and upon completion of same the fuel requirements thereof shall be added to this contract' It was understood and
1809 agreed, however, that 'the Buyer has the option to be exercised two years prior to completion of said unit or units of determining whether coal or some other fuel shall be used in same.' Tampa Electric had the further option of reducing, up to 15%, the amount of its coal purchases covered by the contract after giving six months' notice of an intention to use as fuel a by-product of any of its local customers. The minimum price was set at $6.40 per ton delivered, subject to an escalation clause based on labor cost and other factors. Deliveries were originally expected to begin in March, 1957, for the first unit, and for the second unit at the completion of its construction.

"In April 1957, soon before the first coal was actually to be delivered and after Tampa Electric, in order to equip its first two Gannon units for the use of coal, had expended some $3,000,000 more than the cost of constructing oil-burning units, and after respondents had expended approximately $7,500,000 readying itself to perform the contract, the latter advised petitioner that the contract was illegal under the antitrust laws, would therefore not be performed, and no coal would be delivered. This turn of events
1810 required Tampa Electric to look elsewhere for its coal requirements. The first unit at Gannon began operating August 1, 1957, using coal purchased on a temporary basis, but on December 23, 1957, a purchase order contract for the total coal requirements of the Gannon Station was made with Love and Amos Coal Company. It was for an indefinite period cancellable on twelve months' notice by

either party, or immediately upon tender of performance by respondents under the contract sued upon here. The maximum price was $8.80 per ton, depending upon the freight rate. In its purchase order to the Love and Amos Company, Tampa estimated that its requirements at the Gannon Station would be 350,000 tons in 1958; 700,000 tons in 1959 and 1960; 1,000,000 tons in 1961; and would increase thereafter, as required, to 'about 2,250,000 tons per year.' The second unit at Gannon Station commenced operation 14 months after the first, i. e., October 1958. Construction of a third unit, the coal for which was to have been provided under the original contract, was also begun."

Ladies and gentlemen, that is our part of the stipulation that I read to you in connection with the contract.

The Court: Now the parties have stipulated that the things that you have just heard from counsel are
1811 facts, and the jury will find those to be facts.

By Mr. Rowntree:

Q. Now, Mr. Amos, did you hear about the need of Tampa Electric Company for coal? A. Yes, sir.

Q. About when was that? A. In April or the first of May, it became generally talked among the coal trade that —

Q. Of what year? A. Of 1957, that West Kentucky had refused to ship on their contract.

Q. What did you do when you heard about it? A. I went to see the president of the Tampa Electric Company to see if it was possible to work out something to ship rail coal in there.

Q. What was his name, the president of Tampa Electric? A. W. C. MacInnes.

Q. How did he receive you down there? Was he interested?

Mr. Kramer: Now, Your Honor, we object to negotiations — I take it you say "you", you are talking about Love and Amos Coal Company.

The Witness: Yes, sir.

Mr. Kramer: And Tampa Electric Company.

1812 The Court: I sustain that objection.

By Mr. Rowntree:

Q. What was the result of your conversation with him? A. Well, I had a number of conversations.

Q. Yes, sir. A. The result of the first conversation was that he gave me an order for a hundred —

Mr. Kramer: Your Honor, of course, we object to that as being irrelevant and immaterial in this lawsuit. The fact that Love and Amos sold some coal to Tampa Electric, we don't think has anything to do with the issues in this lawsuit. We say it is irrelevant and immaterial.

Mr. Rowntree: If your Honor please, this is a struggle for a market, the only strong market that this section had available, and this is the struggle for that market, and that is what is going into the record.

The Court: Well, the Court holds that the testimony to the effect that he obtained orders is competent.

By Mr. Rowntree:

Q. Will you answer? A. The result of that first visit was he gave me an order for — a spot order for a hun-

1813 dred thousand tons of coal to be shipped as rapidly as he could unload it. He had no facilities at that time to unload rail coal.

Q. Was this Tampa coal to come by water from West Kentucky? A. The contract was, yes, sir. There weren't any rail facilities available at the time I am talking about.

1814 Q. The contract for 100,000 tons was to go by rail? A. Yes, sir.

Q. Go ahead. A. We started shipping on that contract the early part of May of 1957.

Mr. Kramer: Now, your Honor, we want to renew our objection as going beyond your Honor's previous ruling.

So there will be no question about it, your Honor ruled he could show that he received an order, and now they are going ahead to show shipments, and we object to that as

being irrelevant and immaterial for any purpose in this lawsuit.

The Court: Now you propose to show what happened?

Mr. Rowntree: Yes, sir.

The Court: The Court holds that is competent, what happened after those orders, if anything.

Mr. Kramer: May the record show our continuing objection so I need not make it to every question.

The Court: Yes, sir.

By Mr. Rowntree:

1815 Q. Where did you ship that coal from? A. From east Tennessee and southeast Kentucky.

Q. And what period of time did those shipments cover? A. I think, as I remember, we started in early part of May — May 7th or 8th, and we finished the latter part of September of 1957.

Mr. Rowntree: May the record show that among the items of tonnage shipped by Phillips Brothers in the records previously exhibited, there were 2,763 tons shipped by Phillips Brothers in that period to Tampa, Florida.

By Mr. Rowntree:

Q. Now was this a temporary contract you had? A. Yes, sir. It was a spot order.

Q. What did you do about going about obtaining a more permanent basis in that market? A. Well, the freight rate from these mines in this section of the country to all points in Florida at that time were $6.30 per ton. There was an additional charge from the yards at Tampa, Florida to this plant of 57 cents a ton on account of the fact it had to be moved by a small railroad.

* * * * * * * * * * *

1816 Q. Let me ask you, Mr. Amos, did you go see the L & N Railroad, the Seaboard Railroad, the Southern Railroad and Atlantic Coastline? A. I did.

Mr. Kramer: Your Honor, we are going to object because any effect to obtain freight rates is not, in our opinion and under the decisions of the Noerr case or other cases, is not

a violation of the Act. But any shipper has a perfect right at any time to go to the railroads and seek a lower rate, either direct to the railroad or through the Interstate Commerce Commission.

Whatever he may have done does not have any tendency to prove — done in this respect, does not have any tendency to prove a violation of the Sherman Act, and we object to it.

The Court: Unless it has some bearing on the market, on the attempted monopoly of the market.

Of course, it is perfectly proper for any citizen to negotiate with the railroads about freight rates and those things in and of themselves are not violations of any law.

1817 By Mr. Rowntree:

Q. Did you obtain a rate that would be competitive with water shipments to Tampa?

Mr. Kramer: For the reasons already given, the same objection, your Honor.

The Court: Overruled.

The Witness: Yes, sir, I did.

By Mr. Rowntree:

Q. And when was that rate effective? A. December 23, 1957.

Q. Now in the meantime was West Kentucky Coal Company still interested in the Tampa market? A. Yes, sir.

Q. What did they do down there?

. . . . . .

A. The West Kentucky Coal Company, at the time I was in Tampa, at first, maintained a gentleman named McCarter whom I had known previously. They were keeping him there and he was soliciting spot business from the

1818 Tampa Electric Company at a higher price than his contract did.

Q. Did the West Kentucky ship coal into Tampa during this period we have already covered? A. During the same period that I was shipping the 100,000 thousand tons, they shipped 115,000 tons on a spot order.

Q. By water? A. By water; yes, sir.

1824 Q. Mr. Amos, when was your contract made with Tampa Electric Company? A. December 23, 1957.

Mr. Rowntree: We will enter a copy of that as the next exhibit.

Mr. Kramer: All of which is subject to our previous objection.

The Court: Yes.

(Exhibit No. 110 was marked for identification and filed.)

Mr. Rowntree: This contract, the substance of it was read in connection with the Supreme Court statement of facts, I believe.

Mr. Combs: Yes, your Honor, and that is part of our stipulation and I thought that was going to cover this.

1825 Mr. Rowntree: It calls for the tonnage stated before in connection with the Supreme Court statement of fact.

(Exhibit passed to jury.)

By Mr. Rowntree:

Q. The shipments under this contract, where were they to come from? A. From the same territory, that is east Tennessee and southeast Kentucky.

Q. In January 1958 did you give a deposition in the case of Osborne Mining Company against United Mine Workers in which this contract was exhibited? A. Yes, sir.

Q. Now what happened down at Tampa after that?

Mr. Kramer: Now, of course, your Honor, we object to that for reasons heretofore given. We are getting into other litigation.

The Court: Are you asking what happened to him?

Mr. Rowntree: Yes, sir.

The Court: I will let him answer, but, Mr. Amos, don't quote what anybody told you or anything like that. That is hearsay.

I will let you state what happened to you, what happened

to your business, if anything.

1826 By Mr. Rowntree:

Q. What did you see down there and what happened?

The Court: State it of your own knowledge, please, Mr. Amos.

A. Within a week or two after that contract was filed as an exhibit, the West Kentucky Coal Company moved out and took their representative away; the Peabody Coal Company moved their representatives in. They moved a man in permanently.

By Mr. Rowntree:

Q. Did you see officials of Peabody Coal Company down there during that period of time? A. Yes, sir.

Q. Who did you see down there? A. Mr. Kelce, two of the vice presidents, and the man in charge of their water transportation.

Q. Who is Mr. Kelce? A. He is president of Peabody Coal Company.

Q. Did you have an understanding with Tampa Electric Company that they could experiment with water coal? A. Yes, sir. They reserved some tonnage for experimental purposes.

* * * * * * * * * * * *

1829 By Mr. Rowntree:

Q. Mr. Amos, after you saw the Peabody Company officials in Tampa shortly after January, 1958, did Peabody Coal Company ship water coal into — that is coal by water into Tampa Electric Company in the year 1958. A. Yes, sir, later in the year.

Q. And how much coal did they ship? A. A hundred and fifty thousand tons.

Q. In the — did Peabody Coal Company then make a contract with Tampa Electric Company for — that is, a permanent contract?

* * * * * * * * * * * *

1830 Mr. Rowntree: If Your Honor please, the contract is already in evidence. Perhaps I shouldn't have asked the witness.

The Court: Oh, well.

Mr. Rowntree: This is Exhibit 79, and I would like to call attention at this time to the tonnage in the Peabody contract to Tampa Electric Company made February 16, 1959.

The tonnage, 1959, 100,000 tons.

1960, 550,000 tons.

1961, 800,000 tons.

1962, 1,000,000 tons.

1963 through 1979, 1,250,000 tons.

Mr. Kramer: Now, of course, Your Honor, that is not in the same light as the question heretofore asked. That was a contract that was put in. We have an objection to that which we continue, of course, but, Your Honor, that is a contract for coal and not a report of deliveries of coal.

Mr. Rowntree: That's correct, that is the contract.

1831 Mr. Kramer: And the question that was asked when I started my objection was the amount of coal delivered. I continue that objection. That is a different proposition.

The Court: Now, the Court holds that he may answer as to how much coal Peabody delivered to Tampa, if he knows personally, but not by hearsay.

You may answer that, Mr. Amos.

The Witness: Yes, sir, the spot order was for 150,000 tons.

By Mr. Rowntree:

Q. And that was in the year '58? A. That's right, starting in June, I think.

Q. And this contract was at the beginning of 1959.

Did your shipments to Tampa, after these water shipments of coal, amount to the tonnage called for in your contract with Tampa Coal Company?

Mr. Kramer: Now, just a moment, Your Honor, of course we object to that. That is a conclusion — I don't know what —

By Mr. Rowntree:

Q. Is this a resume of the tonnages delivered by you to Tampa in the period of 1957 through 1960 to the present time?

* * * * * * * * * * *

1832 Mr. Kramer: Your Honor, we want to continue the objections heertofore made. I take it it is not necessary to restate them.

The Court: No, sir.

Mr. Kramer: All right, sir.

By Mr. Rowntree:

Q. Your answer is yes? A. Yes, it is.

Q. We ask that that be marked as next exhibit.

(Exhibit No. 111 was marked for identification and filed.)

* * * * * * * * * * *

By Mr. Rowntree:

Q. Mr. Amos, the date of that Tampa contract is February 16, 1959. Did you receive a letter from Tampa Electric Company on or about March 26, 1959? A. Yes,

1833 sir.

Q. Is that a copy of it? A. Yes, sir.

Mr. Kramer: Your Honor, we object to the introduction of this offered exhibit. It is irrelevant. It is immaterial. We think it is incompetent for any purpose connected with this lawsuit, Your Honor.

(The proffered exhibit was handed to the Court.)

The Court: Sustained, you may put it in the record for identification purposes. Sustain the objection, not on the ground that is indicated by Mr. Kramer, however. It is sustained because it is a communication —

Mr. Kramer: It is hearsay.

The Court: In the nature of a self-serving communica-

tion, and the best evidence would be the evidence of the man who wrote the letter.

* * * * * * * * * * *

1834 (Exhibit No. 112 was marked for identification only.)

Mr. Rowntree: May I ask this, Your Honor.

By Mr. Rowntree:

Q. Mr. Amos, will you state whether or not in order to continue to ship coal to Tampa after March, 1959, you had to take some other step with respect to your cost to Tampa? A. Yes, sir.

Q. And what was that? A. We made a reduction —

Mr. Kramer: Now just a moment. Your Honor, because conditions changed, and he changed his methods of shipping, I can't see where that is material to this lawsuit. I just can't follow that. I object to that on the materiality.

The Court: It may not, but I will let him answer it.

The Witness: We made a reduction in our price.

The Court: Now the Court holds that that is competent. It may have, it may not have, some bearing on the basic issues in this case, but the jury may consider it for whatever bearing it has on such issues.

1835 By Mr. Rowntree:

Q. Will you state whether or not you had to take any step with respect to rail rate? A. We did

Q. What was that? A. We asked the railroads to make a further reduction —

Mr. Kramer: Now, Your Honor, we again object to this negotiating.

The Court: Sustained.

* * * * * * * * * * *

By Mr. Rowntree:

Q. State what happened to the rates. A. It was reduced to $3.80 per ton.

Q. Is that a firm reduction at this time?

Mr. Kramer: I hate to keep continually objecting, Your

Honor, but I cannot see the materiality of that. If the railroad company saw fit to change freight rates, I cannot see that the United Mine Workers or the Trustees of the Welfare Fund, that that could be held as the basis for any conspiracy.

The Court: It cannot, and the Court so instructs
1836 the jury, but the Court is permitting this testimony for whatever bearing it may have on the entire picture, that is, the picture involving the prices of coal and the alleged attempt to monopolize the coal etcetera.

Now, Mr. Rowntree, what did you have, what were the things that you had in mind on this freight rate ques-
1837 tion?

Mr. Rowntree: This Peabody contract came and this heavy tonnage into Tampa in spite of Love & Amos' contract for their supply of Tampa. Then Mr. Amos had to reduce his price, then he had to get a second reduction in the freight rate which is not yet completely resolved, and the struggle is still going on.

The Court: Well, it is offered for whatever bearing it may have on the alleged monopolistic feature involved in the case; is that the point?

Mr. Rowntree: Yes, sir.

Mr. Kramer: May I state my objection a little further.

Your Honor, the fact that Mr. Amos, or his company, or somebody else, was attempting to get lower freight rates, which, of course the Court has judicial knowledge, and is a matter of common knowledge, is always going on — the thing I can't understand as your Honor knows, there is always a fight for lower rates by the shippers and the railroad companies or the barge companies, whoever it may be, are always insisting the rates are too low, and the fact he did make an application for and did obtain a lower freight rate, I can't see where that would be an element of conspiracy that the United Mine Workers would be
1838 a party to.

The Court: That alone, Mr. Kramer, has no sig-

nificance insofar as the Court can see, but it may have some bearing when it is put into the entire picture on this price question.

The Court is not indicating it has any significance, but the Court feels it should let it go into the record for whatever bearing it has on the monopolistic issue, if any.

* * * * * * * * * * *

By Mr. Rowntree:

Q. Mr. Amos, is Tampa Electric Company the first sizable market in Florida for coal? A. Yes, sir, it is.

Q. Is Florida a potential great market for coal? A. I think so; yes, sir.

Q. If the coal moves by rail where will the coal come from to Florida? A. East Tennessee and east Kentucky.

Q. If the coal moves by water who will ship the
1839 coal? A. West Kentucky is the only people who have shown any interest.

Q. What about Peabody Coal Company? A. I mean the west Kentucky field.

Q. Now what proportion of your contract is being shipped at the present time?

Mr. Kramer: Now, your Honor, we are going to object to that.

Mr. Rowntree: All right, we will refer to the contract. I would like to point out this, the contract between Tampa and Love & Amos called for 350,000 tons in 1958.

Love & Amos Coal Company shipped 248,000.

The contract called for 700,000 tons in 1959. Love & Amos shipped 476,000.

The contract called for 700,000 tons in 1960. Love & Amos shipped 252,000.

The contract called for 1,000,000 tons in 1961, and Love & Amos is shipping at the rate of about 180,000 tons for the year.

By Mr. Rowntree:

Q. Mr. Amos, why didn't you ship more tonnage as the

contract called for? A. The water coal was taking
1840 the business.

Q. Mr. Amos, what kind of a steam utility market or steam coal market was there in the east Tennessee Coal field in the period 1950 to 1954? A. My recollection is that it was dull during that period.

Q. Can you explain why it was dull? Was it a good steam market in the area? A. No, there wasn't.

Q. Can you explain why? A. The production of electric — the electric production was just beginning to start.

Mr. Kramer: What year are we talking about?

The Witness: '50 to '54, as I understood you.

Mr. Rowntree. That is right.

A. (Continuing) The Widows Creek plant was built in that time. The big plant was put in production, I think in 1955. That plant alone burned about 4,000,000 tons of coal a year.

By Mr. Rowntree:

Q. How was electricity generated in the area before the steam plants? A. In small plants and with hydro.

Q. Did TVA have a large hydroelectric system? A. Yes, sir.

1841 Q. And that did not consume coal? A. That is correct.

Q. What about the other areas of the country, were they generating electricity by hydro or by coal? A. You mean the other areas of Tennessee?

Q. The other areas of the country. The northeast, the middlewest. A. They were mostly steam and hydro.

Q. Now Mr. Amos, are these books commonly used in the coal selling business with respect to the selling of coal for steam utility use? A. Yes, sir, they are generally referred to in the coal industry as the Bible on utility use.

Q. Was this chart developed —

Mr. Kramer: Those books we have not seen and they have not been identified further than just "these two books,"

and I don't know what they are. Some mention about the Bible. Maybe they are the Old Testament or the New, or something else, I don't know. But I would like to know what they are.

Q. Were they books prepared by the National Coal Association? A. They are; yes, sir.

Q. What is the caption of the first book, the big
1842 book? A. "Trends in Electric Utility Industry Experience, 1946-58, Comparative Coal, Oil, and Gas Consumption Statistics, and other Related Data Pertaining to the Generation of Electric Power."

Q. What is the caption of the second book, the smaller book? A. "Steam Electric Plant Factors 1958. Comparative Coal, Oil, and Gas Consumption Statistics and Costs and other Related Data Pertaining to the Generation of Electric Power."

Q. Is there any other source to obtain the information that is contained in those books? A. My understanding is that all of this information is assembled by the National Coal Association from the information in the Federal Power Commission's files.

1843 Q. Is it the only accumulation of information in use? A. The only one that I know of, sir.

Mr. Rowntree: We would like to offer those books, your Honor, the bigger one as the next exhibit, the smaller as the succeeding exhibit.

* * * * * * * * * * *

1844 The Court: You shall have that reservation.

(Exhibits No. 113 and 114 were marked for identification and filed.)

Mr. Combs: May it please the Court, I expect that counsel is trying to prove the relevant competitive market in
1845 this section. I would like to point out that in Justice Clark's decision in the Supreme Court that this question was decided by the court, the relevant competitive market as related to that Tampa Power contract, and in

that finding by the Supreme Court he pointed out that there was about 700 producers in that effective market area, and then the justice goes into the tonnages, who sells the coal, and all in a comprehensive way.

The figures that the court uses are taken from the United States Bureau of Census and United States Mineral Industries.

Now the only thing I am pointing out at this time, it seems to me that this exact thing was before the court and what is the relative competitive market in the Tampa, Florida area —

Mr. Rowntree: We are going by TVA market.

Mr. Combs: We started out with the Tampa contract and it certainly isn't clear to me, and I don't believe it would be clear to the jury, if you start out talking about a Tampa contract and keep on that, and then suddenly it becomes the TVA market.

Mr. Rowntree: We can start on a new subject any time, and we are starting on a new subject.

Mr. Combs: That is the only reason I was calling
1846 attention to this, and I think the court has already decided this question of competitive market as far as utilities are concerned in the Tampa and adjoining areas.

The Court: The Court recalls what Justice Clark said in that opinion. If you gentlemen want to stipulate about that, it is agreeable with the Court.

Mr. Combs: I think that was the finding of the Court as far as this Tampa contract and all that was concerned. That was exactly what was before the Court.

Mr. Rowntree: I don't know exactly what the Supreme Court held in that case. The Tampa market is not what we are offering this evidence for. I think the proof in this case shows who the competitors were for the Tampa market, and I don't know what additional benefit we will get out of the Supreme Court's opinion but I will be happy to stipulate on it, whatever relevency it has to Tampa market.

Mr. Combs: I might say this, as far as counsel is concerned, that the testimony of the witness does not compare with the findings of the court. That is my whole point.

Mr. Rowntree: In what respect?

1847 Mr. Combs: In this respect. I believe the witness testified it was a very limited market, a very limited number of competitors, and yet Justice Clark says that the market in the Tampa area and utilities area covers over 700 producers, producing coal in seven states, and then it goes ahead to give the tonnages for the various years, 1954 up through the time this was before the court.

Mr. Rowntree: You mean he held those number of producers were shipping coal to the Tampa market?

Mr. Combs: That the relevant competitive market in the Tampa area consisted of —

Mr. Rowntree: You mean he was holding that all those people were shipping coal into Tampa Electric Company?

Mr. Combs: No, he was holding that it was a relative competitive market that they were talking about, not the peninsula of Florida but the peninsula of Florida together with Georgia, and that the relative competitive market in that case is, as he described it — and if the Court would like and counsel would like, I would be glad to read what the court said.

Mr. Rowntree: What we need to know is what do they mean by relevant market. What do they mean by

1848 that?

Mr. Combs: I think what the court meant by it is what we what we think that you have to establish in your case that the competitive situation has to be related to the market of where you are trying to get a monopoly. If you are claiming that the monopoly consisted of a national situation that affected your client in this particular way, that is one thing.

Mr. Rowntree: That is what we are claiming.

Mr. Combs: If you are claiming TVA market and these other markets, I don't know how you segregate it.

Mr. Rowntree: I don't think the relevant market has a thing to do with a national conspiracy, your Honor.

Mr. Kramer: We were talking a minute ago about the competitive market in Florida. I don't know, he says he is about to change. What the proof has been in the last few minutes has been the competitive market in the Florida area, and that we were freezing out or that there was a combination attempting to freeze out, if you want to use that language, or monopolize that Florida market. Now what we are saying is that the Supreme Court of the
1849 United States said that there are 700 producers who are relevant producers for that Florida market. And it isn't just freezing out to monopolize one or two people. In order to do it, you have 700 coal producers down there and we say that that establishes by the Supreme Court of the United States the relative number of producers that are involved in the competitive market supplying the Florida area, and that it is not merely West Kentucky and one or two others, Peabody or somebody else, but here are 700 producers down there that are selling in that market. And to monopolize, you have got to substantially affect that group of producers.

Mr. Rowntree: Of course, we are not claiming a monopoly.

The Court: Is there any objection to your reading right there what Justice Clark said about it? Any objection?

Mr. Rowntree: No, sir.

* * * * * * * * * * *

1850 Mr. Combs: Now, the Justice is talking about the Tampa area and the Tampa contract. That is the issue, whether or not that that contract constituted a monopoly of that particular market. The Justice is talking about the relevant competitive market in that area, and here is what he says:

"While the relevant competitive market is not ordinarily susceptible to a 'metes and bounds' definition"—and then he cites cases—"It is of course the area in which respondents and the other 700 producers effectively compete."

* * *

"'The record shows that like the respondents, they sold bituminous coal 'suitable for (Tampa's) requirements,' mined in parts of Pennsylvania, Virginia, West Virginia, Kentucky, Tennessee, Alabama, Ohio and Illinois. We take notice of the fact that the approximately total bituminous coal (and lignite) product in the year 1954 from the districts in which these 700 producers are located was 359,289,000 tons, of which some 290,567,000 tons were sold on the open market. Of the latter amount some 78,716,000 tons 1851 were sold to electric utilities. We also note that in 1954 Florida and Georgia combined consumed at least 2,304,000 tons, 1,100,000 of which were used by electric utilities, and the sources of which were mines located in no less than seven States."

And then he, in a footnote cites the states.

"We take further notice that the production and marketing of bituminous coal (and lignite) from the same districts, and assumedly equally available to Tampa on a commercially feasible basis, is currently on a par with prior years.

"In point of statistical fact, coal consumption in the combined Florida-Georgia area has increased significantly since 1954. In 1959 more than 3,775,000 tons were there consumed, 2,913,000 being used by electric utilities including, presumably, the coal used by the petitioner. The coal continued to come from at least seven States. From these statistics it clearly appears that the proportionate volume of the total relevant coal product as to which the challenged contract pre-empted competition, less than 1% is, conservatively speaking, quite insubstantial. A more accurate figure, even assuming pre-emption to the extent of the maximum anticipated total requirements, 2,250,000 tons a year

would be .77%."

1852 Now, Your Honor, I think that all the testimony covered by this witness up until now has related to this fact here.

Mr. Rowntree: It is related to the Tampa Electric Company market.

Mr. Combs: That's right. That's right.

Mr. Rowntree: And of course, we do not claim that anybody has attained an actual monopoly of that market. This case deals with an actual monopoly claim, a claim that a contract — not a conspiracy, but a contract — gave a monopoly to a market, to a particular seller.

We claim in this case that there was a conspiracy to monopolize. In a conspiracy case, you don't get into relevant market. You get into relevant market where you have a contract, question of monopolization by contract, by an individual seller, but a conspiracy to monopolize never gets into the relevant market question, and I doubt if you can cite a case where the conspiracy question arises in a —

Mr. Combs: I don't think counsel is right, and I certainly think that the testimony that counsel was eliciting from this witness here could only relate to what we are talking about here, a relevant market. If it doesn't relate to that, I don't know what the benefit of it would be. It

1853 is the competitive situation that is involved.

Mr. Rowntree: The relevant market —

Mr. Combs: They conspire to change that competitive situation.

Mr. Rowntree: The conspiracy was to take a — a portion of this conspiracy we are talking about is to take this Florida market. The Tampa Electric Company is the frontier of that market. The conspiracy to monopolize gives a cause of relief regardless of the actual attainment of the monopolization.

We say that the market that was attempted to be monopolized is not limited to Florida, it is not limited to TVA. It is a monopoly that exists throughout the country. We have

to provide evidences of that conspiracy wherever we can find them and wherever we meet them, and can produce evidence on them.

We say that in Florida we have encountered evidence of it as shown by the proof here. The market we are dealing with is not some vague expression about "relevant market," it is the Tampa Electric Company, and in the final analysis of proving conspiracy, you have to deal with practical economics, a seller and a buyer, and we have shown the buyer here, the Tampa Electric Company, and what has been done with respect to that buyer, and we are
1854 proving a conspiracy case here, and not a monopolization by contract, by an individual seller, and it is only in that latter area that you get into the relevant market question.

Mr. Combs: Now, Your Honor —

Mr. Rowntree: In further explanation, Your Honor, you can see that a lot of contracts are made with exclusive dealership for exclusive sales. Every one of those contracts are not invalid. It is a question of how much of the market they monopolize, and that is the kind of case you get into in the relevant market question. It is not in a conspiracy to monopolize a particular market, a big market like TVA. It is certainly not a question in a case for a national conspiracy to monopolize, a national conspiracy to restrain trade, and no such case as that can counsel cite a case where relevant market comes into question.

Mr. Combs: Your Honor, I want to point out up until now the witness has been testifying on where Tampa could get their coal. As I understand his testimony, they could only ship it by rail in a limited fashion. Justice Clark wrote that that wasn't so, that Tampa had this whole market to buy coal, and that that was a relevant area.

. . . . . .

1855 By Mr. Rowntree:

Q. Mr. Amos, is that chart prepared from figures

of the last two exhibits? A. Yes, sir.

Mr. Rowntree: I would like to offer this as the next exhibit.

(Exhibit No. 115 was marked for identification and filed.)

1856 Mr. Kramer: Your Honor, as a part of this exhibit there seems to be an attempt to show, as counsel termed from these books that have been filed yesterday, two preceding exhibits coal produced and utility use and cost of coal produced in the states of New York, Pennsylvania, Illinois, Ohio, Indiana and Tennessee. And, your Honor, we do not see the relevancy of that portion of this exhibit and we are going to object to that on the ground of irrelevancy.

The Court: What is the purpose of this testimony?

Mr. Rowntree: This is on the development of the TVA market — the growth of the market.

The Court: All right.

1857 Mr. Kramer: Our answer is, your Honor, that TVA is not in Pennsylvania, TVA is not in New York, and we don't say that is the basis of my real objection, if this is for the TVA market. TVA doesn't sell a kilowatt of electricity there and it doesn't buy coal there, and the testimony of Mr. Hill they read the other day says that Pennsylvania is outside of their market, and he said "We don't buy coal from Pennsylvania" — and he mentions the states that he doesn't buy coal from, and I don't know about New York but he mentioned Pennsylvania. I don't see where the relevancy is.

The Court: Is it a question of comparison?

Mr. Rowntree: Yes, sir. Price comparison of TVA, the growth of — the tremendous growth of TVA with other coal producing states, how the price compared with TVA. This question of price is a matter of economics, and we say this price was depressed in TVA. We attempt to show why it was depressed.

The Court: By comparing the price here and other areas?

Mr. Rowntree: That's right.

The Court: Where coal is used?

Mr. Rowntree: That is right. Where there should be a lower price than what we have here. Show the con-
1858 trast.

The Court: And that is the sole purpose of this exhibit?

Mr. Rowntree: That is correct.

The Court: It is admitted for that limited purpose, or for those limited purposes.

* * * * * * * * * * *

Mr. Kramer: While the Marshal is placing the exhibit which has just been admitted on the board, it doesn't seem to have on there any dates.

Might we ask counsel — well, it is over on the lefthand column, and evidently ------

Mr. Rowntree: I think each column has dates in it except the last column, which is all 1957.

Mr. Kramer: I see where the dates are. Are these dates — may I ask counsel another question. This book that I hold in my hand, which is Exhibit 114, bears date, 9th Edition, July, 1959, and the other one, which is Exhibit 113, bears date of 1960 without the month being shown, at least on the front page.

Do these books, not having an opportunity to examine them, give these figures back to 1951?

1859 Mr. Rowntree: That is right.

* * * * * * * * * * *

1860 Mr. Rowntree: This says, "U. S. Tons of Coal for Steam Electric Utilities." That 1951 figure the book shows is not available. That figure is not available, '51.

* * * * * * * * * * *

Mr. Rowntree: 1952, the use of steam coal in steam electric utilities, 104,000,000 tons. You can see the figure as they grown down to 1958, 152,000,000, which, I think, represents a growth of 50 per cent in that period, 1952-1958, for

the country as a whole.

1861 The Court: Growth of coal, you say ----

Mr. Rowntree: The use of steam coal in the electric utility industry.

The Court: Has grown from how many tons?

Mr. Rowntree: From 104-million tons in 1952 to 152-million tons in 1958.

The Court: All right.

Mr. Rowntree: In Tennessee, starting in 1951, there were 1,103,000 tons used in the steam electric utility business.

Mr. Kramer: You are talking about tonnage consumed and not tonnage purchased?

Mr. Rowntree: Tonnage consumed; right.

Mr. Kramer: All right.

Mr. Rowntree: In 1952 there was approximately 2-million tons consumed in the Tennessee steam electric market. You see the figures of the growth. Down to 1958 where it was 9,043,000 tons consumed in Tennessee steam electric market. A growth from 1952, the comparable date over here -- a growth of roughly 450 per cent as compared to 50 per cent for the country as a whole.

We take a sister state of Virginia.

By Mr. Rowntree:

1862 Q. Does Virginia produce much coal? A. About 5-million tons a year, is my recollection of it, sir.

Mr. Kramer: Well, your Honor will recall that Mr. Hill testified on yesterday as to the small percentage of Virginia coal. I don't recall those figures, but that was extremely small that entered into the TVA field.

In view of that, we think that evidence insofar as Virginia is concerned, is irrelevant and immaterial, and we are continuing the objection.

Mr. Rowntree: We are not talking about TVA exclusively. We are talking about steam electric industry, steam electric consumption.

Mr. Kramer: Yes, but the proof that you have introduced heretofore, you say that the main growth in the consumption of coal for generation of electricity was because of the increase in the TVA market.

Mr. Rowntree: That is correct.

The Court: All right. The objection is overruled. You may go ahead.

Mr. Rowntree: Virginia, as you know, starts off 1951 at 3,440,000, but by 1958 it had grown only to 4,742,000.

The cost in 1957 — the cost at the plant in Virginia
1863 was $8.75 per ton. 1957, Tennessee cost at the plant $4.81.

And we point out that great difference in spite of the tremendous increase in the market in Tennessee.

Mr. Kramer: That is argument. We object to that argument. I don't have any objection to pointing out what is on there, but I object to argument.

The Court: The argument is not evidence and will not be considered by the jury as evidence. But counsel on each side has a right to state his contention with respect to a certain subject.

Now Mr. Rowntree, you are just pointing out, as I understand, what the figures show on the chart?

Mr. Rowntree: That is right.

The Court: Well, he has a right to do that but he cannot argue about them at this time.

Mr. Kramer or Mr. Combs shall have the right at any time to interrupt counsel and state your position, Mr. Kramer, to the end that the jury may understand the problems that are involved better by such explanations.

Go ahead.

Mr. Kramer: May I ask counsel one question that I did not ask earlier, the figures as to the cost I didn't ask
1864 you about. Are they in these same exhibits?

Mr. Rowntree: They are in the same exhibits.

Mr. Kramer: Go ahead.

Mr. Rowntree: In fact, that last — yes, they are. The first book — the big book.

This last exhibit sets forth the top six states in the use of steam electric utility coal in the year 1957 — a year right in the middle of this case here.

The top — well, here is the top user of steam electric utility coal, Ohio. The next is Illinois.

Ohio used 19,000,000 tons; Illinois used 18,000,000 tons; Pennsylvania used 17,000,000 tons; New York used 13,000,000 tons; Indiana, 12,761,000 tons; Tennessee is the 6th state — it has grown from this point down here to the 6th state in the use of steam utility coal.

We have on this chart the production, the coal produced in the various states which produce coal.

New York, of course, draws a blank on that. The cost in New York, a non-coal producing state with a heavy use of utility coal, $9.89.

1865 Pennsylvania, outside of West Virginia, uses a heavy tonnage of steam electric coal with the cost of $6.53.

And another heavy producer, Illinois, and the cost — and the same with Ohio and Indiana — all of those being far heavier producers of coal than Tennessee.

Tennessee with a great growth of steam utility market with a relative low production compared to the other heavy users with the lowest price — lowest cost at the plant of any.

1866 Q. Mr. Amos, would you tell us if the information shown on that chart with respect to West Kentucky Coal Company and Nashville Coal Company, would that have an effect on the spot coal market of TVA? And, if so, why?

. . . . . .

A. Yes, sir, I think what you are referring to is the large tonnages of coal they are bidding on, and assuming that this is bid on a spot market, is that correct, sir?

Q. That is correct. A. Well, bids of 60,000 tons a month would have a terrific impact on the market.

Q. Is that an unusually heavy tonnage for the spot market bid? A. Yes, sir. I don't know of anybody able to furnish that much other than the West Kentucky field.

Q. What effect would it have? A. It would have the effect of bearing down on the price heavily.

1867 Q. What exhibit is that?

* * * * * * * * * * *

A. Three B. No. 102.

* * * * * * * * * * *

1868 Q. Mr. Amos, assuming a state has a production of coal at the rate of 7,000,000, roughly, tons per year; and assuming that that state starts in 1951 with a coal use in the steam market of 1,100,000 tons and that market grows to 9,351,000 tons over a period of from 1951 to 1957 at the rate of approximately 450 per cent, whereas the country as a whole starts off with a coal consumption for utility purposes of 104,000,000 tons and grows, roughly, 50 per cent in the equivalent period of time; and assuming that the costs in a sister state, with a growth of only 1,000,000 tons over the equivalent period of time has a cost at the plant of $8.75; and assuming that the first state we are talking about, the state that we are talking about has

1869 grown to the sixth state in the country in the use of steam coal by 1957, and that four of the other six top users of coal are among the top producers of coal and have a production rate well over twice as great as the first state; and assuming that the costs in those other states at the plant are respectively $6.53, $5.43, $5.56 and $4.91, whereas the first state cost at the plant in 1957 for steam coal was only $4.81, state whether or not had it not been for the practice of dumping coal on the market, the price of coal for steam use in the first state would be the national average price for coal.

Mr. Kramer: Now, your Honor, we object to that.

The Court: I sustain the objection as to the last part of the question, the very last part. The question is, do you have an opinion from the typothetical facts given to you by Mr. Rowntree of why the price of coal in Tennessee was such and such a figure. Do you have an opinion?

The Witness: Yes, sir.

The Court: All right. Second, do you have an opinion as what the price should be in Tennessee?

The Witness: No, sir, I don't know what the price should be, but I have —

1870 The Court: Well, I will let him express his opinion as the reason why the cost in Tennessee is such and such a figure, if he has an opinion.

Mr. Rowntree: May he give his opinion as to whether or not it should be at least the national average?

The Court: He can give his opinion of what it should be. That is what I tried to ask him.

Mr. Kramer: He said he couldn't give that opinion. That is what he has sworn. I don't think counsel can cross examine his own witness.

By Mr. Rowntree:

Q. Could you give us your opinion as to whether or not it would be as great as the national average?

Mr. Kramer: Your Honor, we object to that because in all of this question, the question of markets has not been taken into consideration. It isn't a question of production within the fields. You have got to, in order to realize for figures to be worth anything, you have got to realize markets that may be involved because production may be entirely different.

The Court: I think, Mr. Kramer, with due deference to you, that that objection goes to the weight of the testimony rather than the competency.

1871 The Court holds that the witness may give his first opinion, what I asked him if he had an opinion in that first proposition and he said he did.

Mr. Kramer: I want to object generally on the ground that the witness is not qualified to answer the facts of the question as now put.

The Court: The Court overrules the objection.

The question is whether you have an opinion for the reason that the price of the coal in the first state — he used Tennessee — he used Tennessee as the first state in his question, as I understand. Now the price was what, Mr. Rowntree, during the period of time involved in Tennessee?

Mr. Rowntree: We have Phillips price, your Honor, which followed the market pretty closely. The cost at the plant, $4.81.

The Court: Well, I am using the price and Mr. Rowntree is using the cost.

Do you have an opinion why the cost of coal in Tennessee was at that figure that he just mentioned?

The Witness: Yes, sir. It seems obvious to me, and I am just trying to recall Mr. Rowntree's figures — he told a production of about 7,000,000 tons a year and a consumption of so many million tons. It seems to me it is obvious that there is outside pressure that would drive that price
1872 as low as it is, lower than the other states. There is some outside pressure doing it.

The Court: Now I will let you ask the second question. By Mr. Rowntree:

Q. Do you have an opinion as to whether or not the price in that state should be as great as the national average? A. Yes, sir.

Mr. Kramer: Our objection continues, your Honor.

The Court: Yes. The Court rules that is it competent as evidence for whatever consideration the jury may think it is entitled to.

* * * * * * * * * * *

Q. What is your opinion? A. My opinion is that the quality of coal from the territory you are talking about is

far superior to the national average quality of coal
1873 and that under those circumstances; that coal from your territory that you are talking about should be above the national average. I said, your Honor, that I didn't know how much.

1874 Q. Is the coal in the East Tennessee Field, particularly Campbell County, Tennessee, above the national average in quality? A. Yes, sir.

Q. How much comparatively or generally? A. This is from recollection, Mr. Rowntree. I think the national average is somewhere about eleven thousand six or seven hundred BTU, whereas the average of the coals in Campbell County that you refer to, the principal coal being the Jellico coal, will run around 13,200 BTU.

The Court: That is for what per —

The Witness: Per pound of coal.

The Court: Per pound.

The Witness: Yes. Maybe this will help you on that, Your Honor.

The Court: I don't think I can be helped on this BTU, but you can try.

The Witness: As a rough rule, the cost per cent for each one cent or pound of coal is equivalent to about twenty-five cents per ton, so that you can see the difference between eleven five and thirteen would be material.

The Court: Mr. Rowntree, the Court, in its rulings, didn't intend to cut you off from full examination of this witness. If you have any other points involved, you
1875 may have the privilege of asking the witness about them, and then as objections are made, the Court will pass on them as they are made.

The Court interrupted the witness, because the Court felt that the objection was good and sustained it. If you have any other points that you want to bring out from the witness stand, you may ask him, and if the objections are made, I will pass on them.

Mr. Rowntree: Thank you, sir.

By Mr. Rowntree:

Q. Mr. Amos, this is a book put out by the Bureau of Mines, I believe. A. Yes, sir.

* * * * * * * * * * *

(Exhibit No. 116 was marked for identification and filed.)

* * * * * * * * * * *

1876 By Mr. Rowntree:

Q. Mr. Amos, I show you the chart there and ask you if that chart, in the left-hand column, gives the national average price of coal of 1956, 1957, and 1958, in accordance with the Bureau of Mines figures.

Mr. Kramer: What page is that report?

Mr. Rowntree: Maybe I can see it better than you can. It is page 9.

The Witness: Yes, sir. 1956, the average value per ton was $4.82. In 1957, $5.08, and in 1958, it was $4.86 per ton.

* * * * * * * * * * *

By Mr. Rowntree:

Q. Now, Mr. Amos, does this show — this next chart we are about to deal with — does that show the average

1877 price of coal and show the Phillips price average for those years, and show the difference between his price and the national average, and show a figure of amount multiplying that difference in price by the tons mined by Phillips Brothers Coal Company?

Mr. Combs: May I ask a question, Your Honor?

The Court: Yes, sir.

Mr. Combs: Does that show the difference between steam coal and metallurgical, or is it both?

The Court: What about that?

Mr. Rowntree: This is the national average for all coal.

Mr. Combs: Both steam and metallurgical?

Mr. Rowntree: All kinds.

Mr. Combs: Thank you.

Mr. Kramer: Your Honor, we want to object then to it, because we do not think that the national average — in

other words that you could establish any facts of substantive value in this lawsuit by saying that the national average price per coal — sales price of coal — that exhibit is used as "value" — I don't know just what that means, "value per ton", — but it says "value per ton" is so much, and then Phillips sold their coal at so much per ton. We do not think, Your Honor, that that establishes anything
1878 at all, because you have to show that the quality of their coal was equal to the national average, location as to markets was the equivalent to the national average, that the other things that would go into the establishment of the national average of value was similar before a comparison of national average and what some one isolated person would sell at.

It is irrelevant to the lawsuit. We say it is immaterial, and we object to it and say it should not be entered in the lawsuit.

The Court: What are the classes of coal? You say steam coal and metallurgical coal, and what else?

The Witness: Your Honor, I have only looked at this one page, and it shows the average price realized per ton on all coals. Of course, there are low grade coals in there and high grade, and this is the average for all of them.

The Court: What is metallurgical?

The Witness: Metallurgical coal is a special coal used in the production of steel. I don't see that it makes any great difference. It is coal that is sold to the steel companies.

* * * * * * * * * * *

1879 Mr. Combs: As a matter of fact, I think it would make a great deal of difference. They are talking about utility coal, that is steam coal, and I think the witness and counsel will admit that steam coal sells at a much lesser price than metallurgical coal. Metallurgical coal is a higher grade of coal.

Now, you can't distinguish how much of one or the other. I don't see how it follows on the markets that he is trying

to develop here. That was the point I was making. It may be for the question of other witnesses, I don't know, but I just wanted that as a matter of information.

Mr. Rayson: There's already testimony, your Honor, by other witnesses that TVA purchases inferior grades of coal, and can use them, whereas other businesses cannot. I think that was brought out by the TVA witness Hill, and I think Mr. Schmidt testified the same thing, and I think that would further eliminate any basis for comparison of what Mr. Amos is talking about with the price of steam coal paid by the TVA.

Mr. Rowntree: I think that the —

The Court: Mr. Amos, now you know about the coal business, as an operator. Do you have an opinion of whether or not the average shown in there has any relation to the type of coal that is furnished or that is purchased
1880 and used by the TVA, and as I understand the figures in the pamphlet that you have in your hand apply to all coals. It is the average price of all coals, and the proof in this case so far shows that TVA uses steam coal only, and that the TVA possibly uses coal that has slightly more impurities than the average user of steam coal.

Now in the light of what is in this record up to the present time, do those figures have any relationship to the problem at hand? The Court is asking you these questions, because the Court and the jury are not coal people. I assume the jury — not many on the jury who have had any experience with the coal business, and maybe you can help the Court and the jury on that problem.

The Witness: Your Honor, you are trying to get at what is the fair average price for all coal in the country, and I think this is as fair average price — it's figures gotten up by the government, and it is without bias.

The Court: I overrule the objection. I think the objection goes to the weight of the testimony and I will give counsel full opportunity to cross-examine. It is as to the

weight rather than the competency.

1880A Mr. Combs: All right, Your Honor, but I just want to point out —

The Court: Yes, sir.

Mr. Combs: The witness' remarks have no relation to what I was talking about. I don't question the authenticity or the fairness of those figures.

I was simply pointing out that out of the average of 1958, I think out of four hundred and twenty million tons of coal, over three hundred million tons of that coal was metallurgical coal, and I don't think the witness or anyone else will testify that there is any fair comparison between the price that you receive from metallurgical coal and steam coal.

The Court: Mr. Combs, what figure did you use there? Four hundred and twenty million in this pamphlet?

Mr. Combs: I am speaking from memory. He has the book, but I would say in 1958, there was in excess of four hundred million tons of coal mined in this country. I think that that book reflected that. The witness might tell me.

The Witness: Four hundred ten million.

The Court: What year?

The Witness: 1958.

1881 Mr. Combs: All right, four hundred and ten million tons. Now out of that four hundred ten million tons, there was used one hundred and fifty-two million, three hundred fourteen thousand — I can't see it from here.

A Juror: Five hundred forty.

The Court: How much?

Mr. Combs: It is the last figure on the chart.

A Juror: 152,414,000 tons, this figure right here.

Mr. Combs: That was the steam coal in the utilities. That doesn't reflect the steam coal that was in some of the other markets, but this is what he is talking about. Now the rest of that was metallurgical coal.

Mr. Rowntree: All the rest of it?

Mr. Combs: Not all the rest of it, of course not, but most

of it, a lot more metallurgical coal than what he is talking about is my point, and it is not a fair comparison.

The Court: Now, you have got —

Mr. Rowntree: Now, Your Honor, most of this metallurgical coal comes from captive mines. Have you got the proportion of that?

Mr. Combs: Now, Your Honor, to show what we
1882 are talking about, the captive mines tonnage is included in the four hundred ten million. There is no question about that. That is the total production.

The Court: Your point is that much of the coal used over the United States is metallurgical coal, and that that is a higher type coal than the coal the TVA uses, and since it is a higher type coal it brings a higher price, and by using all of these figures, all of these figures including the metallurgical coal and the prices for the metallurgical coal doesn't give a true picture of the situation involved in this suit. Is that the point?

Mr. Combs: Yes, Your Honor, and in addition to that, the question asked of the witness is whether or not the —

The Court: I sustain the objection to this testimony so far. Now I will let you go into the background of this problem with this witness, and then I will reconsider the ruling after I hear it. I think Mr. Combs has made a point there, Mr. Rowntree.

1883 Mr. Rowntree: In the first place, we don't think the metallurgical coal was in this price. That is something we will have to develop because there is no price on the greater bulk of metallurgical coal because it comes from captive mines, and I would like to ask the witness that question.

The Witness: That is true.

The Court: You answered what? What was the question? What was the answer?

The Witness: The greater bulk of metallurgical coal comes from mines owned by the steel corporations themselves.

The Court: All right. Are the tons listed in this pamphlet that you have in your hands?

The Witness: I don't know, your Honor. It doesn't show metallurgical coal separate. But metallurgical coal would only be relatively small portion of this 410-million tons.

The Court: And only a small portion of the average price as shown in that pamphlet, is that what you are saying?

The Witness: Yes, sir.

Mr. Combs: Of course, that is the testimony of the witness and that is his testimony. That goes to the weight. That is not what I am objecting to.

1884 The Court: That goes to the weight and I will let it go in under that statement.

* * * * * * * * * * *

Mr. Kramer: This does not purport to show the price realized per ton for all of the Phillips coal. It is only their rail tons, and they had other sales of coal.

I do not think you can pick out a piece of coal. They were handling domestic coal and truck coal, as this record discloses, and on this exhibit there is only a portion of the coal taken for their cheaper coal and attempting to compare it to the national average.

Mr. Rowntree: We are separating the coal that we say was affected by the conspiracy. We don't claim any damages for the domestic coal. We claim damages for the steam coal.

The Court: I see. All right. The objection is overruled. Go ahead.

1885 Mr. Combs: May I make one remark. I don't want to interrupt. But that is exactly my point.

They are claiming that the coal here, and the evidence will show that is steam coal market. The captive mine tonnage and the metallurgical coal will amount to approximately a ton of coal for each ton of steel. The capacity of the steel mills at that time was 65 or 70 per cent, for instance. That is metallurgical coal. That is 65- to 70-million tons right there besides all the other production in this country.

The witness knows what I am saying is true.

The metallurgical coal is reflected in those figures. The price of it is reflected there, your Honor. So —

* * * * * * * * * * *

Mr. Combs: If you will pardon me one minute.

What I was trying to say is, that the question that counsel was getting to at the time I interjected here was whether or no in the witness' opinion that the Tennessee coal should be as high or higher than the national average of coal.

Now the Tennessee coal admittedly is steam coal.
1886 The question is whether or not that steam coal should be as high as the national average that includes the metallurgical coal.

My point is, that is not a fair comparison even of an expert witness.

Mr. Rowntree: Counsel is assuming that because we are in the Tennessee Valley, because we are in Tennessee, that the steam market here should be considered lower than other parts of the country.

Mr. Combs: I do not.

Mr. Rowntree: Counsel is saying that because we are in Tennessee, and we are in the TVA market, we are bound to have a lower market than other parts of the country.

* * * * * * * * * * *

Mr. Rowntree: Because you see the chart on the board, your Honor, which shows a cost of coal in these other states. You can see how that one price compares with the same kind of coal in these oth[illegible] states.

Counsel has stated that the metallurgical coal is in this price, national average price. We say it is not. Coun-
1887 sel says that the witness knows it is in there. We say it is not in there.

Mr. Combs: If they are taking this position, that will be our proof.

The Court: I understand your point.

Mr. Combs: I don't want to be placed in an unfair posi-

tion. I do not contend one single moment that Tennessee coal should be cheaper than other coal.

The Court: I understand your position.

Mr. Combs: Steam coal, whatever state it is in, is cheaper than metallurgical coal.

* * * * * * * * * * *

By Mr. Rowntree:

Q. Mr. Amos, can you state whether or not this Bureau of Mines computation of prices we were referring to before, the book of 1958, includes coal of a lesser quality than
1888 bituminous coal? A. Yes, sir. It says that it goes down to lignite. It includes lignite. As I understand, it includes all of the different qualities and grades of coal in the United States.

Q. And bituminous coal is the great bulk of the coal that is sold in the markets? A. Yes, sir.

Q. And how does the East Tennessee coal compare with the average quality of bituminous? A. All of the East Tennessee coal that I am familiar with is above the average. There are a few mines in East Kentucky in a low grade seam but they are of such small portion of the total that they don't amount to anything.

Mr. Rowntree: That chart that we started to refer to before, that you have in front of you, with respect to the national average, we offer that as the next exhibit.

Mr. Combs: Just for my information, may I inquire whether or not the witness said that included all coal. I don't believe it included anthracite?

The Witness: Bituminous, I meant. Bituminous coal and down to lignite.

The Court: What did you say, "lignite"?

1889 The Witness: Yes, sir.

The Court: What kind of coal is that?

The Witness: Coal just starting to form. There is a little mined in this country, your Honor.

The Court: All right.

By Mr. Rowntree:

Q. Mr. Amos, will you explain where the national average figure on the lefthand column on that chart comes from?

A. It is taken from this 1958 report on bituminous coal and lignite put out by the Bureau of Mines.

Q. Which is exhibit— A. Exhibit No. 116.

Mr. Rowntree: We offer that exhibit and ask that it be passed to the jury.

The Court: All right.

Mr. Kramer: Now, your Honor, we object to this exhibit. I don't think your Honor has seen it, which exhibit will bear number 117, on the ground that no proper basis has been laid for the comparison attempted to be made by this exhibit; therefore, it is incompetent.

Mr. Rowntree: It might help the Court to see this previous exhibit Mr. Phillips introduced (referring to Exhibit No. 22).

1890 The Court: Now, Mr. Rowntree, from what information or source was the information obtained in Exhibit No. 117?

Mr. Rowntree: Exhibit No. 117 is this column here, the national average which the testimony has just been relating to, taken from the Bureau of Mines book.

The Court: All right.

Mr. Rowntree: This next column, Your Honor, is the difference between that figure here on Exhibit 22, which is the last column on Exhibit 22.

The Court: Just a question of mathematics?

Mr. Rowntree: That is right.

The Court: And it is introduced for the purpose of clarification and to help the jury to better understand the problems that are involved?

Mr. Rowntree: That is correct.

The Court: The objection is overruled.

Mr. Kramer: Of course, your Honor, we did not object on the basis of mathematical calculations.

The Court: No, sir.

Mr. Kramer: But it is on the basis of use of the national average which we do not think is a proper method of comparison here.

The Court: The Court is of the opinion that counsel's objection goes to the weight of this testimony rather than its competency, and therefore overrules the objection.

1891

(Exhibit No. 117 was marked for identification and filed.)

By Mr. Rowntree:

Q. Mr. Amos, can you state whether or not the thickness of seams and working conditions in mines have an effect on the operating costs of mines? A. Yes, sir, they do.

Q. What is that effect? A. Well, of course, it is natural that the cost of producing tonnage from a thin seam is going to be higher than from a thicker seam. There are other factors to be involved, however.

Q. What type seam appears in the coal fields of East Tennessee? A. Generally they are thin. They are classed as thin seams.

Q. And does such a seam adapt itself to mechanical mining? A. Not very readily; no, sir.

Q. The thickness of the seam or the thinness of a seam, does it have any effect on the operating costs in strip mining? A. Well, yes, sir, it does in strip mining and other mining too. The thinner coals, you can't get the production per man that you do out of a thicker seam.

1892

Q. The terrain involved in mining, does it have any bearing upon costs with respect to transportation of the coal to the tipple? A. Yes, sir. Of course, in a level country your cost of transportation is cheaper than it is in mountainous country.

1893

Q. In Tennessee is there any problem with respect to the haulage of coal from pit to tipple with respect to strip operations insofar as distance or terrain is concerned? A. Yes, sir. That varies, but generally you have to

bring that coal off a mountain or over a mountain in Tennessee, and the hauls are very much greater than they are in west Kentucky.

Q. Are there roads accessible to strip pits? A. They have to be built by the operator.

Q. Can you state whether or not that affects the production time of the mining unit? A. Yes, sir, it does.

Q. What is the effect? A. Well, it is difficult to build a road in this mountain country, and most of the strippers in this country have difficulty during wet weather or winter weather in that the roads have a tendency to fall out from under them.

Mr. Rowntree: We offer as the next exhibit page 6 of this Bureau of Mines Report for 1958, Bituminous Coal, having to do with the thickness of coal seams in coal producing states.

Mr. Combs: May it please the Court, I think it would be convenient for counsel on both sides to know that we expect to introduce as an exhibit all of these Bureau of
1894 Mines reports for, I think, from about 1941 up through 1958.

Of course, we have no objection, and those books are going to be rather numerous. They come in annual volumes. We have told counsel we expect to use those. We expect to file with our testimony each one of those books and counsel then, if he has the pages and all, it is all right to use them, if he wants to refer to them.

We have no objection whatsoever to the introduction of anything out of Bureau of Mines reports.

The Court: All right.

(Exhibit No. 118 was marked for identification and filed.)

Mr. Rowntree: We offer as the next exhibit page 41 of the same publication dealing with distance of haul, average distance of haul in stripping operations in various states.

Mr. Kramer: Which is indicated as Table 29.

Mr. Rowntree: Table 29.

(Exhibit No. 119 was marked for identification and filed.)

Mr. Kramer: We do not object to it as the source coming from the Bureau of Mines, but I don't see any relevancy, and I am going to object to this as being irrelevant,
1895 but not as to source.

* * * * * * * * * *

The Court: I overrule the objection.

* * * * * * * * * *

1896 By Mr. Rowntree:

Q. Can you state what the size strip shovel dipper capacity is in the east Tennessee coal field? A. Well, that varies, sir. They use all the way from a half-yard up to five yards. My own judgment is that about a two and a half yard shovel is the most efficient under those conditions that we have up there.

Q. You are speaking about conditions of terrain? A. Yes, sir, terrain.

Mr. Rowntree: We offer as the next exhibit from the Bureau of Mines report, page 37, table 25, having to do with size of stripping equipment in various states.

Mr. Kramer: Objection continued on the ground of relevancy.

The Court: Same ruling.

(Exhibit No. 120 was marked for identification and filed.)

Mr. Rowntree: Now, if your Honor please, this next chart comes straight from the records of volumes of Bureau of Mines for 1955 and 1959, the class of mines by size in Tennessee in those two years, show a comparison, and I would like to introduce that as the next exhibit.

1897 Mr. Kramer: No objection, subject to check of the accuracy of the figures.

(Exhibit No. 121 was market for identification and filed.)

By Mr. Rowntree:

Q. Mr. Amos, are there any real big mines in Tennessee, I mean 500,000 or over? A. Not to my knowledge, no, sir.

Q. 500,000 tons a year production or over? A. No, sir, not that I know of.

Q. That chart shows five mines, both in 1955 and 1959, in Tennessee, with a production of 200,000 to 500,000 tons per annum. Do you have any knowledge as to what those mines are? A. What years did you say?

Q. That is 1955 and 1959, those two years. A. No, sir, I don't think there are five. I can only think of two. The Clinchfield Coal Corporation and Consolidation — Consolidated Coal Company — Consolidation Coal Company I believe it is, each have a mine that would fall in that category.

Q. The other three, are you personally acquainted with them or do you know where they would be? A. I don't know what the other three would be, unless it would be Tennessee Consolidated Coal Company, which is now
1898 closed down. The Bessemer mine, which I just saw in the paper —

Q. Don't state any hearsay. Do you know of your own knowledge that the Tennessee Consolidated Mine is down? A. Yes, sir, I know they are down.

Q. Do you have any personal knowledge with respect to any other mine in that category? A. No, sir.

Mr. Combs: May I inquire what dates they are talking about?

The Court: Yes, sir.

Mr. Rowntree: I am talking about closed as of the present time.

The Witness: I am talking about right now, yes, sir.

By Mr. Rowntree:

Q. But the other two mines besides those that you have mentioned you are not personally acquainted with, other than hearsay? A. Well, I know the mines all right, but I haven't been by to see whether they were running lately or not.

Q. All right. The next class, Class 3, shows in 1955, 14 mines in Tennessee producing 927,000 tons—.
1899 Strike the previous.

Class 3 shows nine mines in Tennessee in 1955 pro-

ducing 1,327,000 tons in 1959, two mines producing 222,000 tons.

The next class shows 14 mines in Tennessee producing 927,000 tons in 1955 and 12 mines in 1959 producing 771,000 tons.

The next two classes, Class 5, 10,000 tons to 50,000 tons per year, shows an increase in mines of 90 in 1955 to 103 in 1959. Class 6 shows a slight decline of number of mines in the category of less than 10,000 tons of 368 in 1955 to 358 in 1959.

Those two smaller categories, do you know if those mines are the same mines in 1955 as those in 1959? A. The operators are coming and going. The names are changing on those small mines constantly. The number of small mines, from my observation, is increasing, but the larger mines are going out of the picture.

Q. Do you know why these small mines keep coming back? A. Well, it is the men and their sons who were formerly employed in these larger mines, and as they go out of the picture, they open up these small mines. They have no other place to work. That picture has been going on for a good many years now in the state.

1900 Q. Will you state whether or not there is unemployment in the coal fields of Tennessee? A. Yes, sir, very great unemployment.

Mr. Kramer: Your Honor, we do not object to this exhibit. I do not now object to it, except I want to make this statement. Of course, we do insist that nothing in the year 1959 is material to this lawsuit.

The reason I did not object to it, there is not much difference between '58 and '59. Therefore, I did not raise the question about that, but we are not waiving the objection to 1959 being immaterial.

I think you will find there is not much difference between '58 and '59, and, therefore, we did not make an objection at this time.

The Court: All right.

Testimony of John H. Amos

Mr. Rowntree: It is our position that there is a difference in '58 and '59, the big difference being that a new contract was offered by the United Mine Workers in 1959, which had a tremendous effect.

Mr. Kramer: If you say there is a substantial difference on mines — I am talking about the exhibit — in a number of mines of these various classifications between '58 and '59, then I am going to object to the introduction of it.

1901 I think, your Honor, the facts show that there is not much difference — there may be a variance of two or three in each group, but not enough to be material in this lawsuit. As far as the number of mines, we did not object, because we think the number of mines in each of these groups by tonnage is about the same — not exactly, but about the same as it was in 1958. I think the record will so show when it is developed.

If the idea is to show a change between '58 and '59, then I want to now move to strike.

1902 Mr. Rowntree: We want to put it in for that purpose, but we want to show the decline in mines, and that is the purpose for which it is offered.

Mr. Kramer: Well, I agree that between 1955 and '58 or '58, it shows the comparative number of mines substantially, yes, Your Honor, as being correct.

The Court: All right.

* * * * * * * * * * *

By Mr. Rowntree:

Q. What is the answer then with respect to the reason for the continuance in the large number of small mines?

* * * * * * * * * * *

1903 The Witness: I thought my answer was that as these larger and so-called rail mines went out of the picture, the employees at those mines and their sons who are getting large enough to work were opening more of these small mines in order to get a livelihood.

* * * * * * * * * * *

Mr. Rowntree: We would like to offer as next exhibit

"A Brief Report on Employment and Unemployment in the Coal Mining Industry of Tennessee," prepared by the Research and Statistics Section, Tennessee Department of Employment Security, Nashville, June 10, 1957.

(Exhibit No. 122 was marked for identification and filed.)

Mr. Combs: May it please the Court, we have no objection to the introduction of this material on its authenticity. We do object to its relevancy. We might point out it is the position of the United Mine Workers that there is a great deal of unemployment in the mining industry, there
1904 is no denial of that. It is not only in Tennessee, it is throughout the United States.

If he is going to put these out of turn, I think in our turn, we will also show that there is unemployment in the steel industry and in the rubber industry and in the rail industry. I am not sure that this case should go into these fields.

I want to point out though, that this has nothing to do with the Anti-trust Act. There is no argument here about unemployment being in the coal industry that I know of. It is all over the country.

Mr. Rowntree: Well, Your Honor please, the testimony in the record is that the United Mine Workers offers one contract to all mines, large and small. The testimony is that there is only one contract, contains the same terms for everybody, the large mechanical mines, strip mines of West Kentucky using fifty-five yard shovels and on up to seventy-five yards. That mine has the same contract terms as these little mines where the men are trying to make a living because of unemployment.

The United Mine Workers has stated in its Organizing Committee Reports, the International Organizing Committee, that it intends to and will organize and put under contract all of the mines in the country, and we say—
1905 and they say that they have been largely successful. That includes these small mines, these little mines

in Tennessee where the unemployed miners are trying to make a living. It includes the big mines as well.

The success of the United Mine Workers in doing that is exemplified by this case. We say, it is our position, that the intention of putting that contract on such little mines as exist in this state is part of a conspiracy to run them out of business and keep the markets for these large mines who obviously can afford to pay the contract.

I think it is equally obvious that these small mines left in the state of Tennessee cannot afford to do it. I think it is obvious to the union, and I think that the union has notice of the fact that these small mines can't pay that contract, and that the only purpose they can have in forcing the contract on these little, bitty mines is to put them out of business.

That is our position, and we say it is part of the conspiracy.

Mr. Combs: May it please the Court, of course it is the position of the United Mine Workers that that is the purpose, to organize all of the employees of the coal mines.

It's been the purpose since 1890. The people going 1906 into business are the ones to go into the business.

The object of the union is to organize the people there. They don't bring the people there.

As to the legality of it, Your Honor, we say the Clayton Act specifically exempts labor organizations from the provisions of that Act.

Now in the question of striving for a minimum wage, the same pay for the same work, has to do with elimination of competition between the human beings, and we say that the United Mine Workers and other labor organizations have a right under the Anti-trust Act and under the Taft-Hartley Act to try to eliminate competition between labor as between one person and the other.

It isn't the purpose of the union to run anybody out of business. I think it is obvious to anybody that that would be to the disadvantage of the union. They are trying to help

them and represent those people, but the question of unemployment as I pointed out a while ago, is a broad question, and of course if counsel is going to put it in and it is permitted by the Court, why we will expect, and it will be our position — so that it will be very clear — we will try
to show that in the steel industry, the rubber in-
1907 dustry, and in the railroad industry all of these industries have suffered unemployment. It's a problem that everyone is trying to solve. That was my point in relation to the unemployment in Tennessee.

The Court: I understand.

Mr. Combs: And it certainly isn't the position of the union that these little mines should operate or should not operate. They don't tell anyone to go into business, and they don't try to run them out of business.

The Court: Well, let's put it into the record.

Mr. Rowntree: I would like to read portions of this, Your Honor.

The Court: Yes, sir.

Mr. Rowntree: "This is a brief report on the unemployment situation in the bituminous coal mining industry of Tennessee. Sharp increases in unemployment in Grundy and Marion Counties—"

That is southeast Tennessee.

"—Marion and Grundy Counties in recent weeks—"

And this was put out in June, 1957.

"— have focused the attention of governmental agencies and the public upon the plight of unemployed coal miners
and their families in these two areas. Since exten-
1908 sive unemployment has been a prevailing characteristic of all coal producing areas in the state, this review will examine the unemployment problem throughout the industry as well as for Grundy and Marion Counties.

"The Tennessee Department of Employment Security is very much aware of the extent of unemployment in this industry since most unemployed miners filed claims promptly for unemployment insurance when they lose their

jobs. The records of the Agency have been utilized to prepare this report.

"Current Unemployment in the Coal Industry.

"Data have been brought together in Table 1 showing unemployment levels in the important coal producing counties of the State for May 1957 and for the same month a year ago."

Grundy County, May, 1956, 114 people unemployed in the coal mining industry. In May, 1957, 550.

* * * * * * * * * * *

1909 Mr. Rowntree: Marion County, May, 1956, 35. May, 1957, 216.

Anderson County, May, 1956, 500; May 1957, 600.

Campbell County, May 1956; 900; May, 1957, 1,100.

Claiborne County, May 1956, 600; Claiborne County, May, '57, 700.

I might say that their production is in here in a summary form. I might say that prior to this Grundy County and Marion County situation that arose in 1957, that the production in Tennessee, according to these figures, actually increased from 1950, 4,596,490, to 8,720,937 in 1956, and with respect particularly to Campbell and Claiborne Counties, the particular counties involved in this case here for our client, the Campbell-Claiborne County area—

* * * * * * * * * * *

"The Campbell-Claiborne County area which produced about forty per cent of the total tonnage of the state in 1950, produced only fifteen per cent in 1956. On the other hand, the Grundy-Marion County area raised its pro-

1910 portion of the total coal production of the state from about twelve per cent in 1950 to slightly more than twenty-five per cent in 1956."

That production for 1956 was before this great increase of unemployment in those counties in 1957.

* * * * * * * * * * *

Mr. Rowntree: "Employment Declined fifty Per cent in Tennessee Coal Mining Since 1950.

"While the coal industry was increasing its tonnage by about 100 per cent during 1950-1956, employment in the industry declined fifty per cent. This surprising difference in trends may be attributed largely to more efficient methods of mining, including mechanization, strip mining and auger mining. Higher production costs have forced operators to mechanize where possible. New strip mines have been opened up, while some of the large older and deeper mines have been shut down. These improvements have made it possible to increase tonnage and to meet competition in the industry. Along with this development has been the large scale buying of coal by TVA, a most important influence in expanding coal production in the state in recent years."

• • • • • • • • • • •

1912 Mr. Rowntree: I would like to read particularly the Campbell County figures on page 9—average monthly covered employment and annual payrolls in the coal industry in selected Tennessee counties, starting with Campbell. That is the only one we will read.

1950 average monthly employment, 1963.

1951, 1,782; 1952, 1,358; 1953, 832; 1954, 736; 1955, 802; 1956, 593.

The employment index decreased from 100 per cent in 1950 to 30.2 per cent in 1956.

• • • • • • • • • • •

Mr. Rowntree: Scott County. 1950, 382 average monthly employment.

1951, 296; 1952, 226; 1953, 160; 1954, 171; 1955, 227; 1956, 342.

The difference in employment index, 1950 100 per cent; 1956, 89.5 per cent.

• • • • • • • • • • •

Mr. Rowntree: I would like to read Claiborne County, which is adjacent to Campbell.

Average monthly employment, 1950, 1,476; 1951, 1,346;

1952, 1,099; 1953, 602; 1954, 354; 1955, 174; 1956, 158.

1913 The employment index decreased, 1950 100 per cent to 1956, 10.7 per cent.

* * * * * * * * * *

1914 LEON DAY

called as a witness by and on behalf of the defendants and cross-plaintiffs.

* * * * * * * * * *

DIRECT EXAMINATION

By Mr. Robertson:

Q. Is this Mr. Leon Day? A. That is right.

* * * * * * * * * *

Q. Have you ever worked for Phillips Brothers Coal Company? A. Yes, sir.

Q. When did you start working there?

* * * * * * * * * *

A. Last part of '55.

Q. Had you ever worked there at all before that time? A. Yes, sir.

* * * * * * * * * *

1915 Q. Had you ever done any mining before you went to work for Phillips Brothers? A. Yes, sir.

Q. Where had you worked? A. Straight Fork Coal Company.

* * * * * * * * * *

1916 Q. Mr. Day, were you present at the Phillips Brothers tipple sometime in April, 1955, the time of any unusual occurrence there? A. Yes, sir, I was.

Q. Do you know the exact date of that occurrence? A. No, sir, I don't.

Q. How did you happen to be there? I don't believe you were employed at that time? A. No, sir.

Q. How did you happen to be there on that occasion? A. Visiting my father-in-law and mother-in-law.

Q. Do they live there near the tipple? A. Yes, sir.

Q. And just tell in your own words what occurred there on that date. A. They just a bunch of fellows drove in and started talking—

Mr. Kramer: Just a moment. We object to this as having no relationship whatsoever to the alleged conspiracy. This is some conduct that was claimed to have happened with respect to organizing of the mine which is not in anywise connected with the conspiracy.

Mr. Robertson: Your Honor, we have charged in this case the imposition of this contract, this UMW contract upon these companies, and we are showing by this testimony how this contract was imposed upon these companies.

1917 The Court: I overrule the objection.

Mr. Kramer: Your Honor recalls the cases in line with the Apex case for the authority?

The Court: Violence has nothing to do with the issues in this lawsuit, members of the jury. This testimony is admitted for whatever bearing it may have on the question of whether or not this contract, collective bargaining agreement, was or was not used as a device to monopolize the coal business in the area of Campbell County and adjacent areas. And that is the purpose is it not?

Mr. Robertson: Yes, sir.

The Court: And the sole purpose of it?

Mr. Robertson: Yes, sir, how this contract was imposed.

The Court: All right.

By Mr. Robertson:

Q. All right, if you will just tell us in your own words what happened there on that date.

A. They just a bunch of men drove in and started talking to Mr. Phillips.

1918 Q. Is that Mr. Raymond Phillips? A. Yes, sir.

Q. Go on. A. I didn't understand what they said, but they was talking—so many of them talking at the same time, you couldn't tell.

Q. Did you stay out there in the yard during the time that they were there? A. About ten minutes.

Q. Could you estimate how many came there on that occasion? A. Well, I didn't count them.

Q. Well, was it a large group? A. It was a pretty good bunch.

Q. Did you see a lot of automobiles that they came in? Were there several automobiles or not. A. Well, there was quite a few. I don't know how many. I never counted them or nothing.

Q. What did you do? You said you stayed out in the yard a' at ten minutes. How long did the group of men stay there approximately? A. Around 20 or 25 minutes.

Q. Where did you go after you left the yard? A. Went in the house.

Q. Did you hear anything that was said between
1919 the spokesmen for this group or any of this group and Mr. Phillips? A. No, sir, I couldn't tell you what they said.

Q. Now how long was it after this occurrence that you went to work for Phillips Brothers, a few months or a few weeks, do you recall? A. Well, over a year. I went up in Michigan and worked a while.

Q. Well, when you began working for Phillips Brothers, were you a member of the United Mine Workers of America? A. No, sir.

Q. Did you join the union shortly after you began working there? A. Yes, sir, in about three months.

Q. Why did you join, Mr. Day? A. Well, I just wanted to join it.

Q. State whether or not it is your understanding when you were employed by the union mine that you have to belong to the union?

Mr. Kramer: Just a moment, your Honor. The witness has answered why he joined, because he wanted to join.

Now some understanding he may have had, unless it was something that the union told him, your Honor, it would not be competent for any purpose. I don't know
1920 what understanding, how he may have gotten it is something else. We couldn't be charged with an understanding that comes to him from some other source, some other way, and we object to it.

The Court: Yes, I think the objection is good. It is sustained. Proper foundation is not laid for it. I will let you ask him if he had an understanding, how he attained it, but you will have to connect the union with it before it would be competent evidence.

By Mr. Robertson:

Q. Mr. Day, you say you had worked at Straight Fork and been a member of the United Mine Workers before you went to Phillips Brothers. How long was that approximately? A. Well, I worked in '46 to '52.

Q. And you were a member of the United Mine Workers during those years? A. Yes, sir.

Q. Did you attend local union meetings during that time? A. At Straight Fork I did.

Q. Did you associate with other union members during that time? A. Yes, sir.

1921 Q. Do you know the impression the men in the industry had there then as to whether or not you are expected to join the union when you work for a company that has a UMW contract? A. Well, they just wouldn't let you work if you didn't join.

Mr. Rayson: Just a moment, Mr. Day.

We object to this question, your Honor. We think it would be highly irrelevant, even under the circumstances that Mr. Robertson has related. The man was operating under an entirely different contract at a different place.

The Court: You asked him about 1952, as I understand it.

Mr. Robertson: I am asking him about—he says approximately the latter part of '55 or some time in '56,

whenever it was he went to work there. That is as close as he gets it. He states that he had been a union member the entire time he had worked at Straight Fork, which was from '46 to '52. Now I am asking him now about his impression whether or not he was supposed to join the union, was that his understanding.

The Court: You mean in 1956?

Mr. Robertson: In 1955 and '56.

Mr. Combs: He asked that question a while ago
1922 and he said he joined because he wanted to. He has already asked the question.

Mr. Robertson: I am trying to find out why he wanted to.

The Court: I will let you ask that question, why he wanted to.

By Mr. Robertson:

Q. Why did you want to join? A. Well, what time I worked for Straight Fork Coal Company, if you didn't belong to the union, they wouldn't let you work. I figured it was that way at Pioneer.

Mr. Rayson: We renew that objection, because what time he works at Straight Fork includes a four year period when the contract was entirely different.

The Court: I sustain the objection as to what he said about Straight Fork.

You also say what his understanding was when he worked for Phillips.

The Court: Read the question and answer.

(Question and answer read.)

Mr. Rayson: I would say this pertains to a period of 1946.

The Court: If it does, the objection is sustained. I will let you ask him again.

By Mr. Robertson:

1923 Q. Mr. Day, was that your opinion, was that your impression at the time that you began working for Phillips Brothers?

Mr. Rayson: We object to this, your Honor, on the ground that it is a leading question.

The Court: I sustain the objection.

By Mr. Robertson:

Q. Mr. Day, what was your impression at the time you went to work for Phillips Brothers in the latter part of 1955 as to the joining of the union where the employer had a union contract? A. Well, I figured if I didn't join it, they wouldn't let me work. That is the way I have been raised up to.

Q. Were there any other reasons other than this as to why you joined the union at that time? A. Explain a little bit more.

Q. Well, state whether or not you wanted welfare benefits?

Mr. Rayson: Your Honor, we object to that. That is plainly leading. He has been at this man three different ways, and he winds up with a leading and suggestive question and we object.

The Court: I sustain that. But you may ask him if he had any additional reasons for joining the union.

1924 By Mr. Robertson:

Q. All right, did you have any additional reasons for joining the union at the time you joined? A. Well, I needed the work and also I thought if I joined it, I would have my hospitalization and stuff.

Q. Did you get a UMW hospital card after you joined? A. Yes, sir, after I filled out some papers and sent them in.

Q. Do you recall how long it was after you went to work there that you joined, before you joined the union? A. About three months.

Q. Did you get a hospital card before you joined the union? A. No, sir.

1925 Q. At the time that you went to work for Phillips Brothers, did Mr. Raymond Phillips or Mr. Burse Phillips or Mr. James Pennington, anyone connected with

the company ask you whether or not you belonged to a union? A. No, sir.

Q. What did you start out doing at Phillips Brothers? A. When we first went to work, started oiling of a night.

Q. And what were you doing the last time you worker? A. Running the loading shovel.

Q. Do you recall how much you were making at the time that you started at Phillips Brothers? A. A dollar an hour.

Q. And how much were you making an hour the last time you worked for them? A. Two and a quarter.

Q. What union are you a member of now? A. Southern Labor.

Q. Do you still have a UMW hospital card? A. No, sir.

Q. Do you expect to receive any benefits from the United Mine Workers Welfare fund? A. No, sir.

1926 Q. Now, have you continued to work for Phillips Brothers since they reorganized as a corporation at the end of 1958? A. Yes, sir.

* * * * * * * * * * *

By Mr. Robertson:

Q. What are the employment conditions in your area? A. Well, it's pretty bad now.

Q. Does that include all industries, any industry there as well as the coal industry? A. That's right.

* * * * * * * * * * *

1927 CROSS EXAMINATION

By Mr. Rayson:

Q. Mr. Day, where are you working now? A. Nowhere.

Q. Are you not working for Phillips now? A. I'm still employed, but we are out of work.

Q. How long has it been since you worked for them? A. I worked a day or two since January.

* * * * * * * * * * *

1928 Q. I believe that you gave your deposition a few months ago in this case, didn't you? A. Yes, sir.

Q. You were asked a number of questions? A. Yes, sir.

Q. I'll ask you at that time if you said that you joined the union because some of the men who were working for Phillips Company asked you to. A. They did.

Q. Is that right? A. Yes, sir.

Q. Are they the only people who talked to you about joining the union? A. Just the employees.

* * * * * * * * * * *

1929 Q. And did they tell you you had to join, or did they just ask you if you wanted to join? A. They just asked me to.

Q. You had never made an application for a hospital card before that, had you? A. No, sir, not under that company.

Q. And as soon as you made an application for a hospital card, you got one, didn't you? A. Well, it was a few days after I got all of my papers filled out.

Q. Yes, sir. Now, you say that you were there at the tipple in April, 1955, the day a group of men came up there? A. I was up there the day that the men come.

Q. Now, you spoke of going into a house, is this house right by the tipple? A. Yes, sir.

Q. And you walked into this house to visit with your mother-in-law and father-in-law, is that right? A. I was out in the yard.

Q. But after the men— A. I never went in the
1930 house.

Q. But after the men came, you went into the house right there by the tipple? A. That's right.

Mr. Rayson: That's all.

* * * * * * * * * * *

ARLOW HUTSON

a witness called by and in behalf of the Defendants.

* * * * * * * * * * *

DIRECT EXAMINATION

By Mr. Rowntree:

1931 Q. This is Arlow Hutson? A. Yes, sir.

* * * * * * * * * * *

Q. Arlow, when did you first become employed by Phillips Brothers Coal Company? A. August of 1953.

Q. August, 1953, that was a short time after they started operations? A. Yes sir.

Q. Where had you been employed before that time in the coal mining business? A. Blue Diamond Coal Company.

* * * * * * * * * * *

A. Yeah, in Campbell County.

Q. Whereabouts before that? A. Laxton Coal Company, Scott County.

Q. Were you employed anywhere before that? A. Well, I hadn't been in the mine for several years.

Q. What happened to the Laxton Coal Company 1932 and the Blue Diamond Coal Company. A. Well, Laxton, they come out on vacation, and I quit and went to Royal Blue.

Q. And what happened to the Royal Blue? A. They shut down.

Q. Was that a big mine? A. Yes, sir, it was four hundred and something, I think.

Q. Did they ever start up again? A. No, sir.

Q. Were you a member of the United Mine Workers during those employments? A. Yes, sir.

Q. When you went to work with Phillips Brothers Coal Company in August, 1953, how long had it been since you were a member of the union? A. I hadn't been since '52.

Q. '52? A. Yeah, September of '52.

Q. You didn't have a card at that time? A. No, sir.

Q. Did anyone ask you to join the union before 1955, after you became employed at Phillips Brothers? A. No, sir.

Q. Did any field representative come around to 1933 see you? A. No, sir.

1934 Q. How many employees were there in the company about that time? A. I believe there was about seven.

Q. About seven men? A. Yes, sir.

Q. Did you authorize anybody to sign you up in the union before 1955? A. No, sir.

Q. At Phillips Brothers? A. No, sir.

Q. Did you authorize anybody to make a contract as a collective bargaining agent for you with the company? A. No.

Q. In 1955 did you join the United Mine Workers? A. Yes, sir.

Q. Were you employed by the Phillips Brothers then? A. Yes, sir.

Q. What were the circumstances under which you joined the union at that time? A. You mean how come me to join?

Q. Yes. A. One of the men of the company come to me and told me he wanted me to go over on Monday morning to get signed up to go back to work.

Q. Can you recall any incident that had happened 1935 in that period of time the man came and told you to join the union? What had been going around in the coal fields at that time? A. Nobody hadn't come to me before that.

Q. Nobody had come to you before. Who was it, Mr. Phillips? A. Yes. Burse Phillips.

Q. Burse Phillips? A. Yes.

Q. Was this about April, '55? A. It was April—sometime in April, '55.

Q. And at that time did you know why he wanted you to join the union? A. He said he looked like we had to join join the union? A. He said looked like we had to join if we got to work.

Q. And what happened then after he told you that? A. We went over and signed up.

Q. Whereabouts was it? A. Pioneer.

Q. At the tipple? A. Yes, tipple there, and a little shack they had built.

Q. Who all was there when you did that? A. There was

myself and brother, Richard A., and Fred Burnett, and Willard Gord, and—

1936 Q. Well, the employees were all there? A. Yes.

Q. Who else was there? A. Mr. Maddox and Ed Daniel.

Q. Was Mr. Raymond Phillips around at that time? A. Yes, sir.

Q. What about Mr. Pennington and Mr. Burse Phillips? A. Yes, sir, they were there.

Q. Now had you a hospital card with the UMW Welfare Fund before that time? A. Not since '52.

Q. And not since '52? A. No, sir.

Q. And between 1952 and this time in 1955 you did not have a welfare fund card? A. No.

Q. Did you have a welfare fund card after that meeting at the tipple when you joined the union? A. Yes, sir.

Q. How long after it? A. About two weeks.

Q. Now Mr. Hutson, when did you leave the Phillips Brothers Coal Company employment? A. October,

1937 1955. Yes, 1955.

Q. And where did you go to work then? A. Laddie Coal Company in Scott County.

Q. Scott County? A. Yes.

Q. Are you still employed there? A. Yes, sir.

Q. Are you working now? A. No, sir. We are off right now.

Q. What is the trouble? A. They claim they ain't got no orders.

Q. No orders? A. Yes.

Mr. Rowntree: You may ask him.

By Mr. Rowntree:

Q. Mr. Hutson, one more question. Before April, 1955, did you know the Phillips Brothers Coal Company had a contract with the United Mine Workers? A. No, sir.

* * * * * * * * * * *

1939 RICHARD A. HUTSON

called as a witness by and on behalf of the defendants.

* * * * * * * * * * *

DIRECT EXAMINATION

By Mr. Robertson:

Q. This is Mr. Arvin Hutson? A. Richard Arvin Hutson.

* * * * * * * * * * *

Q. Have you worked for Phillips Brothers Coal Company? A. Yes, sir.

1940 Q. When did you start working for Phillips Brothers? A. August 31, 1953.

Q. Had they been in operation long at the time that you went to work for them? A. A short time.

Q. Had you had any experience in mining coal prior to your going with Phillips Brothers? A. Yes, sir.

Q. Where did you work in mining before you went to work for Phillips Brothers? A. I worked for the Red Jacket Coal Company of Brimstone, and later they changed names and called theirselves Glen Mary Coal Company. And then during these periods I was in the service and worked for the Royal Blue Coal Company and Laxton Coal Company.

Q. Was the Royal Blue, is that Blue Diamond Coal Company? A. Yes, sir, it is.

Q. Were you a member of the United Mine Workers during the times that you worked for these other coal companies? A. Yes, sir.

Q. At the time you went to work for Phillips
1941 Brothers were you a member of the United Mine Workers? A. Yes, sir.

Q. Did any one connected with the company inquire of you as to whether or not you were a member of the United Mine Workers? A. No, sir.

Q. Did you have a hospital card — a UMWA hospital card at the time you went to work for them? A. Yes, sir, I did.

Q. Did you know whether or not they had a UMW contract at the time you went to work? A. No, sir.

Q. Did you keep your hospital card during the entire period that you worked for Phillips Brothers after you went to work for them or did you turn it in? A. Turned it in.

Q. Did the union call it in, or how did you happen to turn it in. A. I was told because I was going to work at a non-union mine.

Mr. Rayson: We object to that. He hasn't identified anybody as speaking or the place or anything else, and we object to it.

The Court: Overruled. That is not competent evidence of what was told him was so, or proving the fact of what was told to him, but that is competent to show why he turned his card in. And the objection is overruled with that explanation.

1942

Go ahead.

By Mr. Robertson:

Q. Do you recall who called it in, or in what form you got the notice, whether somebody told you or whether you got a letter from somebody telling you to turn your hospital card in? A. On that occasion, I don't remember, but I do know it was told us to turn them in. I don't remember who told us.

Q. You were not paying your dues at that time? A. Yes, sir, I was.

Q. At the time you went to work for Phillips Brothers? A. Yes, sir.

Q. How about after you went to work for Phillips Brothers, did you continue? A. No, sir. I quit paying.

Q. Do you remember when you turned your hospital card in? A. No, sir, I do not.

Q. Do you remember approximately? A. Couple months,

anyway, after I went to work there.

1943 Q. Did you finally join the United Mine Workers after you went to work for Phillips Brothers? A. Yes, sir.

Q. Do you recall when that was? A. Not the exact date, but it was in the spring of 1955.

Q. What was the occasion for your joining the United Mine Workers at that time? A. Would you explain that please?

Q. Well, why did you join the United Mine Workers at that time? A. Well, it was to so we could go back to work.

Q. Were you shut down at that time, were you? A. Yes, sir, we was.

Q. Why were you shut down A. Well, it was — at that time there was what they call a roving mob went through the country and it scared us out from work.

Mr. Kramer: Your Honor understands we are continuing our objection without making it specific.

The Court: Yes, sir.

Q. Were you working at the time, on the job, when the roving mob shut the mine down? A. You mean shut the mine that we were working down?

1944 Q. Yes. A. Mister, I didn't see them.

Q. I see. A. All I have got is hear talk on that now.

Q. Were you on the job any place else? A. Yes, I was on the job working when we got the news.

Q. Where were you, up at the pit? A. Yes, sir, I was.

Q. Were you notified that you were to close down, to come down off the hill? A. I was told to come off the mountains.

Q. Did you go any place and see anything after you shut down? A. Yes, sir, I did. We heard of this what they call a roving mob, or a mob, and we went to a place called "Newcomb" or "Yokum" — called Newcomb maybe it is.

Q. Newcomb? A. Newcomb, I believe it is. We went to this place, or started rather and we seen a bunch of cars.

So we decided we had better not go on and turned around and went back.

Q. You say "we". Do you recall who all? A. Buster Phillips—I beg your pardon, please. Burse Phillips, one of the deceased operators and a man by the name of
1945 Lloyd Dale.

Q. Was Lloyd Dale employed by the Phillips Brothers at that time? A. Yes, sir, he was.

Q. Do you remember what mine this was where you saw this caravan?

. . . . . .

A. No, sir, I did not.

Q. Were you approached by any representative of the United Mine Workers prior to signing up in 1955 about joining the United Mine Workers? A. You mean before time?

Q. Before this occasion on which you signed up. A. No, sir.

Q. No one approached you? A. No, sir.

Q. What was the occasion? How were you notified about signing up? A. By one of the deceased broth-
1946 ers of the operation, Burse Phillips.

Q. And where did this take place? A. At his store. At Robins.

Q. And where did you sign up? A. We signed up at Pioneer, a little shack over there near the tipple where we worked.

Q. Were all the employees there on that occasion? A. Yes, sir.

1947 Q. Who else was present other than yourself and the other employees, do you recall? A. Please state that again.

Q. Do you recall who was there at the time that you signed up other than yourself and the other employees? A. Well, it was two men we call operators. Buster Phillips and Jim Pennington and —

Q. Is that Mr. Raymond Phillips? A. And Buster Phillips. I call him Buster.

Q. And who else? Anyone else? A. On the occasion we signed up?

Q. Yes. A. Mr. Ed Daniel and Maddox.

Q. What took place there on that occasion at the meeting? A. We just signed up and went back to work.

Q. Were any of the partners in this business in that meeting? A. Yes, sir.

Q. Did they sign up? A. Yes, sir.

Q. Who were they? A. Buster Phillips and Jim Pennington.

Q. Did you go back to work pretty soon after you signed up? A. Yes, sir, I believe we went back to work the 19[illegible] next morning after that.

Q. Did you have any more trouble after that? A. No, sir.

Q. Mr. Hutson, at the time that you signed up with the United Mine Workers, what was your understanding as to whether or not you could receive hospitalization and other benefits from the United Mine Workers Welfare Fund?

Mr. Rayson: Your Honor, we object to what his understanding was. We think it is immaterial and certainly would be incompetent for him to express what his understanding was. His mental attitude would not be competent.

Mr. Robertson: Your Honor, it is our contention that the union has fostered the idea throughout the area that you must be a member of the United Mine Workers in order to receive benefits.

The Court: First, ask him if he had any understanding.

By Mr. Robertson:

Q. Did you have any understanding, Mr. Hutson? A. That we must sign up before we get the card?

Q. Yes. A. Yes, sir, I knew that.

Q. Are you a member of a union now? A. Not of
1949 the United Mine Workers.

Q. Are you a member of any other union? A. Southern Labor Union.

Q. When did you sign up? A. September 16, 1959, I believe.

. . . . . .

Q. Have you continued to work for Phillips Brothers since they had to reorganize the corporation? A. Yes, sir.

Q. The latter part of '58? A. Yes, sir.

Q. What were you doing at Phillips Brothers? What was your job at the time that you started working for them? A. Cleaning coal, labor.

Q. What were you doing the last time you worked? A. Operating a 'dozer.

Q. What were you making at the time you started
1950 in 1953? A. One dollar an hour.

Q. How much are you making now? A. Two and a quarter.

Q. How are employment conditions in your area? A. They are very poor right now.

. . . . . .

RALPH PHILLIPS

called as a witness by and on behalf of the defendants.

. . . . . .

DIRECT EXAMINATION

By Mr. Rowntree:

Q. This is Mr. Ralph Phillips? A. Yes, sir.

Q. Are you any relation to Ray[illegible]nd E. Phillips? A. Not that I know of.

Q. Or Burse Phillips? A. No.

Q. Are you an employee of Phillips Brothers Coal
1951 Company at the present time? A. Yes.

Q. That is the corporation? A. That is right.

Q. Were you an employee of the partnership back be-

fore 1958, Phillips Brothers Coal Company? A. Yes, sir, I was employed before that.

Q. Speak up a little bit so we can hear you. A. I was employed in '55.

Q. 1955 by Phillips Brothers Coal Company? A. Phillips Brothers Coal Company.

Q. Do you recall what time of year it was? Was it in the early part or late part of '55? A. When I was employed?

Q. Yes. A. It was February 2, 1955.

Q. Were you employed in the coal business before you went to work for Phillips Brothers Coal Company? A. Yes, sir, just small mine, wagon mine.

Q. Small mines around Scott County? A. Scott County.

Q. Were you a member of the United Mine Workers? A. Well, I actually wasn't a member, I just signed one time and that is as far as it went. Sort of a charter thing. I didn't have no member — didn't have a card.

* * * * * * * * * * *

1952 Q. Was that some time before you went to work for Phillips Brothers? A. Yes, sir, quite a bit.

Q. In April 1955 were you working for Phillips Brothers? A. Yes, I was working for them.

Q. Did the mine close down in that month? A. They closed down. I don't remember exactly which month.

Q. Was it in the spring of 1955? A. Yes, sir, I think it was, the spring.

Q. Was it a short time after you went to work for Phillips Brothers? A. I went to work in '55 and we shut down, that was about a couple of months or two, a short time.

Q. What were the circumstances under which the mine closed? A. Well, the union.

1953 Q. Why? A. The union in other words, we had trouble and shut down—when they went to organize is why we quit.

Q. Did you know at that time that there was a contract between the company and the union? A. No, sir.

Q. And you were not a member of the United Mine Workers? A. No, I wasn't a member.

Q. Had you authorized anybody to sign a contract for the employees of the company with the company? A. No, sir.

Q. Now after you closed down, did you in that period of time join the United Mine Workers? A. Yes.

Q. Under what circumstances did you join? A. Well, just joined it to get to go back to work. It was join or not work.

1954 Q. Did somebody come to see you to tell you to come to the company? A. What was that?

Q. How did you come to go down and sign up? A. Well, just — well, we just had to sign — we had word — well, Buster Phillips told us we had to sign it or quit, we couldn't work.

Q. Was Buster Raymond E. Phillips? A. Yeah, I seen him, and that was the only way to go back to work.

Q. And did you have a meeting of the employees at the tipple? A. We only had a meeting when they come there to sign us up on this here, ever what their names was, we met there and joined, and went back to work.

Q. Can you state whether or not that was Mr. Daniel and Mr. Maddox? A. Daniel was one of them. I don't remember the other one.

Q. And you did sign up yourself? A. Yes.

Q. Had you had a hospital card from the Welfare Fund before that time? A. No.

Q. Did you get a hospital card after that time? A.

1955 Shortly after that I got one.

Q. And you signed at that time your check-off card? A. Yeah.

Q. For your dues to be paid? A. Yes.

Q. Mr. Phillips, do you remember what wage you were paid when you went to work for Phillips Brothers Coal Company? A. Dollar and a half an hour.

Q. Was your wage later increased? A. Yes, sir.

Q. What kind of operator were you, or what work did you do? A. I was a dozer operator.

Q. And what salary did you later make with the company? A. Two and a quarter.

Q. And did you change jobs after that? A. Yeah, I changed again and raised again.

Q. To what salary? A. Two and a half.

Q. Had you had any change since that time? A. Not an increase. In other words, I'm getting salary pay now.

1956 Q. What is your present job? A. Now?

Q. Yes. A. Foreman.

. . . . . .

Q. Let me ask you, Mr. Phillips, are you a member of the United Mine Workers at the present time? A. No, sir.

Q. Do you have qualifications to receive any benefits under the Welfare Fund at the present time? A. During what time I had my card?

Q. Afterwards. A. No, not afterwards.

Q. After you stopped being a member? A. No.

CROSS EXAMINATION

By Mr. Rayson:

Q. Mr. Phillips, your company isn't under contract with the United Mine Workers now, is it? A. Not now, they aint.

Q. It's under contract with some other union? A. Yeah.

Q. And it has been for sometime, isn't that correct? A. Yeah, it's been sometime.

1957 Q. And you haven't had your card since your company has been under contract with another union, isn't that right? A. You mean the UMW card?

Q. You haven't had your hospital card since your company has been under contract with another union, isn't that correct? A. I have one card from the other union, but not from the United Mine Workers Union. I don't have it.

Q. You have no hospital card now from the United Mine Workers Union? A. No, sir.

Q. And you have not had that card since your company signed up with the other union? A. No, sir.

Q. Is that right? A. That's right.

Mr. Rayson. That's all, Your Honor.

. . . . . .

1958 JOHN AMOS

having been previously sworn, resumed the stand, and testified further as follows:

CROSS EXAMINATION

By Mr. Kramer:

Q. Mr. Amos, you have — well, the Love and Amos Coal Company that you spoke about the other day, is that a corporation or a partnership? A. A corporation.

Q. And it has been a corporation for some years? A. Since the inception, yes, sir.

Q. Love and Amos Coal Company has never been an operating company? By that I mean a company that mined coal and produced coal from the ground? A. No, sir.

Q. Love and Amos Coal Company has been a sales company always? A. That's correct, yes, sir.

Q. In other words, you have bought coal from the producers and sold it into the market somewhere? A. Yes, sir.

Q. You have sold it to utilities or you have sold it elsewhere, wherever you could find a market for it? A. That's correct.

Q. Now the principal office of the Love and Amos
1959 Coal Company has been at Nashville for some years?
A. Yes, sir.

Q. There's been a good deal of controversy between Love and Amos Coal Company and the United Mine Workers of America, hasn't there? A. No, sir, not between Love and—

Q. Not to amount to anything? A. Not between Love and Amos and the United Mine Workers that I know of.

Q. You don't know of any controversy there's been at all? A. No, sir.

Q. Never been any controversy between — A. Yes, sir, there's —

Q. Wait a minute. Never been any controversy that you know of, as I understood your answer, between Love and Amos Coal Company and the United Mine Workers of America. Is that what you mean to tell this Court and this jury? A. I overlooked the fact that Love and Amos was a plaintiff in this Court in 1958 against the United Mine Workers?

Q. When you swore a while ago, you also overlooked the fact that not only were they a plaintiff in this Court in 1958, but also in the United States Circuit Court of Appeals in Cincinnati. A. That was this same case.

1960 Q. And you also overlooked the fact that about three months ago or a little less that the Love and Amos Coal Company instituted a suit in the state court at Nashville. A. That's the same case.

Q. That is not the same case, but a new case involving some of the same questions. A. Well, it is —

Q. It's another lawsuit that was started in Nashville? A. It was the same case that was originated in this Court, and the Court of Appeals, as I understood, Love and Amos was thrown out of the place on the grounds that they have instituted it in the wrong Court, and —

Q. In other words, the Court of Appeals at Cincinnati said that that suit couldn't be maintained in the Federal Court, and then you people later started another suit and it is now pending, awaiting trial against the United Mine Workers of America in the state court in Nashville, isn't that right? A. Yes, sir, that's right.

Q. And in that case, Love and Amos is claiming damages off of the United Mine Workers? A. That's right.

1961 Q. And the fact that you said a while ago you didn't realize there was any controversy between them, you testified at great length when we tried that case,

or it was tried in this Court before His Honor two and a half years ago. A. Yes, sir. When you asked that question, I was thinking about any controversy between United Mine Workers, operating controversy, and Love and Amos.

. . . . . .

1962 Q. You are claiming, without going into any details, substantial amounts of money presently for Love & Amos Coal Company against the United Mine Workers? A. That is correct; yes, sir.

Mr. Kramer: Yesterday there was introduced, your Honor, Exhibit 113 and from Exhibit 113 certain charts were prepared. This is the one that somebody talked about being the Bible in the industry.

And from that exhibit, your Honor, this chart, which I believe is 115, they stated was prepared, and on Exhibit 115, at the righthand end over here, is a series of names of six states—New York, Pennsylvania, Illinois, Ohio, Indiana and Tennessee — showing coal produced for utility use in tons and the cost—sales price, in other words—per ton is shown on that exhibit.

Your Honor, from the same exhibit, which is 113, we have prepared also some charts which I want to introduce here as Exhibit 123.

This exhibit is titled, "Supplementary Summary Chart of Exhibit 113." It really ought to be "Supplemen-
1963 tary Summary Chart of Exhibit 115."

. . . . . .

(Exhibit No. 123 was marked for identification and filed.)

Mr. Kramer: On the exhibit that is on the board —

. . . . . .

In this chart, or graph, whatever you want to call it, that table that was introduced on yesterday, the Court
1964 and jury will note that the six states which had the highest cost of utility sales of coal for utility purposes was given, and Tennessee was given as a sales price

on 9,351,000 tons, $4.81 a ton. And were are talking about 1957.

We have taken this chart, your Honor, or this exhibit rather — this one here Mr. Rayson has in his hand — and from the same page from which these figures were produced — we have produced the additional figure to show what the sales price of coal was not only from New York, Pennsylvania, Illinois, but from the neighboring states of Tennessee. And the jury has in their hands, your Honor has in his hand, this exhibit showing the sale for Tennessee for the 9,351,000 — that "9" isn't too clear to me, looks like a "4" but it is the same as the 9,351,000 if you haven't got a clear one — it is $4.81, which is the last item on this table or Exhibit 115.

Our neighboring state of Alabama, according to this same record put in on yesterday, had a sales price of 10 cents less, $4.71.

Our neighboring state — practically neighboring — of West Virginia had a sale to utilities of 6,296,000 tons in the year 1957, and its price for sale for utility purposes is still lower, $4.29.

1965 Our other neighboring states, coal producing states, Kentucky sold for utility purposes during the year 1957, 6,687,000 tons and the price of the coal sales in the State of Kentucky was $4.25. That is what this table shows, your Honor, taken from the same exhibit.

Counsel asked about adding something to it.

Mr. Rowntree: Yes, sir. Of course, it is our position that Alabama has two of these TVA plants and the depressed price would occur in Alabama just like it would in Tennessee.

Mr. Kramer: Your Honor,—pardon me.

Mr. Rowntree: The depressed price of utility coal would occur in Alabama just like it did in Tennessee.

Mr. Kramer: I call attention, your Honor, that there isn't a TVA plant within hundreds of miles of West Vir-

ginia and West Virginia has a price of $4.29 and TVA markets in West Virginia would not be depressed for TVA coal.

Mr. Rowntree: And we point out, your Honor, that West Virginia had a tonnage, or production tonnage compared with those figures up there, of 156,842,038 tons in 1957—156,842,038 tons produced in West Virginia in 1957.

Kentucky had a production in 1957 of 74,666,796

1966 tons.

Mr. Kramer: I did not catch the figures that counsel gave for West Virginia?

Mr. Rowntree: West Virginia, 156,000,000 tons.

Mr. Kramer: I gave the corresponding figures for the highest states. I just point them out so the jury may see it.

By Mr. Kramer:

Q. Mr. Amos, in the sale of coal for utility purposes, you sell what we generally, or what you people generally call in the coal market as steam coal? A. Yes, sir.

Q. What is the classification of coal that bears usually the highest price in the sale; how do you classify it? A. Block coal would bear the highest price in most of the markets that I am familiar with.

Q. Block coal, and then there is another graduation between block coal and steam coal or the fine coal; what is it? A. Some mines make five or six or more grades of coal out of the mine run that comes out.

Q. When you say "mine run" you mean the coal just as it comes out of the mine? A. Yes, that's right, as shot from the face.

1967 Q. And in order to get a better grade coal, like the block coal, you separate it out so as to sell it at a higher price? A. That's right.

Q. And that is generally done on all coal that is sold for steam purposes, the block coal, the higher priced coals have been taken out? A. No, sir. It has gotten down to where

the only domestic size are taken from the high grade seams, as far as I know.

Q. Some of the seams in Tennessee are high grade seams, you told us yesterday? A. That is right; yes, sir.

Q. You told us yesterday you thought the seams of coal in Tennessee were the equal or superior to seams in many other locations? A. That is correct; yes, sir.

Q. So that the teams in Tennessee do have this so-called high grade coal that is eliminated before the steam coal and utility coal is taken out, don't they? A. They did have, Mr. Kramer, but the markets are gone for those grades of coal.

Q. In 1956 and 1957 the markets were not gone, were they? A. Yes, sir.

1968 Q. They were beginning to lower but there was still a substantial market for block coal in 1956 and 1957, wasn't there? A. I wouldn't say substantially. There still is some market, understand, but it has been decreasing each year.

Q. Yes. Now in the sales that Phillips made to various purchasers, do you know what they did about grading coal and classifying it? A. No. I have never been to their mine.

Q. Do you know anything about the grade of coal that they sold to the TVA or other sales they made? A. No, sir, I do not.

Q. You never been at their mine at all? A. No, sir.

Q. You told us yesterday, as I recall it, that in some of the shipments to Tampa, in a series of shipments to Tampa, in filling the contract you had with Tampa, some 4,000 tons came from Phillips Brothers mine? A. I don't think I said that because I don't know how much —

Q. You don't know whether any came from — A. There was some—

Mr. Rowntree: That was my statement. I read from the record in the case.

1969 Mr. Kramer: I stand corrected, but it is in the record here somewhere, your Honor.

By Mr. Kramer:

Q. You did not know, and you don't know what the coal they shipped was, a ton or what, in fulfilling the contract? A. No, sir. I bought that coal from Royal Fuel Company, and they told us where the coal was coming from and we had some one of our crew go in there and sample some of the coal to see that it was.—

Q. But you, yourself, had nothing to do with that? A. No, sir, I did not.

Q. I take it from what you have just said that all of the sales, or all of the purchases that you made in handling Phillips Brothers coal were made through Royal Fuel? A. That is correct. Yes.

Q. In other words, it was brokered twice. Brokered through you—or, I mean, brokered through Royal Fuel to you and then through you to Tampa? A. That is correct.

* * * * * * * * * *

1970 REDIRECT EXAMINATION

By Mr. Rowntree:

Q. Mr. Amos, I refer now to Exhibit 97, tabulations of Royal Fuel Company, with respect to sales made for Phillips Brothers Coal Company, the sale to Love & Amos for Tampa, Florida, July 21, 1958, with a gross price of $3.75, a net price to Phillips Brothers Coal Company of $3.50, and I believe you have indicated on cross examination that you had a brokerage fee on top of the $3.75? A. That is right, yes, sir.

* * * * * * * * * *

Mr. Rowntree: We would like to file as the next exhibit a page of the United Mine Workers Journal, page 13, July 15, 1954.

(Exhibit No. 124 was marked for identification and filed.)

Mr. Rowntree: This page sets forth awards made
1971 by TVA to coal producers for the purchase of coal by TVA and states "List of Awards, Coal Invitation

to Bid—Requisition 17/808325." It gives the name of contracts, the contract term in months, the tons to be shipped per week, the shipping point, the method of transportation, the bid price, the transportation cost and the plant price.

This lists some 20 companies who sold coal to TVA on these awards, the awards being on June 4, 1954 for delivery to Kingston and also awards of June 28, 1954 for delivery to Kingston.

I will read down through the bid prices, the transportation costs and the plant price.

The first seller, $4.50 bid price, with no transportation cost. Therefore, the plant price would be $4.50.

The next seller, $4.70, and the plant price was $4.70.

The next seller, $4.55, and that is the same price at the plant.

This is the Kingston plant at Kingston, Tennessee.

The next seller, bid price $3.48. Transportation cost is $1.07. Plant price $4.55.

The next seller, $3.05 bid price. Transportation cost
1972 the same, $1.07, and all the rest of these will be $1.07, transportation. In fact, I will omit the plant price because they will all have the same addition of transportation cost of $1.07, and proceed to read the bid price that is f.o.b. mine.

The next seller is $3.57 at the mine.

Next $3.52.

Next $3.35.

Next is $3.50.

Next is $3.52.

Next is $3.60.

The next is Love & Amos Coal Company, coal to be shipped from Jellico, Tennessee, $3.75.

Next $3.28.

Next $3.85.

Next $3.35.

Next $3.50.

Next $3.60.

Next $3.55.

And there is one more at the bottom, $4.48, delivered at the plant. That is Watts Bar, that last one.

Now there is a statement underneath this that says—this is from the United Mine Workers Journal:

1973 "Evidence that TVA is still pursuing its short-sighted and dog-eat-dog policy of buying coal, is offered by the latest contract figures of coal bids awarded in early June for delivery to the Kingston, Tenn., plant. Analysis of the coal awards above, most of which went to non-union companies and brokers who buy from small dog-hole mines that do not observe union wages, hours, welfare or conditions, and also disregard state and federal safety codes and the Walsh-Healey Act, shows how the TVA coal purchase policy operates.

"Note the low prices of coal at the mine which even after transportation costs are still below the prices quoted by established operators and generally recognized as standard prices for the industry. Some of the coal to fill these orders is so-called 'distress coal' which the brokers pick up from established operators who have a temporary surplus due to the fact that they are unable to obtain TVA business on legitimate terms.

"In this particular award list, transportation is mostly by rail and barge, with only three listing truck delivery . . ."

By Mr. Rowntree:

Q. Mr. Amos, would you agree that that was a

1974 low price for steam coal? A. Yes, sir.

Mr. Rowntree: I would like to read into the record a statement by Mr. Lewis taken from the United Mine Workers Journal, February 15, 1955, a statement made in the course of the hearing on the Walsh-Healey minimum wage in that year.

• • • • • • • • • • •

1975 Mr. Rowntree: This statement of Mr. Lewis, quoting:

"Lewis said that because of TVA policy private electric utility companies 'have found it necessary to follow to some degree the same procedures of destructive buying of coal as TVA.'

"Lewis said there is no other industry in the nation 'where the influences of competition are so delicately balanced and so ravaging and destructive in their effect when the balance is disturbed.' "

By Mr. Rowntree:

Q. Mr. Amos, do you recall the exhibit with respect to large tonnage bids of West Kentucky and Nashville Coal Company on the spot coal market of TVA? A. Yes, sir.

Q. Would you agree with this statement of Mr. Lewis that I have read? A. I most certainly do.

1976 Q. With respect to this statement, does that statement of economic circumstance result in any effect on markets adjacent to the TVA? A. Yes, sir, it does.

Q. What specific markets were available to Phillips Brothers Coal Company in the period 1956 through 1958 for this steam coal? A. Well, the power companies in the Carolinas were available and the power companies in Georgia were available and that is about all, according to my recollection, that was available at that time.

Q. And was the Tampa market a market subsequent to that time? A. Yes, sir, but, of course, that wasn't adjacent to TVA.

Q. Would a depreciation of the TVA market have an effect on the markets of those adjacent power companies? A. It always has, yes, sir.

Mr. Rowntree: That is all.

RECROSS EXAMINATION

By Mr. Kramer:

Q. Counsel has read to you a moment ago, Mr. Amos,

an article, part of an article in the United Mines Workers Journal—I have forgotten the date—but just a few
1977 minutes ago, in which Mr. Lewis is quoted as criticizing TVA's pricing policies. If I recall correctly, in some of this litigation that we have had, that Love & Amos Coal Company ran full page advertisements in the daily papers criticizing TVA's coal pricing policies, didn't it? Isn't that true? A. I don't recall.

Q. You mean you just don't remember or it didn't happen? A. I don't remember. I don't remember that they were criticizing their coal buying policies, but they might have been, because they were subject to criticism, I think. I agree with Mr. Lewis thoroughly about it.

Q. What I am saying, he had an article in the Wall Street Journal and you had an article in daily newspapers criticizing TVA's buying policies and pricing policies? A. That has been some time ago and I don't remember just what we were criticizing. I am not trying to say—

Q. You were criticizing some way? A. I would criticize all right.

* * * * * * * * * * *

1978 Mr. Rowntree: If Your Honor please, we have a few odds and ends we would like to finish up here.

The Court: All right, sir.

Mr. Rowntree: This exhibit exhibited by the op-
1979 posing counsel, Exhibit 107, contains figures showing BTU cost at the plant, 1954, and 1955. The witness I. E. Schmidt was examined with respect to this exhibit pointing out the low cost of TVA coal, 1954 and 1955.

I want to read from Exhibit 113—

* * * * * * * * * * *

Mr. Rowntree: This is page 89 of Exhibit 113.

"Tennessee cost of coal per ton at plant, utility plant, 1951, $5.34; 1952, $4.89; 1953, $4.76; 1954, $4.59; 1955, $4.42; 1956, $4.63; 1957, $4.81; 1958, $4.79."

So the two lowest years in cost of coal were these years 1954 and 1955.

I would like to inquire of counsel if there can be a stipulation that the union, under its constitution, had the power to make special assessments on its membership.

Mr. Combs: Well, Your Honor, we would refer
1980 to the constitution on that section, No use to stipulate, it is very clear.

* * * * * * * * * *

Mr. Rowntree: The dues provision of the Constitution of the International Union, Section 11, Article XIV:

"The local union dues to be paid by each member shall not be less than $4.25 per month, $51.00 per year, to be divided as follows: $1.25 to be retained or sent to the local union; $1.00 to be retained by the District organization; and $2.00 to be forwarded to the International Secretary-Treasurer, together with such assessments as may
1981 be levied by the different branches of the organization."

Mr. Combs: We stipulate that, Your Honor, that this was in force at the time pertinent herein.

The Court: Good.

Mr. Rowntree: We have page 7 of the United Mine Workers Journal, January 15, 1957, which we offer as next exhibit.

(Exhibit 125 was marked for identification and filed.)

Mr. Rowntree: We would like to offer as next exhibit, Page 8, United Mine Workers Journal, July 15, 1957.

Mr. Kramer: What portion of this? All of it or just a part of it or what do you see in here?

Mr. Rowntree: The letter.

Mr. Kramer: Your Honor, we object to this, it is not an official pronouncement of the union or the officers of the union. It is an outside matter that is copied in the Journal.

Mr. Rowntree: We put it in for the purpose of showing

that the union International officers had notice of the conditions in this section of the country.

Mr. Kramer: Well, I take it it is a matter of general knowledge there was unemployment in many areas
1982 of the United States, very few industries operating at full capacity today.

The Court: Is that the only purpose it is offered?

Mr. Rowntree: Yes, sir.

The Court: It may go into the record for that purpose only.

(Exhibit 126 was marked for identification and filed.)

Mr. Rowntree: This exhibit reads as follows:

A letter published in the United Mine Workers Journal—

Mr. Kramer: What number is that?

Mr. Rowntree: 126.

The Court: Remember that doesn't go into the record as to the truth of its contents, but it goes into the record solely on the alleged notice to the union on the alleged depressed working conditions in the Campbell County area.

Mr. Rowntree: It is addressed to Mr. John L. Lewis:

"Dear Sir:

"Local Union No. 3295, Jellico, Tennessee, is asking you for your influence, individual, financial, and as President of the United Mine Workers of America for
1983 help to secure employment in Campbell County, Tennessee, and Whitely County, Kentucky—as there are members in both counties in our Local.

"Campbell County . . . has about 2,200 miners out of work."

The Court: Now that doesn't go to prove that Campbell County had 2,200 people of work, but goes, as indicated, to bring home notice to the union of alleged depressed conditions.

Go ahead.

Mr. Rowntree: "A large part of this number have re-

ceived all their unemployment benefits. Whiteley County . . . is in about the same condition.

"The only employment in the above-named counties is in dog holes and strip mines with a small per cent paying contract price. When a man who belongs to the United Mine Workers starts looking for a job here, he is just like a man without a country.

"The U. S. Bureau of Mines states there is as much coal in this section as has been mined. But we think the small companies have not got the capital to mine it because they are not doing it.

"There have been a few small manufacturers talked of moving here. But they ask the citizens to finance the
1984 manufacture and there is not enough capital in the hands of the working people . . .

"We, as members of the UMW of A. need work for our families and ourselves. We do not want to lose our membership in the UMW of A. We have struggled to hold our union . . ."

It is signed by Raymond Douglas, president; the vice-president, and by the recording secretary, and by the treasurer.

Mr. Combs: May it please the Court, as a matter of clarification to the jury, this letter appears on the editorial page of the United Mine Workers Journal under date of July 15, 1957, and it is captioned, "A Plea to Congress for Help."

It reads thus:

"United Mine Workers of America, Local Union 3295, Jellico, Tennessee, recently wrote to President John L. Lewis asking his help in getting action in Congress on legislation to aid depressed areas. We think the mem-
1985 bers of Congress ought to know what the officers and members of Local Union 3295 have to say on this vital subject; so we are reprinting the letter herewith."

Then follows the letter. And after the letter then continues the editorial part.

"The letter asks that Lewis contact Sens. Estes Kefauver (D,. Tenn.), and John Sherman Cooper (R., Ky.) and Reps. Howard Baker (R., Tenn.) and Eugene Siler (R., Ky.).

"It was signed by Raymond Douglas, president; Bill Prewitt, vice president; Clyde Thomas, recording secretary; Hobert Creekmore, financial secretary, and Earl E. Brown, treasurer, Local Union 3295."

It closes with this observation:

"We wonder what Congress will do about such conditions."

And I might say, the Depressed Areas Bill did pass the Congress and was signed by the President.

The Court: All right.

* * * * * * * * * * *

1989 Mr. Rowntree: May it please the Court and ladies and gentlemen of the jury, with respect to the contracts between United Mine Workers and the operators, we rely upon the following parts of the National Bituminous Coal Wage Agreement commencing with the agreement of 1947. This is page 57. The language:

"It is further agreed that as a condition of employment all employees shall be, or become, members of the United Mine Workers of America, except in those exempted classifications of employment as hereinafter provided in this Agreement."

And the similar language appearing in subsequent contracts with modification occurring first in 195, adding the clause "to the extent and in the manner permitted by law," which occurs on page 80.

The language in the 1947 contract, page 61 et seq., with regard to the Welfare and Retirement Fund. I suppose I ought to read these portions.

1990 Pages 61:

"It is hereby stipulated and agreed by the contract-

ing parties hereto that there is hereby created a Fund to be designated and known as the 'United Mine Workers of America Welfare and Retirement Fund.' During the life of this Agreement, there shall be paid into such Fund by each Operator signatory hereto the sum of ten cents (10c) per ton of two thousand (2,000) pounds on each ton of coal produced for use or for sale. Such Fund shall have its place of business in Washington, District of Columbia, and it shall be operated by a Board of Trustees, one of whom shall be appointed as a representative of the Employers, one of whom shall be appointed as a representative of the United Mine Workers of America, and one of whom shall be a neutral party selected by the other two. In the event of resignation, death, inability or unwillingness to serve of the Trustee appointed by the Operators or the Trustee appointed by the United Mine Workers of America, the Operators shall appoint the successor of the Trustee originally appointed by them and the United Mine Workers of America shall appoint the successor of the Trustee originally appointed by it.

"The Operators signatory hereto do hereby ap-
1991 point Ezra Van Horn of Cleveland, Ohio, as their representative on said Board of Trustees. The United Mine Workers of America do hereby appoint John L. Lewis of Washington, D. C., as its representative on said Board of Trustees. It is further stipulated and agreed by the joint contracting parties that the aforesaid two Trustees shall with all dispatch designate and name a third and neutral Trustee. Said three Trustees so named and designated shall constitute the Board of Trustees to administer the Fund herein created.

"In the event of a deadlock on the designation or agreement as to the neutral Trustee, or any future neutral Trustee, an impartial umpire shall be selected either by agreement of the two Trustees, representatives of the contracting parties hereto, or by petition by either of the contracting parties hereto to the United States District Court for the

District of Columbia for the appointment of such an impartial umpire, all as made and provided in section 302 (c) of the 'Labor-Management Relations Act, 1947.'

"It is agreed by the contracting parties hereto that the Trustees herein provided for shall serve for the duration of this contract and as long thereafter as the proper
1992 continuation and administration of said trust shall require.

"It is agreed that this Fund is an irrevocable trust created pursuant to Section 302 (c) of the 'Labor-Management Relations Act, 1947,' and shall endure as long as the purposes for its creation shall exist. Said purposes shall be to make payments from principal or income or both, of (1) benefits to employees of said Operators, their families and dependents for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness, resulting from occupational activity or insurance to provide any of the foregoing, or life insurance, disability and sickness insurance or accident insurance; (2) benefits with respect to wage loss not otherwise compensated for at all or adequately by tax supported agencies created by federal or state law; (3) benefits on account of sickness, temporary disability, permanent disability, death or retirement; (4) benefits for any and all other purposes which may be specified, provided for or permitted in Section 302 (c) of the 'Labor-Management Relations Act, 1947,' as agreed upon from time to time by the trustees, including the making of any or all of the foregoing benefits applicable to the individual members of the United Mine Workers of
1993 America and their dependants; and (5) benefits for all other related welfare purposes as may be determined by the Trustees within the scope of the provisions of the aforesaid 'Labor-Management Relations Act, 1947,' subject to the stated purposes of this Fund, the Trustees shall have full authority, within the terms and provisions of the 'Labor-Management Relations Act, 1947' and other applicable law, with respect to questions of coverage and

VOLUME III

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1964

No. [redacted] 48

UNITED MINE WORKERS OF AMERICA,
PETITIONER,

vs.

JAMES M. PENNINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 17, 1964
CERTIORARI GRANTED MAY 18, 1964

Joint Appendix

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 14,809

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admrx. of the Estate of Burse Phillips, deceased,
Cross-Plaintiffs-Appellees,

v.

UNITED MINE WORKERS OF AMERICA,
Cross-Defendant-Appellant.

No. 14,810

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, as Trustees of the UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND,
Plaintiffs-Appellees,

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admrx. of the Estate of Burse Phillips, deceased,
Defendants-Appellants.

Appeals from Judgments and Orders of the United States District Court for the Eastern District of Tennessee, Northern Division

---

VOLUME III
Pages 1001a-1589a

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

TABLE OF CONTENTS OF APPENDIX

	Page
Caption in District Court	1a
Relevant Docket Entries	2a
Complaint	9a
Answer of Defendants	11a
Counterclaim	18a
Cross-Claim against Plaintiffs and United Mine Workers of America	19a
Order, February 19, 1958	21a
Amendment to Answer	21a
Motion of Cross-Defendant, United Mine Workers of America, to Dismiss Action	23a
Motion to Vacate Order Granted Under Rule 13(h) and to Dismiss Cross-Claim as to Plaintiff Trustees	25a
Answer to Counter-Claim	25a
Motion to Amend Answer, Counter-Claim and Cross-Claim filed by Defendants	26a
Motion to Add a Party Plaintiff	28a
Order, August 11, 1958	29a
Additional Motion to Amend Answer, Counter-Claim and Cross-Claim filed by Defendants	30a
Memorandum (Delivered from the Bench), July 1, 1959	34a
Order, July 2, 1959	36a
Answer of United Mine Workers of America to Amended Cross-Claim filed Against It and Others	38a
Motion of Cross-Plaintiffs to Amend the Cross-Claim or Counter-Claim to Specify Period of Time Encompassed by the Cross-Claim or Counter-Claim	40a

Order of Substitution of Parties, September 30, 1960 41a

Order, November 25, 1960 42a

Amended Answer to Counter-Claim 42a

Order, January 16, 1961 44a

Motion of Defendants and Cross-Plaintiffs for Order Consolidating Claims for Trial and Dismissing Claim of Cross-Plaintiffs Against Cross-Defendants 44a

Response of United Mine Workers of America to Motion of Defendants and Cross-Plaintiffs to Consolidated Claims and Motion to Dismiss 46a

Order, April 10, 1961 47a

Order Pursuant to Pre-Trial, April 10, 1961 48a

Motion of United Mine Workers of America for Judgment in Accordance with Motions for Directed Verdict or in the Alternative Motion For a New Trial 64a

Motion of Trustees for Judgment in Accordance with Motions for Directed Verdict or in the Alternative Motion For a New Trial 73a

Judgement, August 2, 1961 82a

Opinion Rendered From the Bench, July 31, 1961 85a

Notice of Appeal filed by Cross-Defendant 100a

Notice of Appeal filed by Defendants 101a

Order, August 28, 1961 101a

Order, October 2, 1961 102a

TRANSCRIPT OF PROCEEDINGS

Caption in District Court 103a

Court's Statement of Case 104a

Defendants' Opening Statement 108a

Stipulation 117a

Defendants' and Cross-Plaintiffs' Evidence

Jack Shattuck
- Direct Examination 118a
- Cross Examination 129a
- Redirect Examination 130a

Andrew Frost
- Direct Examination 130a
- Cross Examination 137a

H. B. Wicks
- Direct Examination 138a
- Cross Examination 145a
- Redirect Examination 146a

Will Hood Wender
- Direct Examination 146a
- Cross Examination 152a
- Redirect Examination 154a

Alonzo Cox
- Direct Examination 155a
- Cross Examination 159a
- Redirect Examination 163a
- Recross Examination 164a

John Van Huss
- Direct Examination 164a
- Cross Examination 169a

Raymond E. Phillips
- Direct Examination 173a
- Cross Examination 211a

James M. Pennington
Direct Examination ---------- 220a
Cross Examination ---------- 225a

Albert Pass
Direct Examination ---------- 231a
Cross Examination ---------- 242a
Redirect Examination ---------- 243a

United Mine Workers of America
Interrogatories ---------- 244a

John L. Lewis (Deposition)
Direct Examination ---------- 251a
Cross Examination ---------- 493a

United Mine Workers of America
Interrogatories (resumed) ---------- 495a

Judge Charles I. Dawson (Deposition)
Direct Examination ---------- 518a
Cross Examination ---------- 527a

George H. Love (Deposition)
Direct Examination ---------- 530a

Robert L. Kaiser (Deposition)
Direct Examination ---------- 550a

Cyrus S. Eaton (Deposition)
Direct Examination ---------- 556a

Mark Eastin (Deposition)
Direct Examination ---------- 586a
Cross Examination ---------- 613a
Redirect Examination ---------- 619a

Barnum L. Colton (Deposition)
Direct Examination ---------- 623a

James W. Haley (Deposition)
Direct Examination ---------- 646a

William B. Sturgill (Deposition)
Direct Examination ---------- 656a

Albert B. Hill (Deposition)
Direct Examination ---------- 667a
Cross Examination ---------- 686a

J. S. Routh, Jr.
Interrogatories ---------- 689a

R. H. Hughes
Interrogatories ---------- 696a

Herbert C. McCollum (Deposition)
Direct Examination ---------- 699a
Cross Examination ---------- 710a
Redirect Examination ---------- 710a

Merle C. Kelce (Deposition)
Direct Examination ---------- 711a
Cross Examination ---------- 746a
Redirect Examination ---------- 751a

R. J. Snider (Deposition)
Direct Examination ---------- 753a

Raymond Dupee (Deposition)
Direct Examination ---------- 757a

Dino Fratiglioni (Deposition)
Direct Examination ---------- 764a

George Schmidt (Deposition)
Direct Examination ---------- 766a
Cross Examination ---------- 770a

Frank Kreitner (Deposition)
Direct Examination ---------- 770a

J. L. Hamilton
Interrogatories ---------- 774a

H. D. Waters
Interrogatories ---------- 777a
Cross Interrogatories ---------- 779a

Michael F. Widman, Jr. (Deposition)
Direct Examination ---------- 780a

Elmer C. Hill (Deposition)
Direct Examination 787a
Cross Examination 806a
Redirect Examination 830a

Martin Hochdorf (Deposition)
Direct Examination 834a
Cross Examination 838a
Redirect Examination 839a

Taylor Maddox, Sr. (Deposition)
Direct Examination 841a
Cross Examination 844a
Redirect Examination 855a

I. E. Schmidt
Direct Examination 856a
Cross Examination 888a

John H. Amos
Direct Examination 907a

Leon Day
Direct Examination 964a
Cross Examination 970a

Arlow Hutson
Direct Examination 971a

Richard A. Hutson
Direct Examination 975a

Ralph Phillips
Direct Examination 980a
Cross Examination 983a

John H. Amos (testimony resumed)
Cross Examination 984a
Redirect Examination 990a
Recross Examination 993a

Plaintiffs' and Cross-Defendants' Evidence

Josephine Roche
Direct Examination ----- 1005a
Cross Examination ----- 1045a

H. G. Schmidt
Direct Examination ----- 1048a
Cross Examination ----- 1061a
Redirect Examination ----- 1066a

Val J. Mitch
Direct Examination ----- 1066a
Cross Examination ----- 1083a
Redirect Examination ----- 1092a
Recross Examination ----- 1093a

John L. Lewis
Direct Examination ----- 1093a
Cross Examination ----- 1140a
Redirect Examination ----- 1175a

John Owens
Direct Examination ----- 1178a
Cross Examination ----- 1225a

S. L. Jewell
Direct Examination ----- 1249a
Cross Examination ----- 1270a

T. Reed Scollon
Direct Examination ----- 1280a
Cross Examination ----- 1310a

Patrick B. C. Smith
Direct Examination ----- 1318a
Cross Examination ----- 1349a
Redirect Examination ----- 1377a
Recross Examination ----- 1381a

T. J. Hoffman
Direct Examination ----- 1382a
Cross Examination ----- 1406a

Albert Pass
Direct Examination ---- 1415a
Cross Examination ---- 1420a
Redirect Examination ---- 1421a

Mark E. Eastin
Direct Examination ---- 1422a
Cross Examination ---- 1446a

R. E. Phillips (Deposition)
Cross Examination ---- 1466a

Elliott D. Adams
Direct Examination ---- 1467a
Cross Examination ---- 1471a

Welly K. Hopkins
Direct Examination ---- 1472a
Cross Examination ---- 1501a
Redirect Examination ---- 1505a
Recross Examination ---- 1507a

Statements of Counsel ---- 552a

Statements of Counsel ---- 697a

Statements of Counsel ---- 994a

Trustees' Motion for Directed Verdict ---- 1003a

UMW's Motion for Directed Verdict ---- 1004a

TVA Annual Reports ---- 1508a

Rebuttal Evidence ---- 1513a

Trustees' Renewal Motion for Directed Verdict ---- 1523a

UMW's Renewal Motion for Directed Verdict ---- 1524a

Arguments on Motions ---- 1525a

Motions for Mistrial ---- 1532a

Arguments on Motions ----------1533a
Trustees' Renewal Motion for Directed Verdict ----------1535a
Closing Arguments ----------1535a
Court's Charge to the Jury ----------1537a
Forms of Verdict ----------1577a
Objections to Court's Charge ----------1579a
Court's Further Charge to the Jury ----------1585a
Verdict of the Jury ----------1588a

EXHIBITS

No.		Page
13-21	Resume of Phillips Brothers Coal Company income tax returns for the years 1953-1958 (composite of Exhibits Nos. 13 thru 21)	1591a
22	Profit or loss, rail tons, etc., years 1955-1958	1592a
23	Check Letter of Advice, Phillips Bros. Coal Co., 11-12-53	1593a
24	Check Letter of Advice, Phillips Bros. Coal Co., 1-5-54	1594a
25	Check Letter of Advice, Phillips Brothers Coal Co., July 29, 1955	1595a
26	Check Letter of Advice, Phillips Brothers Coal Co., 12-17-55	1596a
27	Check Letter of Advice, Phillips Brothers Coal Co., August 4, 1956	1597a
34	Application Forms for Fund Benefits	1598a
39	List of cases brought by Trustees	1607a
40	List of Coal Companies	1619a
41	Walsh-Healey Act, Minimum Wage Determinations	1620a
42	United Mine Workers Journal, February 15, 1955	1625a
44	United Mine Workers Journal, February 15, 1958	1634a
48	Interests of United Mine Workers of America in West Kentucky Coal Company and Nashville Coal Company	1639a
72	Statement of Condition, The National Bank of Washington, October 3, 1960	1640a

EXHIBITS

No.		Page
73	Interest of United Mine Workers of America in National Bank of Washington	1642a
92	Table, "FACTS ABOUT TVA STEAM PLANTS"	1643a
98	Phillips Bros. Coal Co., TVA bids, 1956-1958	1644a
99	Average BTU Cost, 1956-1958 (Eastern plants & TVA system)	1645a
100	Total Tons purchased, 1956-1958 (Eastern & Western plants)	1646a
101	Pittsburgh-Midway Mines and Peabody Mines, table, 1956-1958	1647a
102	Table, West Kentucky & Nashville Coal Co., 1956-1958	1652a
103	Table, Debardeleben Coal Corp. & Traux-Traer Coal Co., 1956-1958	1656a
104	Table, Term Contract Awards, 1956-1959	1658a
107	Table, TVA Weighted Averages 1954-1958	1659a
110	Purchase Order from Tampa Electric Co. to Love & Amos Coal Co., December 23, 1957	1660a
111	Table, Love & Amos shipments to Tampa Electric Co., 1959-1961	1661a
115	Summary charts, "Tons of Coal For Steam—Electric Utilities" (United States, Tennessee, Virginia and Top Six States)	1662a
117	Summary chart showing National Average Price of coal, and Phillips' Average Price, 1956, 1957 and 1958	1663a
118	"Thickness of Bituminous Coal and Lignite Seams"	1664a

EXHIBITS

No.		Page
119	"Summary of method of haulage", etc.	1665a
120	"Number and production of bituminous coal and lignite strip mines", etc.	1666a
121	Chart, "Tennessee Mines Number and Production by Class", 1955 and 1959	1667a
123	"Supplementary Summary Chart" showing State, Delivered Price and Utility Tonnage	1668a
138	Excerpts from UMW Welfare & Retirement Fund File, re: Clem Terreo	1669a
139	Excerpts from UMW Welfare & Retirement Fund File, re: Steve Molnar	1678a
140	Excerpts from UMW Welfare & Retirement Fund File, re: John Shenkarik	1684a
141	Excerpts from UMW Welfare & Retirement Fund File, re: Rico Boggio	1694a
142	Excerpts from UMW Welfare & Retirement Fund File, re: Robert Taylor	1699a
143	Excerpts from UMW Welfare & Retirement Fund File, re: Thomas Liddle	1708a
145	Map of TVA	1713a
146A	Table 1, "UNITED STATES CONSUMPTION OF ENERGY FUELS", etc.	1714a
147A	Table 2, "UNITED STATES CONSUMPTION OF BITUMINOUS COAL", etc.	1715a
148A	Table 3, "TRENDS IN BITUMINOUS COAL PRODUCTION", etc.	1716a

EXHIBITS

No.		Page
149A	Table 4, "UNITED STATES TOTAL PRODUCTION OF BITUMINOUS COAL", etc. (by size of annual output)	1717a
150A	Table 5, "TENNESSEE TOTAL PRODUCTION OF BITUMINOUS COAL", etc. (by size of annual output)	1718a
151A	Table 6, "NUMBER OF BITUMINOUS COAL MINES", etc. (in United States)	1719a
152A	Table 7, "NUMBER OF BITUMINOUS COAL MINES", etc. (in Tennessee)	1720a
153A	Table 8, "UNITED STATES TOTAL PRODUCTION OF BITUMINOUS COAL", etc. (by method of mining)	1721a
154A	Table 9, "TENNESSEE TOTAL PRODUCTION OF BITUMINOUS COAL", etc (by method of mining)	1722a
155A	Table A, "UNITED STATES EXPORTS OF BITUMINOUS COAL"	1723a
156A	Table B, "SALIENT STATISTICS ON BITUMINOUS COAL IN THE UNITED STATES"	1724a
157A	Table C, "SALIENT STATISTICS ON BITUMINOUS COAL IN TENNESSEE"	1725a
165	Table, "AVERAGE PRICE F.O.B. MINE"	1726a
166	Chart, TVA "ANNUAL CONSUMPTION OF COAL IN TONS", 6-30-56 thru 6-30-59	1727a
167	"COAL—BITUMINOUS AND LIGNITE, PRICES"	1728a
168	Table, "COAL SHIPPED TO T.V.A. FROM WEST KENTUCKY & NASHVILLE", etc.	1729a

EXHIBITS

No.		Page
169	"BIDS ON COAL TO TVA FROM UNIONTOWN MINE", West Kentucky and Nashville, Table	1730a
170	Table, "BARGE LOADINGS AT UNIONTOWN 1958"	1731a
171	Table, "COMPARISON OF TOTAL COAL PRODUCTION" (West Kentucky, Nashville and Total National production)	1732a
173	Table showing Phillips' tonnage shipped by rail, etc.	1733a

eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters.

"The aforesaid Trustees shall designate a portion (which may be changed from time to time) of the payments herein provided, based upon proper actuarial computations, as a separate fund to be administered by the said Trustees herein described and to be used for providing for pensions or annuities for the members of the United Mine Workers of America or their families or dependents and such other persons as may be properly included as beneficiaries thereunder.

"It is further agreed that the detailed basis upon
1994 which payments from the Fund will be made shall be resolved in writing by the aforesaid Trustees at their initial meeting, or at the earliest practicable date that may by them thereafter be agreed upon."

We rely upon the provisions with respect to the Welfare Fund in succeeding contracts in similar language, with the modification in the 1950 contract, which adds the provision in the paragraph sub-part 4 with respect to benefits, page 86, which adds to the language: "including the making of any or all of the foregoing benefits applicable to the individual members of the United Mine Workers of America and their families and dependents," — adding the following language — "and to employees of the Operators other than those exempted from this Agreement."

And the amendments in the Welfare Fund provisions which name the trustees, commencing in the 1950 contract, which read as follows:

1995 "The operators signatory hereto do hereby appoint Charles A. Owen of New York City as their representative on said Board of Trustees.

"The United Mine Workers of America do hereby appoint John L. Lewis of Washington, D. C., as its representative on said Board of Trustees.

"It is further stipulated and agreed by the joint contracting parties that Josephine Roche of Denver, Colorado, is appointed as a neutral trustee.

"Said three trustees so named and designated shall administer the Fund herein created."

We will rely upon the wages, provisions of the succeeding contracts which have already been referred to in the proof, and of course the signatures to the contract, the various contracts.

We rely upon the 1952 contract, page 108, the provisions with respect to application of the contract to coal lands which has been elaborated upon in the proof.

And we rely upon the 1958 protective wage clause that is contained in the 1958 amendment to the National Bituminous Coal Wage Agreement which is quite lengthy, and which has been summarized and referred to in the proof, and the increases in the Welfare royalty in the Welfare Fund parts in the succeeding contracts.

1996 Mr. Kramer: Are you leaving that portion at the moment?

Mr. Rowntree: Yes.

Mr. Kramer: That completes that?

Mr. Rowntree: Yes.

Mr. Combs: May it please the Court, the cross-defendants will rely upon those portions of the contracts that have to do with the union security clause, the union shop clause, the land-leasing clause, the protective wage clause, those sections of the contract that have been elaborated on here.

We will expect to use those in our arguments for a directed verdict.

Mr. Rowntree: The defendants and cross-plaintiffs rest.

Mr. Kramer: We have some matters to which we would like to call the attention of the Court, Your Honor.

The Court: All right, let the jury be excused.

(Thereupon, the jury was excused, and the following proceedings were had in the absence of the jury.)

Trustees' Motion for Directed Verdict

Mr. Kramer: We will have, Your Honor—want to present to Your Honor out of the presence of the jury two separate motions.

1997 One will be a motion for a directed verdict on behalf of the Trustees, the other will be a motion for a directed verdict on behalf of the cross-defendant—that is on behalf of the original plaintiff Trustees, and on behalf of the cross-defendants United Mine Workers of America.

We want to make these motions separately and present them separately, and Mr. Rayson is going to first present the motion on behalf of the Trustees.

The Court: All right.

Mr. Rayson: May it please the Court, plaintiffs John L. Lewis, Henry G. Schmidt, and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, move the Court to direct a verdict in their favor in the sum of $55,982.62, plus interest and the cost of this action on the following grounds:

First that the amount of the judgment in favor of the plaintiffs, if plaintiffs are determined to be entitled to judgment has been stipulated by the parties to be $55,982.62;

Second, the sole defense raised by the defendants to plaintiffs' recovery is their alleged participation in an alleged conspiracy to violate the Sherman Anti-trust Act;

1998 Third, the defendants have not presented any material evidence that the plaintiffs were parties to or participants in any alleged conspiracy to violate the Sherman Anti-trust Act, and specifically that there has been no material evidence presented to prove the overt acts attributed to plaintiffs, that is that the plaintiffs paid trust benefits solely to members of the United Mine Workers of America, that they required pensioners to engage

in picketing activities for the United Mine Workers of America to obtain or retain benefits of the trust, or that they brought suits to recover the royalties owing from the operators in furtherance of the alleged conspiracy.

And our motion is based on these further grounds, Your Honor:

Four, the allegation that the plaintiffs were parties to or participated in an alleged conspiracy to violate the Sherman Anti-trust Act does not preclude the plaintiffs, as Trustees, from recovery as a matter of law since such alleged acts would constitute a basis for individual liability of the Trustees and would not defeat the rights of the Fund which they administer;

Five, the evidence is insufficient as a matter of law to warrant a finding that the alleged conspiracy to
1999 violate the Sherman Anti-trust Act renders the National Bituminous Coal Wage Agreement of 1950 and the amendments thereto invalid and unenforceable ab initio, so as to preclude plaintiffs' recovery of royalty for coal produced by employees who are beneficiaries of the Trust.

* * * * * * * * * * *

2063 Mr. Combs: May it please the Court, cross-defendant United Mine Workers of America moves the Court for a directed verdict in its favor pursuant to Rule 50(a), F.R.C.P., on the following grounds:

1. There is no material or substantial or competent evidence that cross defendant United Mine Workers joined in or was a party to any conspiracy as alleged in the complaint, or that the cross-plaintiffs have suffered any damage or injury directly or proximately as a result of any such wrongful conduct on the part of the United Mine Workers.

2 Cross-plaintiffs have failed to establish, prima facie, that the United Mine Workers entered into any contract

combination or conspiracy, or engaged in any com-
2064 bination or conspiracy, in restraint of interstate trade or commerce in violation of the Sherman Act and particularly Section 1 thereof.

3 Cross-plaintiffs have failed to establish, prima facie, that the United Mine Workers monopolized, or attempted to monopolize, or combined or conspired with any of the alleged co-conspirators, one or more, to monopolize or attempt to monopolize any part of interstate trade or commerce in violation of the Sherman Act and particularly Section 2 thereof.

4. Cross-plaintiffs have failed to establish, prima facie, that there has been any unreasonable restraint of interstate trade or commerce, or any control, attempted or consummated, of an unreasonable part of interstate commerce in violation of the Sherman Act.

5. Cross-plaintiffs have failed to establish that they have been injured or damaged directly and proximately in their business or property from any United Mine Workers conduct forbidden by Sections 1 and 2 of the Sherman Act.

6. Cross-plaintiffs have failed to prove that the violations of the Sherman Act alleged by them have, in fact, caused them any damages.

* * * * * * * * * * *

2237 The Court: It is a troublesome question.

Gentlemen, the Court is constrained to overrule the motions as of the present time.

Adjourn Court.

Mr. Kramer: Does that apply to both motions?

The Court: Yes, sir, both motions at the present time.

* * * * * * * * * * *

2267 JOSEPHINE ROCHE

called as a witness by and on behalf of plaintiff and cross-defendant, after having been first duly sworn.

* * * * * * * * * * *

2268 DIRECT EXAMINATION

By Mr. Kramer:

Q. This is Miss Josephine Roche, I believe? That is your name? A. Yes.

Q. Miss Roche, are you one of the three trustees of the Welfare and Retirement Fund of the United Mine Workers of America? A. I am one of the three trustees of the United Mine Workers of America Welfare and Retirement Fund.

Q. Miss Roche, where were you born? A. Nebraska.

Q. In Nebraska? A. That is right.

Q. During your early life, girlhood, where did you live? A. In Omaha, briefly in Sioux City and then in Denver, Colorado, and part of the time also in northern Michigan, St. Sault Marie, very briefly.

Q. What line of work was your father engaged in? Just briefly. A. Briefly, my father was primarily a banker, opened his first bank west of the Mississippi River in eastern Nebraska. He was interested in all kinds of

2269 development of the western possibilities, lands and farms, cattle, also in Michigan, had interests in Michigan timber developments and then later in the coal developments in Colorado.

Q. During his later years, he was interested in developments in coal? A. That is right, sir.

Q. Of what institution or institutions are you a graduate? A. Of Vassar College and my graduate work in economics and social legislation at Columbia University, New York.

Q. Did you take additional work after your work at Columbia? A. Additional work at Columbia?

Q. No, after Columbia. A. No, my last three years graduate work at Columbia.

Q. At Columbia University? A. That is right.

Q. After graduating and taking your master's degree, what line of work did you take up and follow? A. I was probation officer in Judge Ben Lindsey's juvenile court.

Q. That was the noted juvenile court in Denver, Colorado? A. That is right, sir. I was later chief pro-
2270 bation officer, and a later time referee after Judge Lindsey's juvenile court became also the juvenile and family relations court after legislation which I had initiated in the Colorado legislature.

Q. I believe you were the first woman police officer in that area? A. I think I was in the country. It was a very long time ago, sir.

Q. We will not go into that. A. It wasn't exactly the way you stated it. It was police authority to carry out an ordinance that Ben Lindsey and some of the other progressive attorneys in Denver were interested in getting through to give some woman police authority to look after the young boys and girls on the streets at night and things like that.

Q. It wasn't the kind of policeman I indicated. A. It wasn't the kind that they played up in the newspapers at the time, sir.

Q. Now what work, other work, outside of your work with this juvenile court and family relations court in Colorado—what other kind of work did you follow before you became associated with the trustees for the trust fund? A. During the three years I was doing my graduate work
at Columbia, I was also working in helping in giving
2271 —having classes in some of the settlements, doing an investigation on the sweated industries in the tenements, the child labor particularly, which was very terrible at that time. I also was helping in developing in a rather small way but in a very interested way some of the programs that were being worked on even in those early days for vocational training in the public school system and for young people after public schools.

Q. Now after graduating, where did you work, after you graduated from Columbia, getting your post-graduate degree? A. My last year at Columbia, sir, was when I

returned to Denver to become the so-called policewoman in charge, and I did that job for about a year. Then I became the chief probation officer in the juvenile court.

Q. After you were at Denver, then what? You stayed there a little while in Judge Lindsey's court? A. Yes.

Q. Did you do any work in Chicago of any special nature? A. Then I was working also at that time, sir, on investigations that were being made by the congressional committee on industrial relations in the mining industry and later for the United States Industrial Relations Court, of which Mr. Frank Walsh of Kansas City was
2272 chairman.

The reason I mention that, my connection was quite minor, but it was special studies, and helping with the counsel who was in charge primarily of that work, Mr. Edward P. Costigan, who was our great counsel in the west and who was later United States Senator, and with whom I worked for many years.

Q. How long did you work with that Congressional Committee, or roughly how long? A. Off and on for possibly eighteen months, and maybe a little longer. It was a very long time ago.

Q. After that work was over—that was not a full-time job? A. Oh, no, sir.

Q. Just part-time? A. That's right.

Q. What other work were you carrying on? A. For several months, nearly a year, eight or nine months, I was requested by Mr. Hoover, who was then in London, Chairman of the Commission of Relief in Belgium, to go to London and work on programs for the Belgium refugees, in 1914, '15.

Q. That was the Honorable Herbert Hoover who later became President? A. That's right, sir.

Q. How long did you work with Mr. Hoover in
2273 London? A. I worked there several months, and I came back and continued working for that program

in some of the eastern states, in developing interest in what some of the people could do to help on the refugees.

Q. Placing refugees? A. That's right.

Q. What next line of work did you have, just briefly? A. To the best of my recollection, sir, I think I went back then—it was about 1920 when I went back again to Colorado, resuming my work as Referee of the Juvenile Court with Judge Lindsey, '20 or '21, sometime along there.

Q. Following that work with Judge Lindsey, you stayed there a little bit and then took up what? A. After that, I was back and forth to quite an extent between Colorado and New York. I had become very interested in the World War—well, I'm sorry, I am ahead of my story—in 1917—I beg your pardon, sir—in 1917, after we entered World War I—this was just prior to my going back to become Referee in the Juvenile Court—I have a terrible time remembering all of these dates—President Wilson asked me to work with his Committee on Public Information of which the three Secretaries, Ware, Navy, and State, made up the Committee, and Mr. George Creel, who was an outstanding newspaperman and had been in Colorado—
2274 I had known him very well there—was acting more or less as Executive Secretary.

I was primarily charged with the responsibility of making contacts and developing information programs among all of the great, vast numbers at that time of non-English speaking immigrants who would come over here, many of them who were not yet citizens, and of course at that time, the situation was very different from what it is now. We had great numbers of them, and I worked out, under that committee, the plan which organized and put into effect information to them in their native language on the American ideals, the American program, and also equally important, because there were so many, many Americanization programs at that time which were just telling them what they had to do instead of seeing what we needed to do for them.

Also, the responsibility was mine to see that the many injustices, both economic and social, and all other kinds were taken up, and to the extent possible, adjustments were made.

Q. How long did you work with that committee? A. I was with that committee until I went to the Labor Department to head up the Childrens Bureau, Editorial Division, at the time of the child labor amendment. I was responsible then in 1921 or '22—'21 I think it was, sir—and I was there for about two years, and then I went back
2275 to Lindsey's Court.

Q. Now, before you went back to Colorado, you went to the United States Department of Labor? A. That's right, sir.

Q. In connection with what? The child labor laws? A. The United State Children's Bureau, which then was in the Department of Labor, was developing a great deal of public information, not only on all infant and child welfare matters, but we were working very hard with the organizations that were trying to get through the federal amendments to prohibit child labor, which eventually we succeeded in doing, thank goodness.

Q. You were there until when, you say? A. I went back, I think it was in 1923.

Q. Went back to Colorado? A. That's right, sir.

Q. When you went back to Colorado, what line of work did you take up? A. Then I became Referee in Lindsey's Court.

Q. What? A. Referee in Judge Lindsey's Juvenile and Family Court.

Q. How long did you stay there, and what next did
2276 you do? A. I was there until my father's death—his illness was one of the reasons I returned to Colorado from the Labor Department work. He died in 1926, and after his death, I inherited his holdings in the Rocky Mountain Fuel Company, and as soon as we were

able to work out with our directors and stockholders a plan, we felt that it was very incumbent upon us to take a very definite step in the public interest, because we were all people out there at a time that who had been working in various ways—I mean the people who were working with me on the industry situation—we recognized the terrible destruction of human values and of economic values that had taken place in our state year after year, and that something if possible should be done to meet the public welfare that was involved, the deterioration in natural resources, and particularly of course to some of us the most basic thing was the conservation of human resources, so that we were able to finally agree upon a decision, make a decision to sign a contract with the United Mine Workers of America, which we did.

Q. That was the Rocky Mountain Fuel Company? A. That's right, sir.

Q. And what official position did you have, if any, with this coal company? A. At that time, I was vice-president, and I very soon afterwards became president.

2277 Q. And at that time it entered into a collective bargaining agreement with the United Mine Workers of America? A. We did, in 1928.

Q. What was the condition of the Rocky Mountain Fuel Company when you came into control of it? Not control. I mean into its executive offices. A. It was not good. The company had had a very heavy bonded indebtedness maturing in 1943. The conditions in the entire industry were bad, of course, the first beginnings of the recession, which became the depression, the Great Depression, were making itself felt. We had the problems of competitive fuels, and primarily, of course, we were over extended on this bonded indebtedness which had been put on in the early days.

Q. That was the condition when you came in there? A. Oh, yes, that was the condition when I came in.

Q. Did that result in receivership? A. It did eventually,

but not for quite some time. We did, as a result of our union contract, improve quite substantially our productivity, because we had very definite improvement in our mine operations, but we worked continually, of course, harassed by this bond interest twice a year. April 1 and October 1, are black dates in my mind still.

And then we had the added problems, of course,
2278 of the difficulties that coal production generally was
2279 having, but we did manage to get along, and we fought through until later when we did then go—I went in voluntarily and asked for reorganization.

Q. Reorganization under the Federal Bankruptcy Act? A. That's right.

Q. Yes. Was the Rocky Mountain Fuel Company finally wound up? A. Yes, sir, it was.

Q. Miss Roche, what was your first connection with the United Mine Workers of America? A. Only in business—only in the transaction of the contract, and that was primarily handled through Mr. Costigan, our counsel, and other men in our operating departments.

Q. In other words, Mr. Costigan, who later became a United States Senator? A. Yes.

Q. Really handled all the negotiations? A. Oh, yes, He was our counsel all along.

Q. Now after leaving Rocky Mountain Fuel, did you become associated with the Welfare Fund of the United Mine Workers? A. I did later, yes.

2280 Q. Can you tell us when you first had a connection with the Welfare & Retirement Fund? A. I was first asked to act as a consultant, technical consultant on a part-time basis, in December of 1947.

Q. That was not the present Welfare and Retirement Fund but the one under the previous contracts? A. That is right.

Q. And the present Welfare & Retirement Fund, as I

understand, originated with the collective bargaining agreement which became effective March 5, 1950? A. That is the 1950, present fund; that is right, sir.

Q. During the period 1947 or 1948, when you first went with the old fund of the trustees, organization, what work did you do? A. Before that I was, during the years, through the end of 1934 until December, last of November in 1937, or beginning of December of that year, I was Assistant Secretary of the Treasury appointed by President Roosevelt.

Q. What was the period that you were Assistant Secretary of the Treasury? A. Three years, 1934 to 1937—I beg your pardon—that's right. 1937. And upon being made

Secretary I was assigned the United States Public
2281 Health Service. It was put under my jurisdiction.

Also I was, just prior to my being made Assistant Secretary of the Treasury, President Roosevelt had appointed me on a special technical committee of citizens—appointed 21, I think there were—about, that was in May, 1937, about three or four months before I became Assistant Secretary of the Treasury—to work with programs of what eventually became the social security legislation, which we worked very had on that. And on my becoming Assistant Secretary of the Treasury, I was then transferred from this general citizens committee to the very special government technical committee which worked with the Cabinet Committee, and sometimes represented the five Cabinet members of that committee in discussions and planning the entire social security program which became the Social Security Act.

Q. What did you do with planning and working out the social security program, or the program that became the Social Security Act of the United States and its procedure? A. I worked constantly with the small committee that was working under the chairmanship, mostly, of Mr. Arthur Altmeyer, who was later the Social Security Commissioner

and first chairman of the Social Security Board.

And at the same time I was working on those committees, of course I had this direct responsibility of
2282 developing the Public Health Service into a modern, progressive health program. And the first thing that we attempted there was a nationwide health inventory, which was more than 18 months and became quite outstanding in its report of that 18 months' work—it was quite outstanding in the progress, the index it gave for progress in the whole nationwide health program.

After that survey was completed—it was nearly two years—and presented to the President, the Social Security Act was in effect. President Roosevelt asked me to become chairman of his inter-departmental committee to coordinate all the health and welfare activities of the Federal Government, not only among the new activities in carrying out the federal work but to work out the most helpful —and I was pleased with the word—and the simplest and most practical arrangement with the states in developing this new program.

Q. How long were you engaged in that work? A. I continued as chairman of that committee throughout the time I was Assistant Secretary of the Treasury. And at the time I felt I ought to return to Colorado then, and in 1937 President Roosevelt wouldn't accept my resignation when I sent it in in September, but I finally made him feel that I would have to go back and tend to my coal situation. But he asked me if I would please stay
2283 as chairman. We were developing many programs through several technical committees until 1940.

Q. All right. Let's pass to something else. Now you have told us— A. I hope I can get my dates straight. I am sorry.

Q. That is all right. I will stop you at any time I think necessary.

You told us you first became connected with the Welfare & Retirement Fund of 1947. A. That is right.

Q. When? A. In December of 1947.

Q. Now in what capacity did you become connected with the Welfare & Retirement Fund or the trustees administering that fund? A. On that date?

Q. Yes, ma'am. A. As technical consultant in developing, to help in the development of some of the programs that they had in mine in welfare and health matters.

Q. Was that on a full time basis? A. No, sir. Part time.

Q. Technical consultant on a part time basis? A. That is right.

2284 Q. How long did you continue in your work as a technical consultant? A. Until the spring of 1948, sir.

Q. In the spring of 1948 the collective bargaining agreement or the welfare provisions of the contract of 1948 were in effect. What did you do then? A. Then I was appointed director by the trustees.

Q. You were appointed director of the Fund by the trustees. A. That is right—who were the trustees at that time.

Q. The 1948 trust fund was succeeded by the Welfare & Retirement Fund of 1950? A. That is right.

Q. Have you continued as director during that 1948 fund and through the 1950 fund up to date? A. I have.

Q. As director of this fund what are your duties generally, briefly, as director? A. As director to see that we have, of course, first primary principle, try an efficient and able staff to work in the office and on the programs; to develop procedures implementing the resolutions of the trustees authorizing benefits or in establishing eligibility requirements; carry on the day to day operations in

2285 connection with those programs, and see that the various staff members who are in charge of details of these various programs, that the work is going ahead smoothly and accurately.

Q. How much have you had, or did you have, in the earlier days and continue to have today, with setting up the entire program? A. I had quite a part in it, I would

say, sir, at least in the sense of helping to work out certain technical arrangements as the experience I had had in the federal and state government might perhaps be of help in developing the programs.

I felt very strongly, of course, about the basic principles and policies for which the fund was created or I would have been there even as a consultant or anything else. It was aimed at developing further the conservation of human and economic resources in the interest of the public.

That is what seemed to me of terrible importance, to have a tremendously important public interest involved.

Q. Did you have any other trust fund of a like nature to guide you or did you people have to blaze a trail? A. I beg your pardon?

Q. Did you people have to largely blaze a new trail?

2286 A. We did indeed except in the sense that all of us who had cared about this public interest in the relations between management and industry had always tried to do certain things but this particular thing was entirely new. It was really an uncharted way.

Q. Who were the trustees of this fund at the time you became director? A. Senator Bridges, Mr. Van Horne and Mr. Lewis.

Q. Mr. Lewis was the man designated by the union? A. Union.

Q. Mr. Bridges was the man designated by whom? A. Well, he was supposed to be the neutral trustee.

Q. Who was Mr. Van Horne designated by? A. He had been designated by the operators.

Q. By the operators? A. That's right.

Q. Have there been changes in the trustees since that time? A. Yes.

Q. What trustees have left and what have been added?

A. Mr. Charles Owens was designated in the 1950 fund by the operators. He served until his death, I think it was

in July of 1957, at which time Mr. Henry Schmidt,
2287 president of North American, was designated by the operator group.

Q. Do you recall whether 1958 or 1957, Miss Roche? A. I am sorry. It was 1958. I am so sorry.

Q. And Mr. Owens died— A. And Mr. Owens died in 1957 and Mr. Schmidt was not formally seated until early 1958.

Q. And he was selected by the operators? A. That is right.

Q. Did you become a member of the board of trustees? A. I was a member of the board of trustees in the 1950 contract named by the other trustees in the contract.

Q. Perhaps I should go back and ask you how, if you know, was Senator Bridges chosen for membership? A. I couldn't tell you anything about that firsthand. I heard various reports but I could not say.

Q. But anyway, he was the neutral member? A. He had been under the 1948 fund, that is right.

Q. Of the 1948 fund. A. That's right. I succeeded him as the neutral trustee.

Q. And you were named, I believe in— A. 1950, the 1950 contract.

2288 Q. The record is already in here and shows you were named in the 1950 contract when it was signed? A. That is right.

Q. And you have continued as trustee since that time? A. That is right.

Q. Miss Roche, how frequently do these trustees meet? A. Four or five times a year.

Q. Where is the office of the trustees of this Welfare & Retirement Fund? A. 907 15th Street.

Q. Washington, D. C.? A. Washington, D. C. Headquarters.

Q. Do the trustees own or do they rent a building there?

A. The trustees rent the building. There are really two buildings, seven-story buildings connected.

Q. They pay a rental for those buildings? A. They do.

Q. Do you know what that rental is? A. I think it is around $200,000 a year.

Q. From whom is that building or those two buildings rented; who owns them? A. The United Mine Workers of America.

2289 Q. And do you have—I say "you", I mean the trustees—have the entire building or is there a part of it rented to somebody else? A. We have six floors of one building and the entire seven floors of the other. The ground floor of one of the buildings is rented to other people.

Q. Other tenants? A. Yes, sir. Small shops there.

Q. How do you determine the amount of rent? What procedures do you follow to determine the amount of rent? A. It is constantly checked to make certain it is in line with prevailing rents in the downtown district of Washington.

Q. And have you kept paying the rent that was prevailing in the commercial area there where you are located? A. That is right.

Q. Is that rental paid monthly? A. Monthly.

Q. To the United Mine Workers of America by the trustees and out of the trustees' funds? A. It is paid by the trust fund; yes, sir.

Q. You told us a minute ago that the trustees met four or five or six times a year. Where are those meetings
2290 held? A. In the offices of 907. There is a special room for the trustees, offices there, and they meet there regularly.

Q. And are they attended as a rule by all three of the trustees? A. Yes, that is right.

Q. Who, if anybody else, attends those meetings? A. Counsel to the trustees, Mr. Val J. Mitch; comptroller of

the fund, Mr. Thomas Ryan, and I attend—well, I am trustee—

Q. You are one of the three trustees? A. Also attend as director.

Q. How long do those meetings last that you have? A. Two or four hours. Sometimes only about two, but very often longer.

Q. What is the nature of the business that you transact at these meetings of the trustees? A. The minutes of course are read.

Q. That is the minutes of the previous meeting? A. Minutes of the previous meeting are read.

Q. Incidentally, who keeps those minutes? A. Counsel to the trustees, his secretary. He acts as secretary of the board.

Q. That is Mr. Mitch? A. Mr. Mitch, that is right.

2291 The minutes of the previous meeting are read and discussed, the action taken on them. The group is given a full report by the counsel of all legal matters and the litigation that the fund—against the fund or the fund is carrying through, and any developments of any legal nature which the trustees would not only be obligated to know about but would be interested in.

After that report of counsel, the comptroller—

2292 Q. Before we leave that report of counsel, you said that counsel reports on various items in litigation. Does he report on the suits that have been instituted for the collection of unpaid and past due royalties? A. Always, completely.

Q. In detail? A. In complete detail.

Q. Does he give the names of the companies? A. He does. Amounts.

Q. Names of the companies, the amounts and the courts? A. That is right, and the state of the litigation.

Q. And as these suits progress from time to time, does he make reports? A. He does.

Q. Stating the progress of the various items in litigation? A. Yes, sir, every meeting.

Q. When they are finally concluded, does he make a report? A. He does.

Q. Do you people as trustees point out a particular company that happens to be delinquent in its payment of royalties and designate to him, to counsel, that he shall bring
2293 suit, or how is it handled? A. By resolution of the trustees, place him under the responsibility of following through on all delinquencies on which no arrangements can be satisfactorily made to assure complete payment, and there has never been a case that has not been pressed to the very end on complete payment. And if it is, in his judgement, that is required, he is authorized to bring suit and immediately report at the next meeting on the status.

Q. Do the trustees single out particular coal companies, say small ones, and designate that counsel shall institute a suit against this company or that company? A. No.

Q. Has that ever been done? A. No, not to my knowledge, sir, since I have been trustee.

Q. Has there ever been any discussion by the trustees that you know of in meeting or otherwise that suits were to be instituted against particular coal companies for any other purpose than to collect the money that they owe? A. No, sir, definitely, positively no.

Q. Has there ever been any movement as far as you know of the trustees to impose upon or work a hardship on any company? A. No, sir, none whatsoever.

Q. And now you mentioned a moment ago with reference to the settlement, what about the attitude of the trus-
2294 tees with reference to giving away, to refusing to collect a part of the money that may be due under their signature on the contract? A. It is never permitted, sir.

Q. What do you do with it? A. We continue until it is litigated in court.

Q. Do you exert every reasonable legal effort to collect it? A. We certainly do.

Q. Is that true regardless of the company or the location? A. Regardless of the company or where it is or anything about it.

Q. And Mr. Mitch, himself, is responsible for the handling of those claims? A. He has the responsibility. Of course, he has very remarkable assistants in it, but that is his personal responsibility, yes, sir.

Q. He does, of course, have associate counsel or assistant counsel working under him or working at his direction? A. That is right.

Q. Miss Roche, what types of benefits are paid by the trustees fro mthe fund? A. Pension benefits, hos-
2295 pital and medical care benefits, funeral expense, survivors' benefits, and the very special, not so large but extremely important special benefit to mine disaster widows and survivors.

Q. Are there different heads of the different divisions, one that looks after pensions, say, and one that looks after hospitalization benefits and another that looks after these disaster benefits and so on? How are they handled? A. We have an entirely remarkable system and entirely unique in the world, to say nothing of this country, on hospital and medical care benefits. It is headed by one of the great medical experts of the country, the deputy surgeon general, Warren F. Draper. He has complete and final decision on all medical matters. His standing is internationally recognized. He has ten area medical offices distributed throughout the coal mining areas working under his supervision. The medical service does not have anything to do with the decision as to who is eligible for the hospital and medical care.

Q. What does the medical service under his supervision— A. It provides this tremendous volume of quality hospital and medical care and in that it is very, very unique because

we have stressed from the inception of the program,
2296 which is one of the first we got going in 1948 when

Dr. Draper joined us as the executive medical officer of the Trust Fund, that we would furnish the authorized benefits or benefits authorized by the trustees, but the quality of medical and hospital care had to be good, had to be the best we could get for our beneficiaries, and it had to be at a cost that was reasonable as determined by professional standards, and that has been a 12 or 13 year record of which I don't think there is anything we are prouder of, because there have been tens and tens of thousands of babies' lives saved, mothers' lives saved, of cruelly crippled, disabled men who have been left to die in the mining communities who, through the rehabilitation, have been again brought back to at least self—being able to take care of themselves, and many of them to be re-employed after vocational training under the government program.

Q. In connection with these medical services, have the trustees established hospitals? A. The trustees have arranged through loans to Miners Memorial Hospital Association for the construction of ten hospital chains in Kentucky, Virginia and West Virginia. That was arranged by the trustees some years ago, because unless we did that, there was no other way of getting the kind of quality of care and provision for the vast numbers of people who were beneficiaries of the Trust Fund in those communi-
2297 ties and states.

Q. Since the establishment of those hospitals, they have continued to be operated? A. They have, indeed.

Q. Now you mentioned disaster relief benefits. Would you go very briefly into that for us so we can see what you do? A. Those are financially not as extensive, of course, as the other benefits, but whenever there is a man killed in a mine, whether it is one or two or whether it is what they call a major disaster that we hear about — they get great publicity, but the small killings aren't so much in evidence—

we provide—the thing is sudden and even when compensation starts a little later and social security starts, there is a brief period there of agony, apprehension and fear of paying the grocery bills and this, that and the other. We have our own very highly trained and experienced field staff who go out on all our benefit programs to do two things, to check and make sure that eligibility is fully met before any money is paid on the benefit. We do that, the fund — nobody else can do that — in addition to that, to make certain that every human agony is met by giving a man an opportunity to prove his eligibility.

That staff, when there is this kind of disaster, have been authorized by the trustees to go instantly, and they
2298 do — I get a telephone call at twelve o'clock at night sometimes, or early in the morning about a disaster, and the very fine young man that heads up this field staff instantly has one or two of his boys, depending on the number, the extent of the accident — they are there and they are authorized to give a few dollars, up to a hundred dollars, right in cash. You don't give them checks. It is right there. It is money in their hand, to meet the grocery bill or the immediate needs. Sometimes it is clothes for the children to go to the funeral.

I say it is important because of the psychology, not so much in the money.

* * * * * * * * * * *

Q. Tell us about the pension fund, please. A. Yes, sir. Where do you want me to start?

Q. Start and tell us briefly about what the pension
2299 is and how you handle it. A. The pension program was started, the first pensions were paid in September 1948. That was shortly after I became director, and the months between my appointment that spring of 1948 and the first pension payment on the program we worked out were devoted entirely, and I might add night and day, to working out the kind of arrangements and the application forms and all the details by which —

Q. Let's pass on because the '48 fund is out of existence and really not involved in this, and let's come to the 1950 fund and how you handle it now and in the last six or eight years? A. Fine.

Q. Please. How have you handled the pension fund and in what way is it administered and to whom paid? A. The fund is administered by the administrative staff of the fund in conformity, complete conformity with the resolutions of the trustees authorizing the pension benefits. That means, of course, that we are responsible for seeing that the amount of the pension and the arrangement for payments both go through absolutely without any slip; that the eligibility of every applicant is fully — we are fully satisfied as to his eligibility and that —

Q. Speak a little louder. A. I am sorry again. And that anyone who is ineligible does not receive the
2300 pension. We have already authorized about and there are now being paid about 66,000 pensions.

Q. You mean there are about 66,000 people, former miners? A. That is right.

Q. Receiving pensions today? A. About that number. It changes every day, of course.

Q. There are, of course, many others whose pension payments have been expired by death and so on? A. By death, yes.

Q. Ordinarily, how long do the payments of these pensions continue? Do they continue for life, until death? A. Oh, yes, they continue until death.

Q. Are those pensions on a uniform amount per month? I mean is there a difference in the rate of pension to a former miner who lives in Pennsylvania, or Ohio, than one who lives in Tennessee? A. No, sir, they are all the same, in addition to the social security payment they may get.

Q. And the fact that the pensioner receives social secur-

ity, does that in any wise enter into his pension
2301 claim? A. No, sir.

Q. Something has been said in this record, Miss. Roche, that pensioners have at times been on picket duty lines where there was an organizational strike or an organizational movement perhaps, not strike but movement on foot by the union to organize a mine. Have the trustees ever at any time instructed or directed pensioners to be on picket duty? A. Never.

Q. Have you ever heard of them being instructed or directed by the trustees or with the authority of the trustees to go on picket duty? A. Never.

Q. Has there ever during all the time that you have been connected as a trustee been a rule or regulation that if a pensioner did not go on picket duty, his pension would be dropped? A. No, sir.

Q. To your knowledge has anything of that sort ever happened? A. As far as the fund is concerned, never, sir.

* * * * * * * * * * *

Q. Have you ever had any complaint by any one that it has happened, if they refused to go on a picket line?
2302 A. No.

Q. Nothing of that sort to your knowledge, and you have been there all the time? A. No, sir.

Q. And you do attend, you have said, practically every meeting of the trustees? A. I attend every meeting. I make no exception.

Q. You have here in front of you, I see, a number of files that I want to pick up. Something was said in this record that benefits depend upon membership in the union of the person who receives such pension benefits. Is that correct? A. No, sir, it is not correct.

Q. Has at any time since 1950 when the trust fund of 1950 was established union membership been a requirement for pension benefits? A. No, sir.

Q. Never? A. No, sir.

Q. Has there ever been any action taken by the trustees since the establishment of the 1950 trust which would require membership with or affiliation to the union as a basis for benefits? A. No, sir.

2303 Q. Miss Roche, does the United Mine Workers of America Welfare and Retirement Fund publish an annual report? A. It does.

Q. This Fund began in 1950 according to the record here. I ask you if you have present here copies of the annual report as published by the fund beginning with the year 1950 and running through 1958? A. This first document is the summary of the previous funds and the report of the fiscal year 1951. '50 — we were only three months, four months in existence.

Q. So in other words, the effect — A. Those months were all audited and it is a summary of the four years. After that every year they have been published.

Mr. Kramer: I want to file this report of June 30, 1951 as Exhibit 128.

(Exhibit No. 128 was marked for identification and filed.)

Mr. Kramer: The 1952 report as Exhibit Number 129.

(Exhibit No. 129 was marked for identification and filed.)

Mr. Kramer: The 1953 report as Exhibit Number 130.

(Exhibit No. 130 was marked for identification and
2304 filed.)

Mr. Kramer: The 1954 report as Exhibit Number 131.

(Exhibit No. 131 was marked for identification and filed.)

Mr. Kramer: The 1955 report as Exhibit Number 132.

(Exhibit No. 132 was marked for identification and filed.)

Mr. Kramer: The 1956 report as Exhibit Number 133.

(Exhibit No. 133 was marked for identification and filed.)

Mr. Kramer: The 1957 Report as Exhibit Number 134.

(Exhibit No. 134 was marked for identification and filed.)

Mr. Kramer: And the 1958 report as Exhibit Number 135.

(Exhibit No. 135 was marked for identification and filed.)

Mr. Kramer: Now Your Honor, while we do not feel that the years '59 and '60 are material, but in view of the fact that evidence has gone in, and subject to previous exceptions, but so as not to waive any rights, I also file '59 report as Exhibit Number 136.

2305 (Exhibit No. 136 was marked for identification and filed.)

Mr. Kramer: And the 1960 report as Exhibit Number 137.

(Exhibit No. 137 was marked for identification and filed.)

. . . . . .

Q. I notice in the 1951 report, as Appendix A, which follows page 17, there is a report of the Certified Public Accountants, Wayne Kendrick and Company.

Is there an annual audit made of the finances of the Welfare and Retirement Fund by certified public accountants?

A. Every year, yes, sir, there is. It is extensive.

Q. And is the report for that current year shown

2306 in these various reports that these ladies and gentlemen of the jury now have? A. Each annual report contains a reprint in full of the auditor's report. Of the independent certified —

Q. These are independent certified public accountants, not in any wise connected with the fund? A. Not at all. Wayne Kendrick and Company.

Mr. Kramer: I refer particularly to — I'll take just an illustration, Your Honor. I am not going through all of them, it is too tedious, but if I may, I will make statements, and counsel will check them, because you have copies, and I am now picking out just at random — I can pick out of the others, but the '54 report, and it is on page, Your Honor, page five of '54.

That page, I believe sets out — I am going to state it, Your Honor, and if counsel desires, they can follow it, so as to shorten this matter.

The Court: Yes, sir.

Mr. Kramer: This page, Your Honor, sets out the summary of the benefit fund and starts on page five. Somebody there has this very one in their hand on the jury now.

Similar language, Your Honor, is in others, not always verbatim the same, but practically the same in every
2307 one.

The amount of pension benefits were paid during the fiscal year on the particular year I happen to hold in my hand, the pensions paid during that preceding fiscal year — page five, Miss Roche — was $64,092,309.10.

Sixty-four million, ninety-two thousand. And as of June 30, 1954, there was 54,937 aged, retired miners receiving this benefit, which at that time was a hundred dollars a month, and I want to read the next paragraph, Your Honor.

"Trust Fund — "

And whoever may have this one may follow me there.

"Trust Fund regulations governing authorization of pensions are the same as outlined in last year's Annual Report. These regulations require an applicant to be sixty years of age or over at time of application for pension, to have completed twenty years of seryiec in a classified job in the coal industry within the thirty years immediately preceding the filing of an application, to have been regularly employed in a classified job in the coal industry immediately prior to May 28, 1946, and to have retired from a classified job in the coal industry after that date."

2308 By Mr. Kramer:

Q. Are those the requirements for pensions? A. Substantially the same today, sir.

Q. And have been since 1955? A. Yes, sir.

Q. And I note there is no reference whatsoever to membership of any local union or to any union of the United Mine Workers of America. A. It is not a requirement, prerequisite for eligibility, sir.

Q. And these requirements for eligibility for pensions are published year by year? A. That is right.

Q. In these annual reports? A. That's correct, sir.

Q. Now, tell us about the distribution of these annual reports. A. The annual reports, immediately upon their publication, which is generally about the middle of August or the first of September after the audit is through — that is about thirty days — are circulated immediately, mailed in this form to all operators signatory to the contract, to the district and local offices of the United Mine Workers of America, to all federal and state agencies interested in — the state agencies in the coal-mining areas — to all federal agencies, all the departments and the special divi-
2309 sions of the department that would be interested in any way in any of the programs, to libraries, to large and extensive lists of professional people, both medical, hospital, and legal, to state universities, all state university libraries, and to all technical institutions interested in the work, and to a very extensive mailing list of interested individuals of some approximately, as I recall, about thirty thousand, and anyone requesting a copy of the report may receive it, of course. It is a public property.

Mr. Kramer: I want to turn to the 1955 report and read a statement or two that is there, Your Honor, and I refer now, gentlemen, to page five. "In discharge of their legal obligations, the Trustees recognize the following mandatory eligibility requirements:"

We are talking about pensions.

"Miners applying for a Fund Benefit — "

These are all benefits.

" — must prove that they are presently employed, or were last employed in coal mining, in a classified job by an operator signatory to the Agreement under which he is obligated to pay tonnage royalties to the Fund, and that such employment was subsequent to the date the first Fund was established. Widows and survivors of deceased miners

applying for a Benefit must prove that the deceased
2310 miner was last employed in a classified job by the operator signatory to the Agreement subsequent to the date the first Fund was established. Additional eligibility requirements as established by the Trustees in their discretion govern the various Benefits, and are subject to Trustee revision at any time.

"All eligibility requirements must be fully satisfied before a benefit is authorized. No benefit is authorized solely on the basis of union membership.

"Determination of eligibility can be made only by the Fund after an application and all required evidence is received from the applicant, on whom the burden of proving eligibility is placed by the Trustees resolutions. No applicant is eligible for any Fund Benefit until his eligibility has been thus determined by the Fund and the Benefit authorized; no retroactive payments are made for any benefit."

Now, I turn over, Your Honor, to page six of this same report.

Application forms — "

And these are application forms for benefits. Someone in the jury box holds the report I am reading from, June 30, 1955, and I am reading from page six. "Application for Benefits", two-thirds of the way down the page.

2311 "Application forms covering the essential data required for each benefit authorized by the Trustees, and instructions as to the necessary documentary evidence to be submitted, are prepared with utmost care by the technical and administrative staff, printed and made available to all who desire to submit to the Fund an application for a benefit. Distribution of the application forms is made to all District and Local Union Officers of the United Mine Workers of America for servicing their members in filling out applications and submitting them to the Fund for its consideration and determination of their eligibility. Individuals writing directly to the Fund in regard to Benefits are

instructed as to filing procedures and eligibility requirements."

2312 I will read just one sentence from page 28 of the 1959 report. This is in all of them. I don't want to take time to try to dig it out. I am reading from page 28, the last sentence in the paragraph in the lefthand column. This is in the year ending 1959. Let's go ahead without digging them up. It is in the others but I won't take the time to dig it up.

"Trust Fund Benefits are not authorized on the basis of union membership, but only in conformity with Trustee regulations; all eligibility requirements must be fully satisfied before a Benefit is authorized."

And on the next page of the same report is this language — and I am reading the first paragraph on page 29, your Honor, and this is the 1959 report.

"Application forms covering the essential data required for each Benefit authorized by the Trustees, and instructions as to the necessary documentary evidence to be submitted, are prepared with utmost care by the technical and administrative staff, printed and made available to all who desire to submit to the Fund an application for a Benefit. Distribution of the application forms is made to all Districts and Local Unions of the United Mine Workers of America for servicing their members in filling out applications
2313 and submitting them to the Fund for its consideration and determination of their eligibility. Individuals writing directly to the Fund in regard to Benefits are instructed as to filing procedures and eligibility requirements."

Now similar language, your Honor, is in all of these exhibits. I do not want to take the time to burden the record with it.

. . . . . .

Q. Miss Roche, there has been raised in this case a ques-

tion about people, miners, who have retired and who are not members of the union are not entitled to benefits.

I believe somebody on behalf of the trustees, not you, filed an answer to an interrogatory about difficulty in digging out records.

I will ask you if at my request recently you have had your staff go in a part of the files and get some of the files showing where benefits were paid to people who were
2314 not union members? A. Yes, sir.

Q. I believe the ones that I have in front of me from the files are files, one file for each year, beginning with 1954 and continuing through 1959. A. That is correct.

Q. Are these the full, complete and exact files as they came from the thousands of files you have? A. They are.

Q. How are these files kept, so we will have some idea of the difficulty of someone in things of this sort? A. They are filed alphabetically, and, also, of course, as soon as an application reaches our business mailing room it is given a number and sent right up to the auditing office. They are alphabetical files — they are filed alphabetically and the number of the application forms give some intimation, roughly, very roughly, about the time. Because the lower the number the further back they are, and the bigger the number the more recent they are, is the only way I can state it very — not very accurately.

Q. I find that the one, the first one I have on top, is number — is this the number up here? A. Yes, sir.

Q. It is a red stencilled number? A. That is right.

Q. And this first one that I have seems to bear date
2315 of May 10, 1955. A. 1955, that is right.

Q. And what is the number on that file? A. Pretty dim, 78169.

Q. And on the last one, which seems to be, December, 1960 — A. 104758.

Q. That would be one hundred four thousand, seven hun-

dred fifty eight? A. There are tens of thousands of documents in our files — of these folders in our file.

Q. Is any effort made to keep them separated as to those that apply that are members of the union when they make application and those that apply who are non-union members? A. Certainly not.

Mr. Kramer: I want to take up, your Honor, the first one here, which is marked "noted May 10, 1955". This file — and this seems to be a fellow — the file of a man named Clem, C-l-e-m, Terreo, T-e-r-r-e-o, and I want to file this entire file as Collective Exhibit 138.

I want to ask counsel to agree if we may withdraw these files and reproduce exact copies and put them in the record at the close of the testimony.

2316 Mr. Rowntree: That will be perfectly all right.

. . . . . .

(Exhibit No. 138 was marked for identification and filed.)

. . . . . .

2317 By Mr. Kramer:

Q. The application that we started to talk about just before the recess was made by a man whose name is Clem Terreo, and his address is Eccles, West Virginia, I believe. A. That is right.

Q. Now under this file he wrote for a set of the regulations —.

. . . . . .

Q. — set of regulations showing information with reference to the welfare fund, and his original letter was dated what? Let's see if it was dated. Dated January what?

2318 A. 18th, 1955.

Q. 1955. Now was a pension granted on that application? A. That date is the letter I wrote him.

Q. I beg your pardon? A. His letter was written January 6th, 1955.

Q. And you acknowledged receipt — A. And I replied on that date, January 18, 1955.

Q. Was he granted a pension? A. He was.

Q. On what date was the final action taken and the pension granted? A. Pension was authorized May 4, 1955.

Q. I note a communication from you to him dated February 4th, 1955; is that correct? A. That is right.

Mr. Kramer: I want to read this communication, your Honor.

"This will acknowledge receipt of your letter of recent date requesting forms and instructions for making application for Fund benefits.

"We are enclosing forms on which you can furnish us with information necessary to ascertain your eligibility for Fund benefits. Please fill out all of the blanks on Form DO-1 listing all data requested to the best of your
2319 knowledge; also complete the Previous Employment Record listing your service in the coal industry year by year beginning with 1925 and continuing until your retirement.

"As certification of your service prior to 1937, you are required to obtain, if possible, a statement from each company with whom you claim employment. These statements should outline the exact dates of your employment and give your job classification. To be acceptable, it must be written on official company stationery and signed by a responsible representative of the company. If a company statement cannot be obtained, you must explain why this is not possible. In addition to company statements, it is required that you submit at least two forms 14-P for each period of employment claimed before 1937. These forms must be completed only by persons who actually worked with you.

"Please return the completed forms to this office together with documentary proof of your age. It is necessary that the Preliminary Application form be signed before a Notary Public. We shall communicate with you at a later date regarding your status.

"Sincerely yours, Josephine Roche, Director, UMWA Welfare & Retirement Fund."

2320 This is a copy of her reply, which is in the file, your Honor.

By Mr. Kramer:

Q. Then there is in the file a letter — not a letter but a form authorizing you to obtain, the trustees to obtain the information from the Social Security people with reference to his earnings and employment? A. That is right.

Q. And there is in the file a report furnished to the trustees by the Social Security people? A. Correct.

Mr. Kramer: Then there is in the file completed forms of the ones referred to in your letter giving the dates of employment, names of the coal companies by whom he was employed beginning with '25 and running through '36, and showing the various periods of employment and the number of the mine and the location.

There is also included in this a paper returning to you a communication from one of the coal companies that he was employed — that is the Eastern Gas and Fuel Associates, Coal Division, dated February 8, 1955, and states that they have checked their payroll records in order to determine the length of service at the Eccles mine, and they give the date.

2321 Mr. Rowntree: May I inquire just on the form, just before the letter there, does it inquire as to the local union number?

Mr. Kramer: No, sir, the form does not. I will read the whole thing.

This is a statement by a man who has worked with him, and the form says:

"Certification in Support of Employment Before 1937.

"I, H. J. Clay, live at Eccles, West Virginia, and was born on May 30, 1891, I am not receiving benefits from the U.M.W.A. Welfare and Retirement Fund."

And then it says, "If receiving benefits, my file number is" blank, and there is left a blank here.

"I am still working in the coal industry. My present employer (if still working in the coal industry) is Eastern Gas & Fuel Associates located at Eccles, West Virginia. My Social Security Number is 236-05-6296. I first became acquainted with Clem Terro, the applicant name above, on or about November, 1910.

"The applicant worked with me as follows: (List Employment for Each Year on a Separate line)."

2322 Then on the first line the heading is "year", under it "1925", "From" "To", January, December; "Name of Coal Company", "Crab Orchard Improvement", "Location of Coal Company, Town, State, Eccles, West Virginia, Mine No., 5 and 6, Local Union No." and it is that one that is blank.

That is, this person who is making the statement left it blank.

And then "Type Work, Armature Winder." The same is true down to the year 1934, being a line for each year, and in 1934 where it says "Local Union No." this man, who is making the proof, says that he then was a member of Local Union 5770.

Mr. Robertson: This is an employment record of the applicant; is that correct?

Mr. Kramer: No, here is what it says. The applicant — this man is filing this statement to support this applicant's request for pension, your Honor, and he is submitting a statement from this man, H. J. Clay, and H. J. Clay says that he worked with the applicant — Mr. Terreo, whatever his name is, Terreo, "I worked with Mr. Terreo at this mine during these years." And then he said that "I am a member" --

Mr. Robertson: They are not concerned with the

2323 detailed employment.

Mr. Kramer: You may point that out, if you wish

on cross examination, but I have no objection to pointing out where it says that the applicant was a member of the union. He may have been. I don't know.

2324 Where it says "Local union member", what it says was "The applicant worked with me as follows," then he says and gives the date and place. I don't know whether it means the applicant or the affiant. One of them had belonged to the union, maybe both of them, I don't know. But that was back in 1935 and '36.

There are two copies of that same form in here, your Honor.

Then there is another form submitted by the man himself, gives his employer year by year, beginning with 1916 and running to the time he quit work in the mines, 1946, and he gives the months that he worked, the name of the company he worked for, the location of it, the job he held, and which says nothing at all about the union for anybody on there, one way or the other.

There is included, your Honor, the birth certificate. There is a statement of this claimant again, and I guess maybe in view of the question raised, I should read it in full.

"Preliminary Application. Information about Miner." And this is the one he signs himself.

"Name: Clem Terreo. Social Security Number: 233 12 2155. Address: Eccles, Raleigh County, West

2325 Virginia. Date of Birth: September 6, 1889. Place of Birth: Italy. Is miner a member of the United Mine Workers of America? Not at present time. If 'yes', list local union number and district number," and those are blank.

"Is the miner presently employed? No.

"If 'yes', name of company. Job classification." Both of which are blank because he is not employed.

"Place of last employment in the coal industry: Eccles, West Virginia.

"Dates of last employment in the coal industry, from November 1916 to June 12, 1946."

And then it asks for a list of all employment since leaving the coal industry. It says he worked in a block plant from 1946 to 1954, and signed by him and sworn to.

A letter of transmittal of these forms, letter of inquiry to know whether or not the job armature winder is within—if employed as an armature winder is classified under your district contract, because under the collective bargaining agreement the provision is in there, not union agreement.

A response from the local union telling that it is, and the local union says this about the man:

2326 "In reply to your letter of March 2, 1955, concerning the work performed by Mr. Clem Terreo of Eccles, West Virginia, between 1924 and 1946, please be advised that the classification as an 'armature winder', which he was doing during this time is considered covered employment under the Contract in this District.

"It is our information that Mr. Clem Terreo left the mining industry on June 12, 1946, and since that time operated a dairy, hauled mine timbers, operated a saw mill, and last operated a cement block plant. During this time he failed to maintain his membership in the United Mine Workers of America.

"Sincerely yours, George J. Titler, President, District 29, UMWA."

The other correspondence, and I am not going to take time to read it but which may be read, of course, later, and under date of May 4, 1955, this letter which tells him definitely he had not been a member of the union since 1946, and under date of May 4, 1955, he was awarded a pension, though not a member of the union.

We have there, your Honor, the application of Steve Molnar, Mo-l-n-a-r, which was filed on or at least sworn to on June 4, 1957. That is the only date that seems to appear there.

The Witness: Received August 29, 1957.

2327 Mr. Kramer: But one of the departments investigated and says in August '57, and to which is attach-

ed the correspondence and the final award of pension to this man on August 29, 1957. This file sets out, your Honor, that this man was not a member of the union, and I will read that part.

Mr. Rowntree: That is one of these files you had over here?

Mr. Kramer: Yes, sir, it is one of the files you had there. I picked up the ones you had there. You had all of them there.

And I ask this file be marked as Exhibit 139.

(Exhibit No. 139 was marked for identification and filed.)

Mr. Rowntree: Your statement that he was not a member of the union ---

Mr. Kramer: Do you want the proof that is in here?

Mr. Rowntree: Does that mean he never was a member?

Mr. Kramer: Oh, no. Some of these may have been members one time and not members at another, but they were not members of the union, your Honor, at the time they made application, and I think all of them, unless there was one, was not even a member at the time he last worked. The one I read a minute ago hadn't been a member in nine years. At one time he had been a member, but he hadn't been a member in nine years.

2328

Mr. Rowntree: If your Honor please, these files just came in today. Counsel wanted to withdraw them to copy. I wanted to make sure to get them back.

Mr. Kramer: I am perfectly willing to let you have them over the week-end, as far as that is concerned, and we will withdraw them the first of the week and copy what we want. If you want the original files, your Honor, over the week-end, counsel may have them.

Mr. Rowntree: I just wonder how long is it going to take to copy them. Do you have any idea?

Mr. Kramer: It won't take very long. We will try to have someone make photostatic copies and reproduce them.

If you don't want us to take them and you want to keep

them over the week-end, you may keep them over the week-end, just so we get them back for Monday, I am willing to do that, or have the copies made tonight. I don't want to work all night on the stuff, but we will have the copies to you some time tomorrow. Either way you want to
2329 handle it.

Mr. Rowntree: Copies will be all right, if we get them the first of the week.

Mr. Kramer: All right.

In connection with this application of Mr. Molnar, which is Exhibit 139, I will ask you what this application shows of his last employment. This is his form and I am not going back on all of it which goes back to '27 and shows the coal companies and so on he was employed by, but it shows that his last three employments were from 1951, March, to September 1951 by William L. Driskill, a farmer not a coal company. His next to the last employment was in February 1951, Mrs. Walter Winkenverder, W-i-n-k-e-n-v-e-r-d-e-r, not a coal company, as a gardener. The next employment, which is the last one he had prior to filing his application was from September 1952 to September 1956 by the Maryland Casualty Company.

We reserve the right to call the attention of the Court and the jury to other portions later on to avoid wasting time

I will file as Exhibit 140 the file of John Shenkarik, S-h-e-n-k-a-r-i-k.

(Exhibit No. 140 was marked for identification
2330 and filed.)

Mr. Kramer: And filed --

The Witness: Filed April 12, 1956. That is 2, April 2, 1956.

By Mr. Kramer:

Q. Was pension granted to this man? A. Yes. Terminated.

Q. Terminated, I believe, by death, according to this report? A. That is right.

Q. In March — no, in January? A. January 25, 1961.

Q. There seems to be a letter in this of advice from some insurance company with reference to the date of his death and so on, is that right? A. I wouldn't wonder. We had much communication from the insurance companies. They love to run your business, off the record.

Q. Did you give the date it was filed? A. I said April 12 but it is April 2.

Q. What was the date of the authorization for pension in that case? A. April 4, 1957.

Q. There was a large volume of correspondence in this case? A. Very large.

2331 Q. To show qualification and so on. There seems to be an indication that at first this claim was disallowed and then later it was allowed? A. That is right.

Q. What was the reason for the denial or disallowance before it was reconsidered and allowed? A. He had not adequately established proof of age, 60. He also had not established proof of 20 years' classified service in the coal industry within the 30 year period immediately preceding the date of his application, which is one of the basic requirements for eligibility. He also had not at the time of the first denial, had not established proof of employment of an operator signatory to the National Bituminous Coal Wage Agreement at the time of retirement.

2332 Q. It is a requirement, I believe you mentioned earlier, that at the time a man leaves the mining industry in order to be eligible for these benefits, he must have been employed by a signatory to the contract. A. That is correct, sir. The whole basis is the employee-employer relationship of the signatory ---

Q. That is the provisions --- A. Of the Taft-Hartley Act?

Q. Which you have to carry out? A. Scrupulously, with the terms of the trust agreement, and the contract adhered to.

Q. Now, the three grounds for disqualification that you read were later met? A. They were.

Q. As shown in this correspondence? A. That's right.

Q. And they were awarded? A. Yes, after the additional data requested by the correspondence that was submitted.

Mr. Kramer: I have another file here of Rico Boggio which I want to introduce as Collective Exhibit Number 141.

(Exhibit No. 141 was marked for identification and filed.)

By Mr. Kramer:

2333 Q. What was the date that this application of a non-union member was filed? A. Non-union beneficiary.

Q. Non-union beneficiary, yes, ma'am. He would hardly be a non-union member, would he. A. 5th of November, 1958.

Q. And what was the date that he was awarded his pension? A. 4th of December, '58.

Q. Filed his claim or application in November and was awarded his pension --- A. That's right.

Q. --- in December, 1958? A. That's right.

Q. And this file discloses that he was not a member of the union? A. That is correct.

Mr. Kramer: Correspondence and so on is in it, Your Honor, and we pass it to the jury.

The next file that I want to use here is the file of Robert Taylor, file it as next Collective Exhibit.

(Exhibit No. 142 was marked for identification and filed.)

By Mr. Kramer:

2334 Q. What was the date that this application was filed by Mr. Taylor?

It should be right here.

A. I know, but it doesn't always. You have to look at two places.

May 28, 1958.

Q. Was this pension granted? A. It was.

Q. What date? A. On the 24th — the 24th of April, 1959.

Q. And the information with reference to this file — with reference to this claim or applicant is all set forth in here? A. Exactly. Everything about it in every one of these cases is in this file.

Mr. Kramer: And now the last one that we are going to file is the application of Thomas Liddle, mark as next Collective Exhibit.

(Exhibit No. 143 was marked for identification and filed.)

By Mr. Kramer:

Q. What is the date this application was filed? A. The date of receipt is here.

Q. That is the audited receipt? A. Yes.

2335 Mr. Kramer: I am not going to waste time hunting that. It is in here, but we can't make it out.

The Court: All right.

By Mr. Kramer:

Q. When was this pension granted or allowed, authorization? A. December 1, 1960.

Q. And this is another person who was not a member of the union and who received pensions from the Welfare Fund? A. Direct application to the Fund, that is correct.

Q. Made his own individual application? A. That's right.

Q. And received pension on his application? A. That is correct.

Q. Miss Roche, has Mr. Lewis, during the period that he served as president of the United Mine Workers of America, or at any time since then, attempted as a president of that organization, or president emeritus of it, sought to control the handling of the trust so far as you are aware? A. No, sir, never.

Q. Has he dictated policy any more than the other trustees so far as you are aware? A. That has always been done by the three trustees in formal session, together, not

2336 by him.

Q. Have you people — well first, you, yourself —

have you as a trustee, in passing upon claims for benefits of any kind, whether they are pensions, hospital, catastrophe, or any other kind attempted at all times to follow out the provisions of the law and the trust agreement? A. Absolutely, sir.

Q. Without deviation, because you have union membership and non-union membership? A. Absolutely, entirely. Our obligation is completely to the sound administration of the trust. That is primary and basic to operate it in conformity with the National Labor Relations professed in the trust agreement, the National Labor Relations Act of '47, is our first and primary obligation, to administer the trust soundly in the long-range interest to all beneficiaries who are eligible for benefits.

Q. Has that been true regardless of any effort that may have been made to exercise political influence from the outside? A. Nobody has ever tried that on me. I can't speak for anyone else, but I would doubt it very much. One thing you do not mess with.

Q. Has any operator, to your knowledge, attempted to influence you in — or the trustees — in the allowance
2337 or the disallowance of benefits? A. No, sir, not to influence us. Of course, they give information upon our request.

Q. Yes. A. And the same thing is true, of course, of letters in relation to your previous question. We get many letters from Congressmen asking for information or transmitting letters to us which come from a constituent, which we always acknowledge saying we are writing them direct, or have written them direct, giving them full information as to their status, but I did not interpret that in line with your question.

Q. No. A: We have many such letters, and of course we have many letters from operators regarding the fact or the evidence that is requested from them, sometimes by the applicant, or sometimes by us direct.

Q. What, in your opinion, have the trustees attempted to do, has the trustee who was chosen by the operators attempted in the deliberations to reflect the view of the operators, or has he attempted so far as you could tell, to carry out the provisions of the trust agreement with the law? A. He has completely and scrupulously carried out the provisions of the trust agreement and the law
2338 with a definite sense of responsibility and obligation to the trust, as his only — the only thing he is obligated to.

Q. And what about Mr. Lewis as the representative of the union? A. One hundred per cent the same answer, sir. Under no conditions has he deviated in the least degree and has insisted always in conversation to make it perfectly clear that his first responsibility is not to the union but to the trust, in administering the trust. I have heard him say it repeatedly many times in my presence, and he has so acted.

. . . . . .

2339 CROSS EXAMINATION

By Mr. Robertson:

Q. Miss Roche, I wonder if you could tell us what the most distressing welfare problem facing the coal miner is today? A. Work.

Q. Beg your pardon? A. Work, employment.

Q. The lack of work? A. The employment problem, I would say, sir.

Q. What has the Welfare Fund done in this field? A. I think the Welfare Fund, to the extent that it is possible under the trust agreement and the trustee regulations has done a great deal.

Necessarily an unemployment situation such as today which cuts across the entire economy and hits industry, basic and service and everything else, could not pos-
2340 sibly be handled by the trust fund. But by and large, if the production situation had not been brought

down to the extent it has of today, by competitive fuels, by imports, residual oil, and other factors of that sort, to a very great extent, the entire pension program, as you will have noted, no doubt, sir, in reading the regulations, does a great deal to take care of men who are reaching mature age or even old age, although to me sixty doesn't seem too old.

But, anyway, as you notice, sir, one of the regulations is keyed particularly to the mining situation in that you have your thirty years in which to accumulate your twenty years. You could, as one of these applications which I think was called to your attention indicates, you can accumulate at a period considerably before you reach your age of sixty, if you are let out of the mines, and then when you become sixty and meet the age qualifications, you get your pension.

Furthermore, sir, of course, it has been of tremendous help — at least I will withdraw the adjective "tremendous, I would say a very great help — that the fund has rendered through its hospital and medical care benefits in restoring so many of the disabled men and in continuing the benefits which are unparalleled both in their liberality as to service and eligibility requirements, continuing them now for twelve months after a man has lost his — has left his last occupation.

2341

I think, as you will note of course in reading the trust agreement, there there is, within the terms of that agreement, very wide latitude for the trustees, if, as, and when it seems to them to have priority status, to do something specifically for unemployment problems. I do not think that it is a matter probably that sometime we will be able to do any more than we are doing.

Q. I believe in your answer, you noted two things, that is pensions and hospitalization. Has the fund done anything else such as help train men for other work? A. No, sir, we have not done training. We have done an extraordinary — in fact the greatest program I think that has ever been done nationally or in foreign countries, because they have come from all over to see the physical and medi-

cal rehabilitation that Dr. Draper and Dr. Winebrenner, and these other area medical officers have done in restoring people so that they could be, when the physical and medical program is finished, they are then referred to the vocational and rehabilitation service of the federal and state governments, and a great deal has been done of course with those physically rehabilitated men and women, to train them for other occupations.

Q. And that is under the federal program? A. That is—
after the physical is done, that is a function, we have
2342 always paid for that, but we do not pay for vocational training that we refer them — we have a very successful and increasingly successful, I think I could say, relationship, cooperative relationship, with the state agencies on vocational training, although there is a great deal yet to be done there and with us.

* * * * * * * * * * *

Q. Other than these that you have mentioned, has the welfare fund done any other work in this field of unemployment?

Can you hear me?

A. Yes, I can hear you pretty well. If I can't, I will ask you to repeat it.

I would not say so direct, no, sir. I think we have, as much as we could, helped in stimulating other agencies. That of course is also something we do to the best of our ability, to try to point out certain concrete things that other interested agencies which have specialties such as handling unemployment can do. But spending our own money, no, sir, I would not say anything further right now.

2343 Q. I believe on direct examination you stated that the trustees authorized a course of action against all companies who are delinquent in their payments of welfare royalties, regardless of company? A. That is our obligation, of course, yes.

Q. No favor is made in any way? A. No, sir, they are all treated alike. Big or little, or here or there.

Q. And the trustees do not consider — A. That is right.

Q. The ability of the company to pay or anything of that sort? A. If they sign a contract and that is a contract provision, we feel that that should be worked out. Of course, it is true, as counsel no doubt will state in later testimony, that when it can be paid out within a brief period of time, that can be done, but we never make any exceptions to the total amount. If that is what you mean.

Mr. Robertson: That is all.

* * * * * * * * * *

2344 H. G. SCHMIDT

called as a witness by and on behalf of plaintiff and cross-defendant.

* * * * * * * * * *

By Mr. Kramer:

Q. Will you give the reporter your name as you usually sign it, please? A. H. G. Schmidt.

Q. Mr. Schmidt, how old are you? A. I am 61 years old.

Q. And your place of residence? A. I reside in Cleveland, Ohio.

Q. Were you a native of Cleveland, Ohio? A. I am now a native of Ohio, but I was born near Junction City, Kansas.

Q. What is your educational background, please? A. I was born on a farm near Junction City, Kansas. I attended the elementary schools in that little town. I graduated from the high school there and subsequently attended the University of Kansas at Lawrence, Kansas, and later I also at a later date, several years later, I attended the Massachusetts Institute of Technology. I worked on my

2345 master's degree at that time.

Q. What field did you take your degree in, or what was your field of study when you were at the University of Kansas? A. I studied mechanical engineering and received a degree in mechanical engineering, bachelor of science in mechanical engineering.

Q. Were you raised on a farm? You spoke about a farm.
A. Yes.

Q. After receiving your degree in mechanical engineering at the University of Kansas, what was the first work you did? A. The first assignment I had was as a reserve officer at Fort DesMoines, Iowa, for just a few weeks, if that is considered work. I later went to Boston, Massachusetts, where I obtained a job with great difficult at that time as a molder's helper in the foundry of the Blake & Knowles Works of the Worthington Pump and Machinery Corporation as it was known then. It is now known as the Worthington Corporation.

Q. What was the nature of the work you did briefly while there as a molder's helper? A. Well, it was very hard work. I was assigned as a helper to a Polish man who was the molder. I shoveled sand.

2346 Q. I didn't intend to get into all the details. After shoveling sand there as a molder's helper, about how long did you stay at that job? A. I was there almost a year.

Q. Were jobs scarce and hard to get at that time? A. They certainly were.

Q. Following that work, what did you do? A. Quite by accident I shipped aboard the steamship "Leviathan" and was in the Merchant Marine for some number of months, about a year and eight or nine months.

Q. That was on the steamship "Leviathan?" A. That is correct.

Q. What type of work did you do while you were a hand on that steamship? A. Well, it wasn't a very fancy job to start off with. I was assigned in the lowest classification. It was called a wiper.

Q. Wiper? A. A wiper. We did everything that anyone wanted us to do that they didn't want to do themselves.

Q. On that were you making trips back and forth on that ship? Were you working as a wiper across the Atlantic? A. Yes.

Q. The "Leviathan", as I recall, was a large passenger vessel? A. A very large passenger ship and one of
2347 best known at that time.

Q. That was about when with reference to World War I? A. Well, it was in the year — about the year 1924. It was the old "Vaterland" of the Hamburg-American Line that was interned here at the beginning of World War I, later converted to a troop ship during the war, and subsequent to that was converted to a very fine passenger ship.

Q. How long did you say you stayed on that job on the "Leviathan"? A. That was about a year and eight or nine months.

Q. Then what did you do? A. I went back to Boston and obtained a job as a machinist at the shipbuilding yards of the Bethlehem Shipbuilding Corporation.

* * * * * * * * * * *

Q. You had to have a job there, I take it? A. I certainly did. I didn't have very much money.

2348 Q. During these courtship days and while you took this other job there as a machinist, what line of work in the shipbuilding yard? A. That was the Bethlehem Shipbuilding Corporation. I am very proud to say that I helped in a small way in the construction of the airplane carrier "Lexington", which I think was sunk in the Pacific during the late war. I didn't work there very long. I was fortunate in being able to obtain a job in the testing laboratories of the Edison Electric Illuminating Company of Boston.

Q. Now from that job in the Electric Illuminating Company, what did you do? A. After I had been there a number of months, and after this girlfriend of mine had graduated from Wellesley, I decided I had better go back to school, so I entered the rolls of the Massachusetts Institute of Technology at Cambridge.

2349 Q. Did you stay at MIT, as we generally call it, until you graduated, or what — A. No, I didn't re-

ceive my Masters Degree, much to my regret. Instead I received a job with the Goodyear Tire and Rubber Company.

Q. The nature of that job and how long you followed it, please, what happened then? A. At Goodyear?

Q. Yes. A. Yes. Well, I stayed there for a long time. I was with Goodyear for fifteen years.

Q. Where did you start with Goodyear, and what type of job when you left there? A. I started in as a steam engineer, and rose ver yrapidly with that company — with that great company, I might add — to the position of manager of the engineering staff, and in that responsibility, I was in charge of design and construction of plants for Goodyear all over the world, and also more or less as a side issue, I was general manager of the Wheeling Township Coal Mining Company, a wholly-owned subsidiary of Goodyear. That was how I got into coal.

Q. That was your first connection with coal? A. Yes, sir.

Q. Now what type of mining operation did the Goodyear have through this subsidiary corporation? A. This
2350 mine was purchased during World War I as a source of fuel for their own power plants. The company had signed what I considered to be a very unfavorable lease, and when I took charge, it seemed very clear to me that we would have to develop outside sales to make the operation a successful one, and this I did.

Q. You mean sales of coal other than what you used in your own company? A. To others, to consumers other than Goodyear, and that mine, when I left, was producing about a million, two hundred thousand tons of coal from the Pittsburgh Number Eight seam.

Q. Where were the mines of this subsidiary of Goodyear located? A. This mine was very close to Cadiz, Ohio.

Q. How close were you associated, now, in the operation of that mine? A. I was general manager of that mine.

I took a great interest in it. I developed it from a small mine of about three hundred thousand tons of coal a year to a million two hundred thousand tons a year.

Q. What type of mine was it with reference to its operation, mechanized mine or otherwise? A. Yes, it was a mechanized mine. It had just been mechanized partially when I took over in about 1932.

2351 Q. Do you know about how many men you had employed? A. I would recall at this late date about two or three hundred men, four hundred men, maybe.

Q. When did you leave the Goodyear Tire and Rubber Company? A. I left the Goodyear Tire and Rubber Company at the end of June, 1942.

Q. And then with whom did you go and what line of work did you enter into? A. I was asked by the directors of the North American Coal Corporation to assume the full responsibility of that company in Cleveland.

Q. Is Cleveland, Ohio, and was it at that time the headquarters of the North American Coal Corporation? A. Yes, it was at that time, and it is now, is today.

Q. What size organization was the North American Coal Corporation? A. Well, at that time, it was rather small, it was about the 34th in size in the United States, mining about two million tons, maybe a little more, maybe a little less.

Q. Annually? A. Annually, that's right.

Q. Did you carry the responsibility as the chief
2352 executive officer of that corporation from the time you went with it? A. Yes, I was elected the chief executive officer on July 1st, 1942, and I have continued in that capacity to this date.

Q. Where does North American Coal Corporation have its coal operations? A. I believe the figures will disclose that at the present time and for the year just ended we are the 8th largest commercial coal producer in the United States.

Q. Where are your mines? A. Our mines are located in Ohio, West Virginia, Pennsylvania, and a lignite mine, a small lignite mine, in North Dakota.

Q. Are your mines mechanized? A. They are fully and completely mechanized, yes, sir.

Q. Does the North American Coal Corporation have a collective bargaining agreement, or is it a party to the 1950 collective bargaining agreement with the United Mine Workers of America? A. They do.

Q. Did you personally participate in the negotiations for this company, this corporation, with the United Mine Workers of the collective bargaining agreements? A. Only
2353 intimately in the negotiations that took place a year or two ago. I was informed as to the trend of negotiations that took place, but at no time had I taken an active part until the last period of negotiations.

Q. Someone else was doing the negotiating for your company before that time? A. Yes.

Q. I believe you are now one of the trustees of the United Mine Workers of America Welfare and Retirement Fund, are you not? A. Yes.

Q. When did you become one of the three trustees of that fund? A. If my memory serves me correctly, it was on or about May 9, 1958.

Q. Then you succeeded Mr. John Owen after his death? A. Yes.

Q. I mean Charles Owen. A. Charles Owen, yes, that's right.

Q. After his death? A. That's right.

Q. In what way were you selected as a trustee of this fund? A. It was one of those unusual circumstances. Charles Owen has passed on; the office of trustee
2354 appointed by the operators was vacant. I had expressed considerable dissatisfaction with the $35,000 a year that this man had received from the fund. I thought it was wrong, and when this matter was discussed in a

meeting of the Bituminous Coal Operators Association, I voiced my feeling as I had on prior occasions, and as usual in circumstances of that nature, I was appointed on the committee to find a person who would serve adequately and properly.

We had great difficulty finding anyone that was satisfactory to the industry. We had meetings with the Southern Coal Producers Association. I remember a meeting with Mr. Moody, and there may have been others from that group, but I don't remember their names.

It seemed as if there was no one who was qualified. We thought we had an ex-vice-president, a retired vice-president at Consolidation Coal that everyone seemed to agree to, but when he was opportuned, he turned it down.

Later at a meeting in Washington with the Southern Coal Producers Association, Mr. Moody turned around to me and said, "Well, why don't you take the job?"

I was quite surprised that he would even suggest it. He made the statement that he thought the entire industry would approve of my appointment. I told him I didn't think I would have the time for it, but on the way back to Cleveland in the plane, I decided that if there were
2354a no objections from any substantial operators, or substantial group of operators, or important tonnages, that I would accept.

So I called Mr. Moody and told him of his con-
2355 versation and his remark, and it was a rather casual remark, I thought. And I said to him that if he would sponsor my nomination and there was no important tonnage that objected to me as an individual, and if the operators would pay the cost of my lawyer's services, I would take the job entirely without pay or remuneration of any kind.

I said, "Now, Mr. Moody, I will leave this with you and I will do nothing about it."

I had heard it took some little time to obtain the consent of the various operating groups and the various companies.

At a later date I was officially notified by, I believe it was from Miss Roche. It may have been from Mr. Mitch. I am not certain and it doesn't really matter—that I had been accredited and accepted and there would be a meeting on about May 9th, 1958, and I attended it as trustee at that time.

Q. As I recall the collective bargaining agreement which provides the method of selecting trustees, it provides that the trustee to be chosen of this fund by the operators shall be chosen by operators representing 51 per cent of the tonnage produced. A. Yes, sir.

Q. And you were, so I understood, had been so
2356 selected? A. I understand that is the case; yes, sir.

Q. Since then, which was in the early spring of 1958, you have been serving as a trustee of the Fund? A. Yes, sir.

Q. You mentioned a moment ago salary. Do you receive from the Fund any salary at all for your services as a trustee? A. I receive no salary from the fund and have not from the beginning, and I will not at any time in the future either directly, indirectly, remotely or contingently.

Q. The only compensation is refund of expenses you may have through your attorneys, your personal attorney in the fund? A. Yes, sir, and the operators pay for those services.

Q. Now did you at the time of your appointment, or have you since, had complaint from any of the operators with reference to your appointment or your services? A. I had none.

Q. How frequently have these trustees met, or do they meet, since your appointment? A. We meet every two or three months.

Q. Meetings are in the offices at Washington, D. C.?

A. Always in the offices of the Welfare Fund in
2357 Washington.

Q. You think, as near as you can now recall, that you have attended all the meetings of the Fund since you have been a trustee? A. I have attended all of the meetings since I have been a trustee.

Q. What is the duration—I mean the period of time, length in hours or whatever it may have been—that a meeting ordinarily lasts? A. I don't believe we have ever finished a meeting in less than two hours, and it is my recollection that two or three have lasted almost four hours.

Q. Tell the jury and his Honor, in a general way, the method of conducting those meetings and what business you transact at them. A. In my judgment those meetings are transacted in a very business-like way. The minutes of the last meeting are read; if there are any corrections they are made, or any supplements to the minutes they are made. We then receive reports from counsel, Mr. Mitch.

Q. Mr. Val J. Mitch? A. Mr. Val Mitch, and this usually takes a great deal of time.

Q. We will stop long enough at that point to explain the reports. What is the nature of the reports that the
2358 counsel to the Fund make to the trustees at these meetings? A. Well, those reports are indeed voluminous. They cover a report of settlements that have been made, and decisions that have been made in the various courts—mostly in the District of Columbia.

They comprise new lawsuits that the Fund institutes against many defendants. Almost all of those are in the nature of lawsuits initiated to collect royalty payments that are in arrears.

They also include such lawsuits that are instituted against the Fund. They also will include any formal transactions, such as the transfer of real estate and other legal matters that may, or that need the attention of the trustees and need the action of the trustees.

Q. Are all actions that have been brought by the trustees in the interim between this meeting and the previous one wherein the trustees are seeking to collect delinquent royalties, reported to you people, the trustees? A. They are all reported. They are reported at every meeting.

Q. Then from meeting to meeting as progress takes place in those respective suits, is that reported to you people?

A. That is also reported. We ask many questions
2359 and Mr. Mitch always had the answers. He is fully informed as to the status of the lawsuits, and also he will express an opinion as to when they might be terminated.

Mr. Kramer: That is a hazardous opinion in many lawsuits when they will terminate.

By Mr. Kramer:

Q. But he makes a detailed report with reference to all this litigation? A. He does indeed.

Q. What action, if any, do the trustees take with reference to the report made by the counsel? A. At the end of the discussion, or rather at the end of the report of Mr. Mitch and at the end of the discussion too, there is almost always a long discussion in connection with these lawsuits that are approved by the trustees.

Q. Do the trustees give any instructions to the counsel that certain operators are to be sued and others not to be sued and exercise that kind of control by the trustees? A. Not in the form that he is ordered to take a specific action. He recommends the action. We review it and we, to my knowledge, have always accepted his recommendation and have approved his views.

Q. Is there any policy on the part of the trustees
2360 of singling out or sorting out certain operators and bringing suit against them rather than others? A. Never.

Q. Has there ever been on the part of the trustees since you have been a member of this board of trustees, any efforts to sue punitively against some operator? A. Never.

Q. What does, as far as you know, guide the decision that Mr. Mitch makes and as approved by you people as to who shall be sued? A. I have learned to know Mr. Mitch after three years of association with him, as I have my fellow trustees, and also Mr. Ryan, and I am impressed with his ability, his sincerity and his impartiality, and I feel that he is honest, capable, thoroughly reliable man of high character, and I don't doubt in the slightest that he is making his recommendations, and has made his recommendations, on the basis of complete impartiality.

Q. Has your board of trustees, you individually or the board as a group, since you have been a member thereof, ever taken any action to instruct counsel or his staff to sue any particular operator or operators for the purpose of embarrassing or putting out of business that operator? A. Never.

2361 Q. Has any such type of function or operation ever been discussed that you know of? A. Never.

Q. Has the bringing of lawsuits, so far as you know, ever been used as a method for forcing out of business any particular operator or group of operators? A. I do not believe that has been done. I am convinced it has not been done.

I might add, that I have interrogated not only Mr. Mitch but Miss Roche at length in regard to that because it has many times come to my attention from other operators that deals have been made, and I have asked them in all of those situations to produce the facts, that I was very much interested and if they would produce the facts and bring them to the attention of Miss Roche that they would be properly invesigated and a report made.

It might be interesting to these proceedings to know that not one of these alleged claims that deals are made has ever been made to Miss Roche. They have never followed up on my suggestion. So I have discounted the statements completely.

Q. No facts or information has ever been submitted to you indicating the truth of any statement of that sort?

A. Not one single fact.

2362 Q. That applies to this entire period of some three years you have been a trustee? A. In my entire period as a trustee.

Q. There has been something said in this record with reference to pensioners, that is, retired miners who draw pensions, serving on picket lines where there is an organizational campaign going on by the United Mine Workers of America.

Has any effort been made so far as you were aware during the period of time you have been a trustee of the fund, to command or dictate to pensioners that they must go on the picket line? A. There has never been a discussion of that nature at our meetings in Washington, and no action has ever been taken officially or unofficially in that connection. It just has never been discussed.

Q. So far as you are aware has that even been discussed or has any informal action or word gone out from the trustees? A. No. I am convinced that no such action was taken by any trustee in that connection.

Q. Do you personally know of how many instances benefits, pensions and so on, have been paid, during your period, to retired miners who were not members of the United Mine Workers of America? A. I have no

2363 information as to the number; no.

Q. Do you know that the Fund though has a policy that membership is not necessary for the payment of benefits? A. That is the policy of the Fund as clearly stated in the resolutions.

Q. So far as you know has that policy, during the period of time that you have been a trustee, been thoroughly carried out? A. It has been carried out to the best of my knowledge and right out all through the administration of the fund.

Q. In your service as a trustee of this Welfare & Retirement Fund, do you consider yourself as a spokesman for the operators? A. No, I do not.

Q. Will you explain in what capacity you attempt to, or not only attempt to but do, serve as such trustee? A. I serve as a trustee solely in the capacity of an individual responsible only to my own conscience and to the principles and objectives of the fund.

I feel that it carries with it a tremendous responsibility. I take it most seriously and I do not feel I am responsible to any one, not even to Miss Roche, Mr. Lewis, the operators, to the mine workers, or to the public. I
2364 am responsible only to the Fund.

Q. And is that the attitude you have assumed in the administration of the fund since you have been a member of the board of trustees? A. That is exactly the policy I have pursued and I have made it clear time after time to my fellow operators and to others who have either in detail or casually made inquiries as to my position and my stewardship as a trustee.

2365 Q. Do you feel that Mr. Lewis, while he was president of the United Mine Workers of America or since he has become president emeritus thereof and is still chairman of the trustees of this Welfare and Retirement Fund, has dominated the handling of that fund, or in what way do you think it has been handled, benefits paid, policies followed? A. I do not believe that Mr. Lewis has dominated the fund at all. He has been influential.

Q. Are the various matters that come up before the trustees discussed at length by all members of the trust and they express their opinions thereon? A. They are most surely discussed at great length. Because Miss Roche is the administrator, she in every instance that I recall has presented the problems involved over all general policy and has made her recommendations along the lines that she feels is proper.

I would say that if you wanted to put this on a percentage basis, and I presume this is one of the prerogatives of women, that Miss Roche takes up most of the time in talking about the fund affairs, and I come next, and Mr. Lewis is a very poor third. He listens most of the time.

Q. In other words, Miss Roche is a rather free speaker, is she not? A. Yes. She is in my judgment a very capable, able person.

2366 Q. Going back to the beneficiaries of the fund who may be beneficiaries of some of the benefits, pensions of one type or other benefits, I believe it is provision of the regulations of the fund, as well as the Taft-Hartley Law itself, that only those people who at the time they severed their connection with the fund were employed by a signatory of the contract can receive benefits from the fund. Have you tried to follow that out accurately? A. Mr. Kramer, would you mind repeating that? I didn't get quite the first part.

Q. That beneficiaries of the fund must be or have been employees of the signatories of the contract. A. Right.

Q. Has that policy been followed? A. Oh, definitely.

Mr. Kramer: That is all.

CROSS EXAMINATION

By Mr. Rowntree:

Q. Mr. Schmidt, you were appointed as trustee of the fund May 9, 1958? A. Yes.

Q. And that was after this lawsuit was filed, is that right? A. I don't know.

Q. You appear to have—A. Pardon me, sir, I am
2367 just a little bit hard of hearing. Would you speak up, please?

Q. I am sorry. You appear to have a predilection to taking pay from the trust fund? A. Yes, sir.

Q. Do you have some reasons for that? A. Yes, indeed.

Q. What are those reasons? A. In my judgment the trustee appointed by the operators should be an operator himself. I believe that he should be active in the coal business. He should have some experience in dealing with these social problems and labor problems. The man undoubtedly has an income of his own. This is a charitable trust. It never made sense to me that the operator-appointed trustee should receive $35,000 a year for attending a few meetings. The amount seemed very large and out of proportion to the whole character of the set-up.

Of course, the man that serves has tremendous liabilities, possible liabilities. He is exposed to many lawsuits and many charges of all kinds. And yet with all of that, it seemed to me that a person appointed by the operators, if he was to receive any pay at all, was to receive it from the operators themselves, not from the fund.

The fund is a charitable trust and is set up and
2368 organized for the sole and exclusive purpose of providing welfare services, health and medical services to coal miners, signatory to the operators, and to provide pensions, and also to help the survivors of mine disasters.

It seemed to me that the operator-appointed trustee should be willing to serve without pay.

In my own case, I am adequately remunerated by my own company. I also have substantial income otherwise. In the first place, I feel I owe it to the industry, I owe it to the coal miners, I owe it to society to give some of my time to this great effort. And it was for that reason and for those reasons that I agreed to serve as a trustee.

Q. Now, Mr. Schmidt, I remind you that you were added as a party to this case because your appointment did occur after the case was filed, your addition to the case being on or about May 29, 1958, as a party to the case. Now your predecessor was Mr. Charles Owen, is that correct? A. Yes.

Q. And Mr. Owen did receive pay from the trust fund? A. Yes.

Q. And Mr. Owen was appointed in the contract of 1950? A. I don't know that to be a fact.

Q. You do not know whether or not he was named
2369 in the National Bituminous Coal Wage Agreement of 1950? A. I don't remember the exact date. He was a trustee for quite a number of years.

Q. He was your immediate predecessor? A. Yes.

Q. Now Mr. Owen, I believe, died July 20, 1957? A. About that time. I could not certify as to the exact date.

Q. And you were appointed May 9, 1958? A. Yes.

Q. Approximately nine to ten months after? A. Yes.

Q. After Mr. Owen died? A. Yes.

Q. Did the operators have a trustee on the Welfare Fund in that interval of time? A. No.

Q. Did the trust fund continue to operate in that interval of time? A. Yes.

Q. And could you estimate the amount of money the trust fund received and paid out during that interval of nine or ten months? A. Without quibbling as to exact figures, it must have been in the proximity of 90 million dollars of receipts and about 90 million dollars of
2370 expenditures in nine months. It is about 10 million or maybe a little more. Sometimes it has been as much as 11 or 12. Say from 90 to 100 million dollars.

Q. Did you accept the practices and procedures which you found in the trustees fund when you came into office? A. I did.

Q. There has been no change since you took the office? A. Yes, there have been many changes. Yes, quite a number of changes in the benefits paid to miners and the amount of money paid to pensioners.

Q. I believe one such change was reduction in the pensions? A. There was also reduction in medical pay and

in the rules and regulations pertaining to the qualifications of those receiving medical benefits.

Q. And also was there not a change which eliminated those miners who were connected with the management of a mine from receiving a period of eligibility for pensions while they were connected with management? A. I believe that was discussed. My memory is a little hazy about that, but yes.

Q. Was not the purpose of that to eliminate from
2371 eligibility these small mines, the miners in these small mines who would get together and form a company and open up a small mine? A. No, I don't think the purpose of that was to eliminate anyone that had a right to any benefits from the fund, none whatsoever.

Q. But it would eliminate them from benefits? A. I am not certain that is correct. I would have to examine that carefully to say that.

Q. That was a very important resolution, was it not, Mr. Schmidt? A. They are all important, sir.

Q. Yes, sir. And there are hundreds and thousands of these small mines across the country where unemployed miners have gotten together and formed little companies? A. Yes.

Q. And they are each part of the management because it is a partnership and they go into the ground and open up small mines. Now this resolution would eliminate all those people from eligibility? A. I don't believe that I can answer you on that question. I just at the moment can't say. I don't know. I would like to, if I may, make a comment as to the number of small mines. I don't believe that it is in the thousands. It is in the hundreds.
2372 I think there are a total, according to last count, about 3,000 financial entities in the coal industry.

Q. We have quite a few of those little mines here in Tennessee? A. I have heard that you do.

Q. Yes, sir.

Q. Now is it true, then, Mr. Schmidt, that the bulk of the period of your meetings as trustees is taken up with discussion of lawsuits? A. Discussion of what?

Q. Of lawsuits. A. Lawsuits, part of the time. Sometimes it may be as much as 50 per cent of the time; sometimes it is as little as 15 or 20 per cent.

Q. I believe you said a while ago that lawsuits did take up a good part of your meetings? A. I think 50 per cent of the time is a large part of the time. Now as percentage, I don't know the exact per cent, but it is a large part of the time.

Q. And the fund has a policy of never settling any of these lawsuits? A. Oh, the fund has been definite in policy and an obligation to settle all of these lawsuits and does.

Q. By collecting the last cent? A. By collecting
2373 as much as they are entitled to.

Q. Which is the last cent under the contract? A. Correct.

Q. That policy is pursued even though the company ends up in receivorship or bankruptcy? A. That is correct.

Q. And even though the employees of that company who have mined the coal, that have paid the royalties to the fund before that, are then thrown out of the industry and lose their eligibility under the fund? A. That is correct.

Q. Mr. Schmidt, you mentioned a while ago hear-
2374 ing operators say things about deals having been made. What kind of deals? A. Well, the general statement, most often it was a casual statement, unsupported by facts as I am convinced, but the statement is along this line:

That the fund does not attempt soon enough to collect the royalties, that they wait until all of the other bills are paid, and they hold up on royalty payments, knowing, so the rumor is and so the statement is, that the fund will make a settlement with them on a reduced basis, and I have repeatedly interrogated Mr. Mitch and Miss Roche

as to the practice of the administrator and of the administration of the fund as to that practice, and I am—and I have also interrogated the operators in detail—and I am convinced first that no such practice is indulged in, and secondly, I have yet to receive one shred of evidence from my operator friends that this is a fact.

Q. And it is true that the lawsuits are prosecuted to the ultimate end? A. They are determined to the ultimate end.

Q. Mr. Schmidt, do you have many instances such as is true in this case, where the amount sought to be collected in these lawsuits amounts to more than the profits, the entire profits of the company over its entire
2375 life? A. The profits of the company are never discussed at our trustees meeting, and I have no knowledge of the profits.

Q. Do you have knowledge of the fact that pensioners have been organized into union activities? A. Will you please repeat that question?

Q. Do you have knowledge of the fact that pensioners receiving pensions from the fund have been organized into union activities? A. No, I have no knowledge of that.

Mr. Rowntree: That's all.

RE DIRECT EXAMINATION

By Mr. Kramer:

Q. One question, Mr. Schmidt, you spoke about the fact you did not receive any salary from the trust. Can you tell us whether Mr. Lewis receives any salary as a trustee, receives any salary from the trust as a trustee? A. Mr. Lewis does not receive a salary from the trust as a trustee.

Q. So neither you or he—you chosen by the operators, he by the union—receive any compensation or salary out of the trust, of the fund? A. Not one single penny.

* * * * * * * * * *

2376 VAL J. MITCH

a witness called by and in behalf of the plaintiff and cross-defendant,

. . . . . .

DIRECT EXAMINATION

By Mr. Kramer:

Q. Your name is Val J. Mitch? A. Yes, sir.

Q. Mr. Mitch, how old are you? A. I am fifty-five.

Q. Where do you live? A. In Washington, D. C.

2377 Q. You are a lawyer by profession? A. Yes, sir.

Q. Are you in any wise now connected with the United Mine Workers of America Welfare and Retirement Fund? A. Yes, sir, I am counsel to the trustees of that fund.

Q. How long have you been counsel to the trustees of that fund? A. Since its inception in 1950, on March the 4th, and I was also counsel for a short time of the preceding fund.

Q. The new fund came into existence on March 5, 1950? A. March 5, yes, sir.

Q. March 5, 1950? A. Yes, sir.

Q. Do you have your offices in the same building in which the offices of the fund are located in Washington, D. C. A. I do.

Q. Do you have some associates or assistants to work with or under your direction? A. I have five attorneys, and an auditing section of several employes, plus secretaries.

Q. Plus stenographic help and so on? A. Plus

2378 stenographic help.

Q. Do you give full time to your position there as counsel of the trustees? A. Yes, sir.

Q. And have during all of this period of time? A. I have.

Q. Would you state in just a general way, in not too much detail, what your duties are in this position? A. My duties are to advise the trustees on any and all legal matters affecting the trust; the drafting of resolutions providing for benefit programs to be authorized pursuant to the trust instrument as the trustees may desire; protect

the trust against—and the trustees—against all lawsuits which may be brought against them; to file lawsuits against coal operators who are delinquent in their payments to the fund as required in the trust instrument.

Q. Now, in connection with your duties in the drafting of resolutions, what are the type of resolutions that you draw? A. We draw resolutions setting forth the requirements of eligibility of all miners and their dependents who desire to apply for benefits, and that includes the various types of benefits that the trustees desire to put into effect.

Q. You might state, if you will please, the dif-
2379 ferent type of benefits that are in effect and have been in effect during this period of time. A. The trustees have now in effect, pensions, benefits on account of death, hospital and medical care benefits, a distress or disaster benefit.

Q. And you say that you are responsible as counsel for the fund for the drafting of the resolutions under which these payments are made. After you draft resolutions, what is done with the resolutions? A. The resolution becomes a part of the trust records.

Q. Are they submitted to and approved by the trustees? A. Well, that is after they are approved. Yes, they are always approved by the trustees. I only draft them as requested by the trustees. They are presented to the trustees at a duly constituted trustees' meeting. They are again acted upon and either adopted, amended, or whatever desire they have with respect to it. Then after they are adopted, they become a part of the trust records.

Q. Do you have present here today, and as I now hold in my hand, a full and complete copy of the resolutions about which you are testifying? A. Yes, sir.

Mr. Kramer: Your Honor, I do not file these. I
2380 make these available to counsel, and if they want them to be filed, we will such resolutions as they may want. I make them available to counsel.

By. Mr. Kramer:

Q. Mr. Mitch, do you attend the meetings of the trustees? A. Yes, sir, I attend all meetings of the trustees.

Q. Has that been true from the inception of this 1951 trust? A. With the exception of one meeting that I missed because I was absent from the city necessarily. Only one meeting have I missed.

Q. Do you recall when it was that you missed attending a particular meeting? A. It was in October of 1950.

Q. And aside from that, you have attended all meetings since you became counsel to the trustees? A. I have, yes, sir.

Q. Are all three trustees present at these meetings? A. All of the trustees are present unless they are ill. That's happened on one or two occasions. And after the death of one of the trustees, and until the successor was appointed, there were only two duly-constituted and effectively operating trustees and they were present at every meeting during that interim.

2381 Q. According to the collective bargaining agreement which contains the trust instrument here, the trustees designated when this trust agreement of 1950 went into effect were Charles Owen, Mr. Lewis, and Miss Roche. Has there been any change, or what changes have there been in those trustees during that period, the entire period of this trust? A. There has been one change. Trustee Owen died in 1957, and he was replaced by Mr. Schmidt, Henry G. Schmidt, who is now trustee.

Q. You mentioned a while ago there was a short period of time, some eight or nine months maybe in there when there wasn't the third trustee, and that was the interim or interval between the death of Mr. Owen and the choice of Mr. Schmidt? A. That is it, yes, sir, that is what I had in mind.

Q. Will you tell us just briefly, we have had some proof on it, your version of how these trustees meetings are conducted? A. They are called by the chairman of the board

of trustees. I happened to be designated as secretary to the board of trustees, and I keep the minutes, and the records of the trust. The meeting is called to order, the chairman calls for the reading of the minutes of the
2382 preceding meeting, so they can be examined by the trustees, and changed or ratified. Thereafter he calls for any business which may come before the trust, and then that business is presented to the trustees and disposed of. The trustees adjourn.

Q. What is the usual length of a meeting of each meeting of the board? A. Three to four hours.

Q. You have testified here, and it is uncontradicted, that these meetings run five or six a year. Is that about your recollection? A. About that, yes.

Q. And they are all held in the offices of the trustees there in Washington? A. All except two meetings were held in Florida when Mr. Owen was ill.

2383 Q. And where were they held? A. They were held at St. Augustine and Miami.

Q. Were members, all members of the board there? A. They were all present; yes, sir.

Q. Because of Mr. Owens' illness he was unable to come to Washington? A. That is right.

Q. Mr. Mitch, what, if any, reports do you make at these meetings of the board? A. Well, I report on any matters which are requested by the trustees. Such as the drafting of resolutions or the rendering of any opinion only as requested. But I submit all regular routine. I report on litigation, the status of litigation against the trustees and litigation in which the trustees are parties plaintiff.

Q. What type of litigation do you have, or have you had over this period of time, in which the trustees were parties-plaintiff? A. In which they are parties-plaintiff?

Q. Yes. A. Those are suits to collect the delinquent royalties which are unpaid by operators signatory to the contract.

Q. Will you explain how it is determined and by whom it is determined when suits shall be instituted to
2384 recover delinquent payments by signatories to the contract? A. I submit to a routine adopted by the trustees. The comptroller, after he determines that a company is delinquent over a few months, and after he has communicated with the operator reminding him of that fact and seeking payment, on failure to receive the proper payment the account of those operators are referred to the legal department, to me, and I assign them to one of the attorneys on my staff to make an examination of the account, to gather all of the facts and circumstances, and to communicate with the operator concerned to seek payment.

Upon failure after all possibilities of recovery in that manner are exhausted, lawsuits are filed upon receiving a recommendation from that counsel on my staff that he can go no further. And at the next trustees meeting I report that fact.

Q. Who makes the final determination of whether or not a suit shall be filed against the particular delinquent operator? A. I make that decision.

Q. As a signatory to the contract and after you get this report from your staff, you make a decision? A. I make the decision on prior authority from the trustees.

2385 Q. But before instituting suit against a particular operator, A, B, C, or D, who is a signatory to the contract, do you get specific instructions from the trustees as to that particular suit or are you acting under general instructions? A. I act on general instructions. I get no instructions from the trustees as to any individual specific operator.

Q. In what area do you direct these suits to be filed? In any particular state, or how do you select where the suit is supposed to be filed? A. Wherever the coal operator may be or wherever the coal operator's office may

be, whichever is desirable. Whatever state that is in, may be in, that is where we file the lawsuit.

Q. Do you make any distinction between the type of the operator, that you might say large or small, if those words have a meaning, or do you take all operators who become delinquent and cannot work out a settlement? A. We make no distinction whatever. They are all signatories to the contract and the trustees have the fidicuary obligation to collect these trust monies which belong to them and that is the way we approach it.

Q. Do you make any discrimination as to the area where you will start the suits? A. I make none.

2386 Q. After these suits are instituted you say you do report to the next meeting of the board of trustees, to the trustees themselves? A. I do; yes, sir.

Q. In detail? A. In detail.

Q. Explain, please. A. I give the name of the company, the address, the amount that we have estimated to be owing the trustee fund, the number of months that the company has been delinquent, and recital of the efforts made by the legal department to have that operator pay without the resort to litigation.

Q. Mr. Mitch, after having instituted these suits for amounts that according to the best information you have is the amount owing, do you find errors in the amount sued for time and time? A. Yes, sir.

Q. And how and what do you do? A. We do find errors.

Q. Explain, please. A. The operators frequently do not report to the trust fund as required by the contract and in the trust instrument as they are required to as to what their tonnage may be. We are then put to the task of as-

2387 certaining from any official source available to us what that tonnage may be and what that debt may be.

Many times we find that after we file these lawsuits based on the best possible information we can obtain, that it is not correct and it is only after we proceed through the lawsuit that we ascertain the true amount owing by that operator.

Q. When you do ascertain the true amount, do you proceed in the suit for the amount so ascertained? A. We do; yes, sir.

Q. What about settlement of these cases after they have been instituted? A. There is no settlements made.

Q. Suppose that the operator against whom you brought suit is a signatory to the contract offers to pay it, would you accept the payment after suit is started? A. If he would offer to pay the full amount, we would; yes, sir, absolutely.

Q. Is time given on occasion, extended time for catching up these delinquent payments or making payments? A. If the operator will agree to pay the full amount found to be due and owing, the trust fund after we are satisfied that that is the true amount, we will enter into agreements providing for a time payment, but it must recognize that
2388 the operator must pay the full amount to the trust fund.

Q. Do you give any discount or reduction or do you feel as trustees it is your duty to collect the entire amount due under the contract terms? A. It is the duty of the trustees to collect the entire amount, and we make no discounts, no reductions. We have never done it.

Q. Do you make sometimes a concession of interest when they make a settlement? A. If an operator will agree on this method of paying out over a period of time without resort to litigation and will recognize the full amount of the debt after it is verified, we will not charge him interest unless he defaults on the agreement, in which case the interest is assessed.

Q. If he made an agreement to pay it over a period of months or years you will waive the interest providing he meets those installments? A. If he meets the installments regularly interest is waived during that period. If he defaults interest is assessed.

Q. But in the settlement you make with him does it always cover the full amount that is owing for royalties? A.

Always the full amount; yes, sir.

2389 Q. Have you ever in your experience in handling these delinquent accounts used the lawsuit method for the purpose of driving some person or operator who was signatory to the contract out of business? A. We have never had that in mind. We only have in mind our obligation as trustees that we must seek out this money which is rightfully — which rightfully belongs to the trustees under the trust instrument under which they must operate.

Q. That has been the policy? A. That is the policy.

Q. And the policy in all instances? A. In all instances.

Q. Mr. Mitch, in this record something is said about union membership or membership of a claimant or an applicant for pension benefits or for other benefits must be a member of the union in order to receive such benefits.

Will you tell me the policy that is followed by the trustees and yourself as the legal officer. A. The trustees will follow a policy that any employee of an operator signatory to the agreement who is qualified under trustee regulations is eligible for trust fund benefits. Union membership has nothing to do with it.

Q. So far as you know has that procedure been followed without variation during the entire life of this trust

2390 fund of 1950? A. To my knowledge it has been.

Q. Do you know of any deviation at all from that? A. I know of none.

Q. Mr. Mitch, do you have here a list of the requirements for eligibility for benefits of the United Mine Workers of America Welfare & Retirement Fund as such requirements were in effect during the period of this fund since 1950 to January, 1958, the period covered by this litigation? A. These are the major requirements for eligibility: yes, sir.

Mr. Kramer: I want to file this as Exhibit No. 144.

(Exhibit No. 144 was marked for identification and filed.)

By Mr. Kramer:

Q. Will you read off these requirements? A. For pen-

sion a miner must have attained the age of 60 years or over at the time of the application for pension.

He must have completed 20 years' service in the coal industry in a job classified in any National Bituminous Coal Wage Agreement within the 30-year period immediately preceding application for pension.

2391 He must have retired from or ceased work in the bituminous coal industry after May 28, 1946, following regular employment in a classified job and was regularly employed in a classified job in the bituminous coal industry immediately preceding May 29, 1946.

The benefit payable at the time you state is $100.00 per month to all pensioners whose applications have been approved beginning in the first month after authorization for pension.

As to Hospital and Medical Care: Miners and relatives of miners and widows and relatives of deceased miners, are eligible providing that the miner at the time of the request for the hospital and medical care; or the deceased miner who died after May 28, 1956, at the time of death; were either:

(a) Working in the coal industry in a classified job;

(b) Receiving retirement pension from the Fund and not employed outside the coal industry;

(c) Unemployed and whose last employment was in the coal industry in a classified job subsequent to May 28, 1946.

The funeral expense benefit is payable not to exceed $350.00. Widows and survivors benefit of $650.00 payable in 12 monthly installments, the first eleven of which
2392 shall be $50.00 each and the last shall be $100.00.

Disaster benefits. This benefit provides for the payment of benefits in the case of disaster to miners and to widows and children and other dependent relatives of deceased miners at the discretion of the Director, not to exceed $500.00 for each person, and providing that not more than $2,000.00 shall be paid to any one family as a disaster

benefit, providing the miner or the deceased miner was at the time of the disaster either:

(a) Working in the coal industry in a classified job;

(b) Receiving retirement pension from the Fund and not employed outside the coal industry;

(c) Unemployed and whose last employment was in the coal industry in a classified job subsequent to May 28, 1946.

Q. Mr. Mitch, you have referred in these require-
2393 ments of specifications for benefits a time or two to the word "classified job". Will you explain to us so we understand what this is? A. That means an individual who is covered by the contract, the union contract, and is eligible for trust fund benefits, also under the Labor Management Relations Act, because he is not exempt. He is not in an exempt category, such as foreman, superintendent, supervisor. It means those miners who are covered by the union contract and not those exempt.

Q. The word "classified job" does not have anything to do with union membership; does it? A. It has nothing to do with it.

Q. I notice no reference at all in these requisites for these benefits to union membership, and is it at any time required for the payment of benefits of any type, pensions or hospitals or disaster or any of the other benefits? A. It is at no time required.

Q. Do you know of cases being handled upon many occasions in which pensions or other benefits were awarded where the applicant was not a member of the United Mine Workers of America? A. I do.

Q. Would you say that is a matter of rather fre-
2394 quent occurrence or what? A. Well, it appears frequently, yes. There are a substantial number in the fund, I would say.

Q. Do you know of personally many of those that are approved and come across your desk and are in your office?

A. They do come across my desk and I find out about them in conferences and in other meetings.

Q. You do approve them if they meet the qualifications that you have specified herein, regardless of whether or not the applicant is a member of the union? A. I do not actually approve them. I am frequently called on for legal advice with respect to them and the administrative staff has always followed my advice to my recollection.

Q. What is your advice where a question of membership or non-membership in the union may be involved with the applicant? A. My advice is that if the particular applicant is an employee of a coal operator signatory to the contract and is not in an exempt classification, that he must be approved for benefits, even though he may not be a member of the union.

Q. And they have been approved and are benefits paid?

A. They have been approved and there have been
2395 benefits paid.

Q. I note that in this list of qualifications or requirements for benefits, especially I refer now to pensions, it says, the part you read to the jury a few moments ago, payment of $100 per month to all pensioners, and my question was whether these were regulations that were in effect during the period here involved, which is January 1950 through December 1958. Since December 1958 — I will put this in, your Honor, subject to our previous objection — since December 1958 have there been any changes made in the amount of benefits? A. That amount was changed by trustee regulation last July 1.

Q. To what? A. I beg your pardon. It was February 1, 1960 to $75.

Q. Reduced to $75 per month? A. Yes.

Q. There may have been another change. Was there another change made since 1958? What about hospital care? A. In July 1 of last year, 1960, the time limit for miners who were unemployed who could qualify for hospital medi-

cal care was — the limit reduced to one year after they last worked for a signatory operation.

2396 Q. Did that have anything to do with union membership or non-union membership? A. Nothing whatsoever to do with union membership.

Q. Why were those changes made and the benefits reduced in the pension fund and the cut-off date established on this hosp.al fund? A. Solely to protect the financial integrity of the fund. It ran solely to the financial condition of the fund. The outgo of the fund was exceeding the income.

Q. The outgo or payments from the fund and the benefits have been exceeding the income, and in order to bring it in line, they were reduced? A. In order to bring it in line, these changes were made.

Q. Mr. Mitch, at any time during the period that you served as trustee, which is the life of this trust, has there been any effort made by any of the trustees that you know of to put into effect a requirement that a person must be a member of the union in order to receive benefits from this fund? A. No effort was ever made. There have been no discussions on it.

Q. Now, Mr. Mitch, something has been said in this record about pensioners being on a picket line when

2397 the United Mine Workers of America may be on an organizing drive somewhere, a mine, and that the pensioners of the Welfare Fund, or those receiving pensions, have been active on the active picket line. Has there ever been any requirement that you know of that they must be on the picket line or required to be on the picket line in order to receive or to continue to receive, if they are pensioners — A. There have been no requirements whatsoever. There has been no discussion of it in my presence.

Q. Ever been any request by the man chosen by the union, Mr. Lewis, that any such rule be put into effect? A. None whatsoever.

Q. Has there ever been any rule of that sort? You say there has never been anything done that you know of? A. There has been no rule.

Q. Has anyone ever been penalized that you know of by his pension being reduced, if already on the pension fund? Or other benefits taken away from him or reduced because he did not participate on a picket line where there has been an organizational drive? A. No, sir.

Q. Have pension benefits or other benefits, as far as that is concerned, been denied by the trustees to persons who claimed to be and perhaps submitted proof that they were members of the union? A. There have been many
2398 denied.

Q. The fact that he was a member, the applicant was a member of the union, has not been determinative of whether he could receive those benefits or not? A. No, sir, he just meet the requirements of eligibility established by the trustees.

Q. That brings to mind another thing. Has the United Mine Workers of America Welfare and Retirement Fund or the trustees thereof ever been sued by anyone who claimed that he was a member of the union and seeking to establish a claim for benefits that the trustees had refused? A. We have had several suits where a man had been denied a pension and he alleged in court that he should receive it because he was a member of the union. It has been sustained by the courts that he can't get it because he must meet the requirements of eligibility. Union membership had nothing to do with it.

Q. Even though he was a member of the union, he did not get the benefits? A. That is correct.

Q. Mr. Mitch, during the period that this trust has been functioning and you have been attending its meetings, meetings of the trustees, has the handling of benefits and the payment of them and the establishment of principles for the

operation thereof been dominated by the union? A.
2399 No, sir.

Q. By the operators? A. Not by anyone, except the trustees themselves.

Q. Are there frequent discussions and disagreements and then finally work out an agreement? A. Among the trustees?

Q. Yes. A. Over what?

Q. Well, over something that comes up before the board of trustees. A. Sure, there are always discussions and differences among the trustees, but they settle all those in trustee meetings.

Q. But there is no attempt to dominate either by the union or by the operators? A. No. No, sir.

Q. Mr. Mitch, as of the present time — I believe there is no controversy about this, but I will ask it — Mr. Schmidt does not receive a salary for his services as trustee, does he? A. He does not.

Q. Has not at any time since he was appointed? A. No, sir.

Q. Mr. Lewis? A. Mr. Lewis has never received any money at all from the welfare fund.

2400 Q. Is that right when he first became a trustee, when the fund was first activated or set up? A. That is correct.

Q. Mr. Mitch, as I recall it, in 1949 Judge Charles L. Dawson of Louisville, Kentucky attended a session of wherein — I believe it was Senator Bridges and Mr. Lewis were present, and a question was raised about whether or not Judge Dawson was a member of the board of trustees, or one of the three trustees, and whether he was so designated and properly chosen by the operators. Were you present at that session where the three of them met? A. I was present.

Q. You were present? A. I was.

Q. Will you tell us briefly what occurred at that meeting or that session? A. Mr. Dawson came to the meeting after

his predecessor, Mr. Van Horne, had resigned and credentials alleged to be sufficient to appoint him were sent to the chairman of the board of trustees, and he appeared to assert his right to be seated as a trustee. This was in the fall of 1949.

Q. That was really before the 1950 trust came into existence, wasn't it? A. That was before the 1950 trust
2401 came into existence.

Q. Go ahead and tell us about it. A. It was under the 1947 trust. Benefit payments had been in suspension a month or two before that and the contract that contained the trust instrument had expired on July 1, 1949. A new contract had not yet been negotiated. Trustee Bridges had taken a different contrary view as to the effect of that contract as related to the trustees than did Judge Dawson. There was some discussion and confusion and conroversy over those two opposing views.

Judge Dawson asserted his right to be seated under the contract which had expired. Senator Bridges contended that he had no right to authorize payment of benefits, which was the desire of the trustees prior to that meeting at least, because the contract had expired. He claimed that gave him no rights.

2402 Q. That was Senator Bridges? A. There being two views opposed to each other, Mr. Lewis contended until that was reconciled and there was unanimity among the trustees, that Mr. Dawson could not be seated.

Q. In other words, it was Senator Bridges' position that the contract had expired and therefore you could not operate under it, and they could not pay benefits. A. That's right.

Q. And then it had expired, and they could not choose a successor to Mr. Van Horne. A. That's it.

Q. Was anything done at that meeting about this agreement as to the contract? A. There was considerable discussion, and I don't remember all of those details, the main thing I remember is the main theme that I have enunciated.

There was so much discussion and more or less Mr. Dawson kept bringing up contentions and resolutions and reading statements, and Mr. Lewis would rule him out of order, and unless Trustee Bridges would consent to the payment of benefits — one or the other must give, according to Mr. Lewis' view as chairman of the board.

Q. Did Senator Bridges ever consent that the contract was in effect so you could pay benefits? A. He never
2403 did, no, sir.

Q. Then if the attitude you could not pay benefits, no contract, and no other member could be chosen — A. That's right, no benefits were paid under that fund.

Q. Is that the tone on which that meeting of the group ended? A. That's the tone on which that meeting ended.

Q. Now, when the 1950 agreement came into effect, which was March following this 1959 date, I believe the three trustees, Owen, Lewis, and Miss Roche were named therein. A. In the 1950 contract?

Q. In the 1950 contract. A. Right.

Q. That was to take effect in March, 1950. A. Yes, they were, yes, sir.

Q. Now, after these three trustees were named in the contract of 1950, was there — well, I believe before that maybe — did Judge Dawson institute a suit against all three of the trustees? A. He instituted a suit against the trustees of the '47 fund.

Q. Against the trustees of the '47 fund. A. To assert his right to be seated.

Q. Do you recall that all three — Mr. Van Horne,
2404 Mr. Lewis, and Miss Roche — were named? A. Mr. Van Horne had retired. I mean he had resigned. I think that Mr. Lewis was named. I cannot recall any others.

Q. You don't recall just who was involved? A. I do not.

Q. What became of that lawsuit? A. That lawsuit was settled. I think it was dismissed after — it was pending

when the 1950 contract was negotiated, and —

Q. It never came to trial is what I am getting at. A. Never came to trial.

* * * * * * * * * *

CROSS EXAMINATION

By Mr. Rowntree:

Q. Mr. Mitch, this exhibit 144, does that contain all the requirements with respect to pensions? A. It contains all of the basic requirements.

Q. All of the basic ones? A. Yes, the major requirements.

Q. You mean there are other requirements besides
2405 these? A. Well, there might be minor.

Q. Could there be minor ones such as membership in the union? A. It would not be that, no, sir. That is not—

Q. Mr. Mitch, I believe you testified in this case in Washington, case of Luchetti versus John L. Lewis, et al, trustees, and I believe you stated there as you have here, that you advised the trustees with respect to legal matters, is that right? A. That's right.

Q. And with respect to interpretations? A. Yes, sir.

Q. Of law and contracts? A. Yes, sir.

Q. And is it not true that you stated in that case construing the language of the 1950 contract as it existed in 1955 with respect to the payment of benefits under the welfare fund provisions of that contract —

* * * * * * * * * *

Q. That you construed the language of the contract to mean this:

"All of the foregoing benefits are to be made avail-
2406 able to members of the Mine Workers who are employees of the operators signatory." Do you recall that testimony? A. I don't recall that in detail. I think I testified somewhere along that line. What I had in mind there was —

* * * * * * * * * *

Q. Go ahead and explain it. A. It is mentioned in the contract that pensions are to be made available to the individual members of the United Mine Workers of America employed by operators signatory to the agreement. They must be employees of employers signatory of the agreement. If they happened to be members of the United Mine Workers of America. That is what I meant.

Q. But you did say, "To members of the mine workers who are employees of the operators signatory." A. With respect that that classification mentioned in the trust agreement, yes. But there is also another classification mentioned in the trust instrument, namely employees of the operators signatory to the contract.

Q. Isn't that the language that you were construing, that identical language, and isn't that the language that was inserted as an amendment to the 1950 contract? A. That language is in the contract, yes.

2407

Q. Yes, sir. The 1950 contract added words to the 1947, provision, do you recall that? A. Yes.

Q. The 1947 provision contained this expression:

"All of the foregoing benefits applicable to the individual members of the United Mine Workers of America and their dependents."

Then in 1950, were not these additional words added?

"And to employees of the operators other than those exempted from this agreement." A. That's correct.

Q. And then — A. But it also says that these benefits must be administered in accordance with the Labor Management Relations Act of 1947, which makes it mandatory to the trustees to extend benefits to employees of signatory operators regardless of whether they are members of the union, and that is what we do.

Q. That's correct. Yes, sir.

Q. But now, in 1955, in construing this language, was it not your position that this identical language that we are talking about meant, "to members of the

2408

mine workers who are employees of the signatory operators. A. That means only members of the United Mine Workers who happen to be employees of operators signatory of the contract can qualify.

Q. Correct. A. What I meant to mean — it didn't go further, because they didn't ask me there. If you want me to, I will explain that.

Q. Well, go ahead.

Mr. Kramer: You have a right to.

The Witness: If they are members of the United Mine Workers of America and work in non-union mines, they cannot qualify.

By Mr. Rowntree:

Q. Now, Mr. Mitch, you are familiar with the resolutions that existed before 1950? A. With the what?

Q. With the resolutions of the trusteees that existed before 1950, you are familiar with them? A. I am vaguely familiar with those, ~~but I~~ must say that I am not — my recollection is hazy on that, because while I was counsel to the 1957 trustees, there were no benefits paid.

2409 Q. Well, there were some pensions paid after Mr. Van Horne and Mr. Lewis settled their dispute? A. that was — I was not counsel at that time.

Q. And is it not true that the resolutions before 1950 strictly required union membership? A. I can't answer that. I don't know exactly on that.

Q. Did you examine — A. I beg your pardon?

Q. You were counsel for the trustees before 1950? A. But we paid no benefits and I didn't get into that question.

Q. You never examined the resolutions? A. I examined them, but as I say, my recollection is hazy. I would have to be refreshed to that.

Q. Do you recall, Mr. Mitch, that we asked for these resolutions during the course of this case? A. Yes.

Q. And they were not presented to us? A. You are talking about the 1950 fund?

Q. The 1950 fund.

Mr. Kramer: I think that is correct, Your Honor. I presented them today. They asked for them back there, and, we had an argument on the question of admissibility, and it wasn't followed through, but we presented them,
2410 and here they are.

By Mr. Rowntree:

Q. And isn't it true, Mr. Mitch, that these resolutions in this book are maintained in secrecy, and they are not published to anyone? A. Well, I wouldn't regard it as that. It is official trust business, and we keep all of our resolutions and the minutes and the business of the trust in the office in Washington, D. C. We don't make them public, no.

Q. You don't show them to anyone, even an applicant for a pension? A. We don't make them public, no. We tell any applicant that writes into the trust fund, is always told what they are, what he must meet by way of eligibility.

Q. Well, I am referring now to Exhibit 138, the file of Mr. Clem Terreo, and referring to a letter of January 6, 1955, in which he states, "I understand that there is a book of regulations on this."

That is with respect to applications for pensions, and the letter in response, January 18, 1959, of Miss Roche, the director, quote, "Copies of fund regulations are not available for public distribution," close quote.

Now, isn't it true that you never show these resolutions with respect to eligibiliy requirements to anyone in-
2411 terested? A. May I explain my answer on that?

Q. Yes, sir. Have you answer it? A. What is your answer, what is your question?

Q. Isn't it true that you don't show these resolutions to anyone? A. That is true, but we -- by the same token, we give the information which any man must furnish to the fund, and we send him the proper application forms, if he writes in and asks for them, which is what is done in the next letter in that file you are reading from.

Q. And are these copies of the application forms that you send to the man, referring to Exhibit 34? A. That isn't what we sent to Clem Terreo.

Q. But it is the kind of form that you would present to a man today? A. If he writes in?

Q. Yes. A. No, sir, not exactly. We would tear off the back here, the certification by the local and the district, if a man wrote in direct, which is what we did with Clem Terreo.

Q. But he would fill out these forms? A. He would have to fill out the front of those forms to give the basic information, that's correct.

Q. And these are the forms, they require an answer
2412 to all questions, and I refer to the statement, quote,

"All questions must be answered. Failure to do so will delay processing," Close quote.

And there it calls for his district number, his local union number, requires certification of membership in good standing of the applicant in the union. A. You must not have understood my last answer, because when I said when a man writes in direct, we tear off the back of that form requiring certification by the local union and the district, and we sent it to the man directly, and he is not required to furnish anything.

2413 Q. Is that with respect to pensions? A. Any benefit.

Q. You saw those yellow sheets which require the entry of the local union number. A. I don't know what yellow sheets you refer to. I don't recall now what we did with this gentleman.

Q. These sheets here (handing to witness). A. Yes. Those are sent to him, but you will notice he doesn't have to fill out any space that requires that he signify the local union number or the district number because if he is not a member it is not necessary, it is not important.

Q. But the form calls for it. A. The form calls for it, yes.

Q. You keep minutes of all the meetings of the trustees, Mr. Mitch? A. Yes, sir.

Q. It is in the record in this case that there were no minutes of this meeting between Mr. Lewis, Senator Bridges and Judge Dawson, either of those two meetings. Why is that so? A. That was not considered a meeting. Mr. Dawson was not seated. There was no business transacted and there were no minutes kept. There were notes kept of that but I would not know where they are today.

2414 Q. Did Mr. Lewis issue a call for a meeting? A. No. Judge Dawson asked for it.

Q. Was the business of the Fund discussed? A. There was no business of the Fund discussed. The only discussion was Judge Dawson's request whether or not he could be seated.

Q. I thought you said a while ago that there was discussion as to the payment of benefits during the interim between the contracts? A. That was in a prior meeting when Mr. Van Horne was still a trustee.

Q. No, we were talking about, I believe — A. That is what I had in mind when I said that.

Q. Are you saying that there was no discussion at these meetings between Judge Dawson, Mr. Lewis and Senator Bridges with respect to the business of the welfare fund? A. There was no business discussed at that meeting except what I have already testified to here today.

Q. Isn't it true that Judge Dawson at that meeting took the position that benefits should be paid just as Mr. Lewis was trying to have done? A. He took many positions. I don't recall him taking that one. I think his main interest was to be seated as a trustee.

2415 Q. Do you recall Mr. Lewis making a statement at that meeting to the effect that he resented the operators putting somebody on the board of trustees who could deal with Mr. Lewis? A. He never made that statement, to the best of my recollection.

Q. Do you deny he made that statement? A. I said to the best of my recollection he never made it.

Q. The beneficiaries of the welfare fund, particularly pensioners, are advised that their pensions are not final, that they can be cancelled at any time; is that right? A. All authorizations contain that because if we did not have enough money they would all have to be cancelled.

Q. This statement appears on every pension award: "This pension is subject to suspension at any time by the Trustees, for any reason stated in the rules and regulations heretofore adopted by the Trustees, and shall be subject to termination at any time by the Trustees for any matter, cause or thing of which they shall be the sole judges and without assignment of reason therefor."

Is that the rule which applies to every pension award?

2416 A. That is on the form. That is not—I don't know what you mean by the "rule" that is applied. You asked about the form. It is on the form.

Q. And that would be a qualification that attaches to every pension awarded?

Mr. Kramer: Well, your Honor, that is a construction of a written instrument and a question of law. I object to that question. It is on the award.

The Court: I think this counsel can take care of himself, Mr. Kramer.

Mr. Kramer: Well, I think he can too, your Honor, but —

The Court: Your objection is overruled. Counsel is not objecting to this question, and he may object and the Court will pass on it, but he can take care of himself without any trouble.

Mr. Kramer: I think he can but I thought it was a written instrument and the Court must construe it whether it is a lawyer or layman on the stand.

By Mr. Rowntree:

Q. That is a provision in every pension award?

Mr. Kramer: We admit that.

A. That is on every form.

Mr. Kramer: We admit that.

2417 Q. Did you testify that there were a few cases filed in Washington by individuals against the Fund seeking benefits because they were union members? A. I did not testify that they were filed solely at Washington, but there are many filed there and have been filed there, and have been dismissed by the courts there. They have also been filed in many other places, including New York State, Pennsylvania, Tennessee. Robert Taylor Hobbs, in the Supreme Court of Tennessee, who was a union member, was denied by the Fund. He went to court.

Q. And there are many — A. It was denied.

Q. — many of those cases, aren't there? A. I beg your pardon?

Q. There are many, many of those cases? A. Of union —

Q. Union members seeking benefits under the Fund? A. That are denied because they do not meet the regulations of the trustees of the Fund. Yes, sir.

Q. And isn't it true that there is a broad understanding in the coal industry among the men that union membership means everything with regard to these benefits under the Fund? A. I don't know of any such understanding anywhere.

2418 Q. But these cases have been brought in great numbers upon that basis. A. On what basis?

Q. Union membership. A. They have been brought on union membership. These are men seeking to assert their right in a court to benefits that have been denied them by the trustees of the Fund because they fail to meet the requirements of eligibility.

Q. And they assert that they are entitled to benefits because they are union members. A. Well, they assert they meet the regulations of the Fund. They happen to be union members who assert they meet the regulations of the Fund

who were denied by the trustees and they have gone to court and the court has refused the claim.

Q. Now isn't it true, Mr. Mitch, that they are asserting in those pleadings that they are union members and they are entitled to the benefits? A. Well, that is in the assertions.

Q. Well, isn't it repeated over and over again in those cases filed up there and around over the country? A. Well, they assert their right to benefits and many of them assert that they are members, and many of them assert that as an incidental matter. It has been our experience
2419 that they also assert that they have served so many years in the industry and that they are over 60 years of age.

Q. Has anything been done by the trustees to alleviate or take away this notion that union membership is a requirement to these benefits? A. In every annual report for the last several years there are statements to that effect, that union membership is not a requirement. And wherever the trustees are in line of duty called upon to communicate with potential beneficiaries, applicants, that fact is always stated. Yes. They do what they can to get that across.

2420 Q. Has it ever been published in the United Mine Workers Journal, for instance, or in any other publication that goes to the men in the industry, a broad dissemination of the expressed statement that this requirement of union membership does not exist? A. We don't publish things like that in the newspapers. We do what we can to make it public. We have an official organ of the trust fund, the annual report that the trustees make each year. They try to give as factual account in that report as they can and that is one of them.

Q. And that goes to the operators and to Congress and to the libraries? A. That has wide distribution. That goes to schools. It goes to libraries, operators, educators.

Q. But a non-union man in the mines would never see this? A. We give as wide a distribution as we can.

Mr. Rowntree: That is all.

REDIRECT EXAMINATION

By Mr. Kramer:

Q. Now these annual reports, we filed them this morning by somebody else. They are sent to local unions, in addition to other places you mentioned? A. They are sent to all local unions, all districts of the United Mine Workers.

2421 Q. Now in addition to that distribution that you have talked about, I will ask you if that report in full, or practically in full—if not in full, I believe it is in full—isn't published in the United Mine Workers Journal annually? A. It is always published in the United Mine Workers Journal, yes.

Q. So it goes through the Journal, goes to the union, goes out to the public as you have indicated? A. Yes, sir.

Q. And which sets forth the requirements for pensions and other benefits under the fund? A. Yes, sir.

Q. Has any effort been made at any time to conceal, as far as you know, on behalf of the trustees the requirements necessary to obtain benefits? A. There have been no efforts to conceal anything of that character.

Q. By misrepresentation being made that you know of by the trustees? A. No, sir.

Q. When a person has written in for information, as is shown in these files, has there been any effort so far as you know always to give accurate information to the indi-

2422 vidual inquiry? A. Accurate and complete.

Q. Has there been any differentiation in the way those claims are handled once they reach the trustees or the staff of the trustees, delaying them in time or anything else, or whether they come through the union or come direct by the individual? A. They are processed in routine fashion, and there has been no effort made to delay them in any way,

shape or form. If there is any delay, it is because the man himself hasn't submitted sufficient evidentiary material to support his claim.

Mr. Kramer: That is all.

RECROSS EXAMINATION

By Mr. Rowntree:

Q. I would like to ask one more thing. This Exhibit 34, that is a welfare fund— A. Pardon?

Q. This is a welfare fund form? A. Yes, sir.

Q. And that is the form which contains certification of membership in good standing in the United Mine Workers of America?

Mr. Kramer: I am going to object to that form of question. It is a form that has a place on it for the certification by a union. It has that on it.

2423 Mr. Rowntree: Of membership in good standing?

Mr. Kramer: Yes, it has a place on that, and these others didn't have on there and they were paid benefits.

* * * * * * * * * * *

2424 JOHN L. LEWIS

called as a witness by and on behalf of the cross-defendants.

* * * * * * * * * * *

DIRECT EXAMINATION

By Mr. Kramer:

Q. This is Mr. John L. Lewis, I believe? A. Yes.

Q. May I ask how old you are, Mr. Lewis? A. Born 1880.

Q. You have for quite some years until quite recently been president of the United Mine Workers of America, I believe? A. Yes.

2425 Q. And you are now President Emeritus of that organization. A Correct; yes, sir.

Q. When did you step out of the presidency and become President Emeritus of that organization? A. January, 1960.

Q. What was your first connection with the United Mine Workers of America? A. As a member and an officer of local unions; as legislative representative of districts; delegate to conventions; organizational work; statistician for the International Union; manager or business manager of the United Mine Workers Journal which at that time was on a circulation and advertising basis; later vice-president; later acting president; president in 1920 until 1960 inclusive.

Q. Do you recall what year you first joined the United Mine Workers of America and became a member? A. I do not right now, sir, but —

Q. Where were you living at that time; where was your home? A. In Iowa where I was born.

Q. Your resident at the present time is where, Mr. 2426 Lewis? A. Legal residence is Springfield, Illinois. Temporary residence, Alexandria, Virginia.

Q. Where are the present headquarters of the United Mine Workers? A. In Washington, D. C. since about 1935 or '36.

Q. Prior to 1935 or '36 and after you became president in 1920, where were there headquarters? A. Indianapolis, Indiana, established there in the early days of the organization because it was a centrally located place geographically, and remained there until moved to Washington.

Q. In what areas of the United States, principal ones, are the bituminous coal mines of this country located? A. What we call the entire Appalachian area of the industry running from Pennsylvania on the north to the Warrier River field of Alabama, and extending crosswise of the country in a northwesterly direction to the State of Washington and south to the State of New Mexico. A few small lignite deposits in the State of Texas. Still a few small deposits in California, but there are broken strata and pockets of coal and it is greatly bothered with sulphuric acid water and hardly profitable to operate.

In Oregon there is a small deposit at Coos Bay, in that

area, and the Cascade Mountains of Washington and
2427 right through toward Seattle there are vast areas of coal which have not been developed to any substantial proportions.

Q. And there are some substantial coal deposits, or fairly substantial, in the bituminous field in Tennessee, eastern and middle Tennessee, and in parts of Kentucky? A. Quite so. In West Virginia and Pennsylvania, and so forth. In this so-called Appalachian area.

Q. Mr. Lewis, I have here a book, copy of which has already been filed in this record, your Honor, as an exhibit from interrogatories, the Constitution of the International Union and United Mine Workers of America, is that correct? A. I verify it.

Mr. Kramer: I desire to read, your Honor, into the record a portion of the constitution. Reading the preamble first.

"There is no truth more obvious than that without coal there could not have been such marvelous social and industrial progress as marks present day civilization.

"Believing that those whose lot it is to toil within the earth's recesses surrounded by peculiar dangers and deprived of sunlight and pure air, producing the commodity
which makes possible the world's progress, are en-
2428 titled to protection and an equitable share of the fruits of their labor, we have formed the United Mine Workers of America for the purpose of establishing, by lawful means, the principles embraced in the body of this Constitution."

And I read Article I and Article II, your Honor, only of the Constitution, not to be unduly lengthy.

"Article I. Name. This organization shall be known as the United Mine Workers of America. It shall be International in scope, and as an organiation shall not be committed to or favor any particular religious creed; neither shall affiliation herewith interfere with the religious or political freedom of individual members.

"Article II. Objects. First. To unite in one organization, regardless of creed, color or nationality, all workers eligible for membership, employed in and around coal mines, coal washeries, coal processing plants, coke ovens, and in such other industries as may be designated and approved by the International Executive Board, on the American continent.

"Second. To increase the wages, and improve the conditions of employment of our members by legislation,
2429 conciliation, joint agreements or strikes.

"Third. To demand that not more than six hours from bank to bank in each twenty-four hours and not more than five days per week shall be worked by members of our organization.

"Fourth: To strive for a minimum wage scale for all members of our union.

"Fifth. To provide for the education of our children by lawfully prohibiting their employment until they have at least reached eighteen years of age.

"Sixth. To secure equitable statutory old-age pensions, workmen's compensation and unemployment insurance laws. To provide for security against old age and disability of members and their dependents.

"Seventh. To enforce existing just laws and to secure the repeal of those which are unjust.

"Eighth. To secure by legislative enactment, laws protecting the limbs, lives and health of our members; establishing our right to organize; prohibiting the use of deception to secure strike breakers; preventing the employment of privately armed guards during labor disputes; and such other legislation as will be beneficial to the members of our craft."

2430 By Mr. Kramer:

Q. Mr. Lewis, you have heard me read the objectives set forth in Article 2 of this constitution. Since you have been president of this organization or while you were

president of it, did you attempt to carry out those objectives? A. At all times and under all conditions, subject, however, to such modifications as conditions imposed upon the industry and upon the bargaining processes thereof and the limitation of the United Mine Workers as an organization of — a voluntary organization of human beings.

Q. In the carrying out of the objectives or the organization as set forth and as I have read them, have there been negotiations for collective bargaining agreements between the owners and operators of mines on the one part and representatives of the United Mine Workers of America on the other? A. Oh, yes. Practically since the beginning, the foundation of the organization in 1890, and continuing up to this time. The bargaining, the mechanics of the bargaining and the geographic areas representing the bargaining conferences by representation from management and the union have varied at times by rearrangement, by shifting volume of production, economic conditions and so forth.

Q. Have there been shifting volumes of production
2431 from different areas of the United States to other areas so that some that once produced larger quantities now produce smaller, or at least percentage wise? A. There has been a great shifting of volume of production in the various areas.

Q. In the early days of the industry, or back at the time when you first became officially connected with it, what was the largest production area in the bituminous coal fields? A. The largest production area at that time was what came to be known as the central competitive field in the mining industry.

Q. Would you explain it a little, please? A. It embraced four states, Illinois, Indiana, Ohio and western Pennsylvania, which at that time were the main producing districts for commercial coal, and produced about two-thirds of the annual production of the nation. The effort was made to arrive at a base in the central competitive field, which became the guide line of the various outlying districts as they

were called. Some production in West Virginia, some in Kentucky, a little in Maryland, some in eastern Pennsylvania that was not embraced in the central competitive field, Iowa, Wyoming, New Mexico, Kansas, Missouri, Arkansas, they were outlying districts producing about one-third of the total volume annually mined; but from every
2432 standpoint of stability they did not wield the influence in the industry that the central competitive field did.

Q. Collective bargaining agreements at that time in those earlier days were entered into usually first, I take it, by the United Mine Workers of America and the operators in those districts, in that central district, that central field? A. That is right.

Q. And then were agreements also entered into between the operators in the outlying fields and the United Mine Workers of America? A. Yes, premised upon the central competitive field settlement, insofar as was deemed proper by the parties of the conference.

Q. During these negotiations for those contracts, then and continuing on down to the later years, what has been the objective of the United Mine Workers in the conferences? A. In which conferences?

Q. In the conferences that were held to determine a contract, what objective was the United Mine Workers putting forward in all these conferences and meetings, negotiations?

A. Consistent with the declared objectives of the
2433 union, which were written substantially as they read now in the constitution, by the founders of this organization about 70 years ago, and modified at times by existing economic conditions, the inability of the union to accomplish those objectives in the face of the opposition which it encountered, the limited means of the mine workers, the men who worked in the mine, and all of the other circumstances attendant upon those conditions. Invariably they were the objectives.

Q. Was it at any time during the period that you have had official connection with the United Mine Workers of America the objective of the United Mine Workers to put out of business any coal operator? A. Never at any time. To the contrary, the union was dedicated to the proposition of encouraging those men to become members of the union and join with their fellows throughout the national industry in improving their common lot, raising their standards of living, increasing their compensation, providing for better working conditions, less hazardous, and providing — seeking to establish a basis of living, to add to their material well being and enable them to provide for the evil years that faced them all in the end.

Q. What, if anything, does the union have and has it had during the years to do with the picking of the negoti-
2434 ating parties who represented the industry or the operators? In other words, who has chosen the operators that appeared, who has chosen the negotiators who appeared on behalf of the operators? A. The various coal operators associations. There are national associations and there are local associations, of which there are a substantial number. Operators in their given area, county perhaps, or in a given area where working conditions and mining problems are somewhat similar they form a local association which conducts the local negotiations during the pendency of a contract, on interpretation of the contract, and affecting the grievances of the men under that contract during its life.

2435 Q. I take it those coal operators associations have varied in size from a small number of operators in a particular association to larger numbers in other associations. A. Quite true, sir. The original representation in the central competitive field in 1898, when the first central field contract was negotiated, there were eight operators and eight representatives of the Mine Workers from each of the four states. The operators likewise were represented

by eight men from each state making the negotiating conference have a membership of sixty-four individuals.

In order to function in parliamentary fashion, special committees were created that studied and made report on specialized subjects. They were called sub-committees. The sub-committees varied in size from two or three on each side down to one man on each side, and during the years that came, that membership was slightly decreased, became a more normal representation.

At times, all of the miners and operators met in what is so-called joint conventions, too large to be really constructive, but offering a platform for the principal figures on both sides, to publicly enunciate their viewpoints in defense of their respective positions, and during the years, it's been changed at various times in various ways.

Quite frequently at all times during the years that
2436 Mr. John Mitchell was president of the organization, oft times he and the leading operator in the central competitive field, having the confidence of his associates, would go off on a two-man committee to see whether they could work out a program to recommend in proper sequence to the negotiating committee, to recommend to their respective memberships.

Every resource to arrive at a common understanding was utilized from time to time during those years.

Q. How were the representatives of the union, men who negotiated for the union, selected? In what manner were they chosen? How were the unions or the men in the unions kept advised of what was going on in these negotiations over the years? A. Under the authority of a constitutional convention of the United Mine Workers, held from time to time, a policy committee was created to deal with wage negotiations between conventions, and a designated number of representatives served on the policy committee from each of the several districts of the United Mine Workers of America.

That was really the negotiating conference. The membership of that committee varied from time to time, and its membership ranged at different times from one hundred to one hundred twenty individuals to as high as two hundred individuals at times, all with equal repre-
2437 sentation proportionately from each of the several districts of the union.

They would appoint or select a scale committee, the actual number of representatives that would meet in joint conference with the operators' representatives. This scale committee would report back to the policy committee its progress or its non progress from time to time.

The policy committee had a warrant from the constitutional convention giving it full jurisdiction between conventions as the responsible organization to decide those things, all things pertinent, between the conventions.

Q. There have been consumated, of course, between these various operator groups and the United Mine Workers of America over this period since you have been president many different contracts have there not? A. Quite so.

Q. The basic agreement in effect at the present time I believe we know in this record as the 1950 agreement, as you are aware. A. Yes.

Q. But there have been certain amendments to it since it became effective in March, 1950? A. The 1950 agreement as modified from time to time.

Q. As modified, yes. A. As amended rather.

* * * * * * * * * *

2438 Q. What was the agreement known as, the one that was just prior to the 1950 agreement? A. Oh, it was the agreement known from time to time as the current agreement between certain dates, known by the agreement of certain dates.

Q. Well, the one I am referring to is the 1948 agreement which you recall. Now, I believe the 1948 agreement had a provision with reference to cancellation, that either party—

Mr. Kramer: And this agreement is in the record, I am

not going to take time to read the various provisions, Your Honor.

By Mr. Kramer:

Q. — had an agreement in it with reference to cancellation upon notice of either party.

Do you recall whether the operators gave notice to the union of cancellation of the 1948 agreement? A. Are you referring to the cancellation by the Southern Coal Operators Association that year? I think that was the year.

2439 Q. Yes, sir. A. Yes, I recall that.

Q. Had the United Mine Workers given any notice of cancellation? A. No.

Q. After the Southern—well, before I get to that—what area comprised what you referred to as the Southern Operators Association, in general terms? A. That was the group of operators who called themselves representatives of the southern mining companies.

Q. I take it it included— A. And embraced tonnages in Southern West Virginia, Virginia, Kentucky, Tennessee, Southern Appalachian contract, and I think the commercial operators of Alabama.

Q. That contract, and I am referring now to the 1948 contract, had the clause in it that it could be cancelled after a given time by either party after sixty days notice. A. That is right.

Q. And the Southern Operators gave notice of that cancellation? A. Yes, they did.

Q. I believe that was in the early part of the year, 1959, probably February, or about that time, is that about

2440 right? A. That is right.

Q. February, 1949. What followed after notice was given? I say "followed", I mean as far as negotiations are concerned, or dealings with reference to a contract?

Somebody tells me I am wrong, Mr. Lewis, that that was April rather than February or March. I thought I had a note here, but I can't find it.

Anyway, it was in the early part of '49, after having given that notice, what occurred? A. For the time being, nothing occurred. The southern operators had expected that the United Mine Workers, when in receipt of this sixty-day notice of termination, would likewise issue a sixty-day notice against the northern operators which was the preponderance of the tonnage of the country.

The United Mine Workers did not give such a notice.

Then it became apparent that a unique situation was developing, that the southern operators would sever their contractual relations with the United Mine Workers on a given date, sixty days from the day of their notice, and presumptively wouldn't operate their mines. But it became increasingly aware of the menace to their established business if the northern operators kept on working.

Later, it resulted in a joint conference being held
2441 in Bluefield, West Virginia with the Southern Coal Producers Association or representatives, and a conference with the Northern Coal Operators Association Association at White Sulphur, West Virginia. Some of the representatives of the United Mine Workers attended the Bluefield conference, and some the White Sulphur conference.

It was not the desire of the Mine Workers to in any way disturb the equilibrium of the company at that time. They would not have given any notice, but in the end we were compelled to give notice to the Northern Operators and assemble this conference in order to prevent too wide a gap between the two contract expirations which had been rather disastrous for the commercial interests in the industry.

Q. So that following those meetings, you did, the United Mine Workers did give notice of cancellation of the contract, collective bargaining agreement that was in effect with the Northern Operators? A. Yes.

Q. After those two contracts were terminated by these notices, were negotiations entered into with reference to

the entering into a new agreement? A. Did such negotiations ensue you mean?

Q. Yes. A. Yes.

2442 Q. Did those negotiations continue over a long period of time? A. They did.

Q. In other words, there were substantial differences in opinion between the owners and operators of the mines and the union as to the proper terms to be written into that contract — A. Yes.

Q. Were they not? A. Yes, sir.

2443 Q. During the period when these negotiations were carried on, being carried on, did the mines operate on a partial basis and the union members function during part of that period, and if so on what basis? I am referring to the three-day work week, Mr. Lewis. And explain, please. A. The so-called three-day work week came about in this manner. At the time the work in the mines was suspended the United Mine Workers knew that every need of the country was being met because we had an exact number of the amount of storage of coal above ground and where it was located, and so forth, and we knew that there was no emergency. But the newspapers of the country and the public press and some of our public officers, begin to bring that out as a contingency facing the nation—that the nation was going to be short of coal by reason of the controversy between these conflicting interests. They wanted the Government authoritatively to request the mine workers to work pending negotiations.

The mine workers knew that there would never be any termination of the negotiations as long as the mine workers worked pending negotiations, but in order to abate the public concern as to a possible shortage of coal in new quarters the mine workers agreed to return to work pending negotiations, conclusion of negotiations, subject, however, to this qualification. That a three-day work

2444 week would assure the country an ample supply of coal for all public services and every personal in-

dividual requirement. So that we offered to work three days a week and accept the work pending arrangement and instructed our membership likewise.

Well, the operators attempted to believe that we were asking, trying to impose a three-day work week on the industry in perpetuity, which of course was not true, and a great clamor went up about the mine workers' position on the three-day work week.

We were roundly criticized in some quarters, mostly by interests who failed to comprehend the strategy that was involved in such—the protection of the public interest and at the same time penalized the operator for not working the remaining days of the week if they were able to work the remaining days of the week.

As a matter of fact, sir, if the United Mine Workers were offered a three-day work week voluntarily by the operating interests of this country, we would become compelled to refuse it, then and now, because it would be too restrictive on the income of the members of the United Mine Workers of America and be by far from equitable to require a man to live in the tenements of a coal mine with the opportunity of working three days a week and remaining idle four days of the week. Perfectly absurd from an economic standpoint, from a personal and humane standpoint. The oper-
2445 ators well knew that, but they were perfectly willing for the public to believe that our motives were ulterior and sinister. They were not.

It was merely a small piece of strategy designed at the moment to create a little discomfiture in the operators' ranks while they were disinclined to make an agreement and abate the controversy.

Q. In other words, it was used during the period of negotiations as a strategic move but at no time did the United Mine Workers ever demand the inclusion in a contract of a three-day work week; is that correct? A. That

is right on the three-day work week. There have been demands and requests in time gone by for the five-day work week in accord with the trend of the industry and requirements of the country but nothing further than that.

Q. I want to ask you particularly this question because of the assertion made in the present lawsuit, Mr. Lewis. Did the United Mine Workers, as one of the requests to be included in the 1950 agreement, demand that the operators enter into a three-day work week? A. The United Mine Workers of America did not make any such statement or demand, and the United Mine Workers of America today if offered a three-day work week would have to decline its acceptance out of hand.

2446 Q. Now Mr. Lewis, I want to talk a minute about wages as the United Mine Workers have stood for wages of these people who are employed in the coal mines.

What has been the policy continuously of the United Mine Workers from your years connected with it officially down to the present time on the wage structure?

Maybe I ought to start out, do you recall what the wage increase was that was included in the 1950 contract when it was finally negotiated? A. All of the gains made during the 1940 to '50 period were consolidated in the 1950 agreement, written in.

The Government, on several occasions between 1940 and 1950, seized the mines by Executive Order of the President and operated upon the account of the Government and would call upon the mine workers to work for the Government during the pendency of that seizure.

The mine workers would do so and work out an agreement with the representatives of government to govern the mines during the period they were under government control.

Various things were agreed to, including the introducement of the Welfare & Retirement Fund. The limitation on work day to eight hours underground as against eight hours at the working place far inside the mines from the

place of entrance. The payment for travel time, the
2447 payment for lunch time, and various other items which were negotiated with the Government.

The operators encouraged the Government to seize the mines to increase the responsibility of the mine workers. The Government and the mine workers would cooperate and agree on these items of consequence. The operators would then demand their mines back, but one of the conditions of terminating the Government control was that the operators would have to agree to write into the agreement all of these things that we had negotiated with the Government while they were utilizing our mines, the operators' mines.

All of those things in the end were accepted by the coal companies of this country after being instituted by the Government of the United States, after having their mines returned so they could operate them on their own account. Those items I have mentioned and a number of others were assembled and written into the 1950 agreement.

Q. The 1950 agreement recites on its face, as I recall it, that the wage increase which was granted by that agreement was a wage increase of 70 cents per day, as we call it, across the board. That is for all job classifications. A. That is my recollection, sir.

2448 Q. Seventy cents a day was the increase. During the period that negotiations were going on and the period between the date that notice was given of the termination of the 1948 agreement in '50, was there some substantial litigation between the — well, instituted by the Government and operators? A. Oh, yes, during the period of the '40s particularly, and '49.

Q. And after the litigation was terminated was the 1950 agreement immediately executed? A. Yes, substantially.

Q. Now with reference to certain of the clauses in the 1950 agreement or subsequent agreement to which reference has been made in this lawsuit, I want to mention one or two of them. One I want to refer to is what is known

as the "land lease" provision which, I believe under the record, it is already here in front of the Court, originated with the 1943 agreement — that is, the 1943 collective bargaining agreement between the operators and the miners or the miners' union.

What is the land lease provision, in substance? Maybe I ought to ask what is its purpose, the provision of the agreement which provides that the operators will not lease lands, coal lands that they own to other operators for the purpose of subterfuge or in order to effect an unfair wage scale. Tell us about it, please.

2449 A. The land lease arrangement or demand on the part of the mine workers was merely to tighten up the processes of collective bargaining and prevent any coal company from chiseling away at the agreement and by subterfuge sub-leasing or sub-contracting certain parts of the work essential to a coal mine or mines.

We wanted to deal with the same employers as affecting all the operations of the coal mine of which he was the owner or the representative of the owner, and it was merely done to eliminate the sub-contracting to irresponsible individuals without credit or assets who frequently failed to meet their payrolls and cause destitution and poverty among our people and increased it.

There are many ramifications of those chiseling practices by irresponsible operators but those are the chief reasons why the mine workers desired that.

Q. The first time that this is inserted in one of these contracts — these contracts are all in the record, if your Honor please, — this reads thus:

"The operators agree that they will not lease any operating mines subject to this supplemental agreement as a subterfuge for the purpose of avoiding the provisions of this supplemental agreement."

Is that the way you recall it? A. Yes.

2450 Q. In other words, in order to prevent an operator from subleasing his property out to someone that would produce it at a sub-normal price after he had signed an agreement? A. That is right, sir.

Q. Was that done for the purpose — was the entering into of this land lease provision in these contracts and the carrying of it through the contracts for the purpose of forcing small or other operators out of business? A. Oh, no. It had no relation at all to that question. It was merely protecting the wage standards and the conditions of the working miner.

Q. And for that purpose alone? A. That is right.

Q. The question is raised about the so-called protective wage clause which is in the 1958 agreement. I mean — yes, the 1958 agreement. And I read from the portion of that clause or a portion of that clause that is contained in the 1958 agreement:

"It is recognized that when signatory operators mine, prepare, or procure or acquire under sub-contract arrangements bituminous coal mined under terms and conditions less favorable than those provided for in this contract, they deprive employees of employment opportunities, em-
2451 ployment conditions, and other benefits which these employees are entitled to have safeguarded, stabilized and protected. Accordingly, the operators agree that all bituminous coal mined, produced or prepared by them or any of them, or procured or acquired by them or any of them under a sub-contract arrangement, shall be and shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this contract."

Will you comment on it and explain the purpose of it and why it was entered into?

A. Substantially for the purposes enumerated in general terms in that contract. There had grown up in the mar-

keting area of the coal industry certain practices that impacted severely upon the membership of the United Mine Workers, affected the stability of their joint industry contracts and impaired their annual earnings and the future security of their jobs.

For instance, a coal company might engage to deliver a million tons of coal to the docks on the upper lakes or in the Canadian market or to a public utility in the United States, or to any other consumer of coal in volume, at a certain priced based on his cost of production, all of those things being jointly agreed to between the contracting parties.

He would then go out on the highways and by-
2452 ways and he would buy himself a half million tons of coal from mines that were working at sub-normal wages and sub-normal conditions, below the recognized American standards and below the wages paid to the original operator that had a contract with the United Mine Workers. The result would be that mine would lose half of the employment providing, mining a million tons of coal. Their work would be interrupted. The operator would blend this half million tons of coal with the half million tons of coal produced at his own mine and increase his profit under the contract by the margin that he could save, at the price of depreciating work opportunity for the men that he employed.

We felt that was not a good thing carrying out the contract. It was not constructive and made the mine workers the victim of the market manipulation. That was the chief and only reason, outside of those enumerated there, why that was done and insisted upon.

Q. In other words, the purpose of the insertion of this clause was to protect the members of your organization as your constitution provided you should protect them? A. And only the members of our organization.

Q. Did you insist or the United Mine Workers insist on

that inclusion of the provision into the 1958 agreement? A. Yes.

2453 Q. What about the operators, were they docile to it or were they bitterly opposed to it? A. I think there was some objection, not impressive on the part of some of the operators and speaking for the record sometimes, but we encountered a healthful reaction among most of the operating companies.

Q. But the provision was inserted upon your insistence? A. Upon our insistence.

Q. Of the United Mine Workers? A. Certainly so. They would not have considered it for a moment without our insistence.

Q. And was the same thing true of the land lease provision we talked about a few minutes ago? Was that demanded and insisted upon by the union? A. Oh, yes, sir.

Q. In other words, it was at the insistence of the union that these two clauses went into these contracts? A. Quite so.

Q. You recall that back prior to 1957 there was a provision in the agreements or about that time, known generally as the union security clause in the agreement? A. Yes.

Q. Whose purpose, I believe, was recited to be for the protection of the membership of the United Mine
2454 Workers of America? A. Yes, sir.

Q. That was abandoned later or modified substantially in the later agreements, beginning with the 1952 agreement, was it not? A. Yes, sir.

Q. And at any time since 1952 and the enactment of the provisions, 1950 — what did I say? 1950, that was the 1950 agreement. I am mistaken. The 1950 agreement, the clause that has been in there has been the same and the union has insisted upon its operation, carrying it out, since 1952? I will read it to you, Mr. Lewis, and I am reading from the 1952 contract:

"As a part of the consideration for this agreement, the operators signatory hereto agree that this agreement covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production. The said operators agree that they will not lease out any coal lands as a subterfuge for the purpose of avoiding the application of this agreement."

Now that is the clause that has been carried in since the 1950 agreement? A. Yes.

2455 Q. Oh, there is a slight change in the first sentence between the one I read earlier and '52, but since 1952 that has been the exact language? A. That is right, as I recall it.

Q. Mr. Lewis, what was the origin — you have mentioned it briefly a moment ago — but what was the origin of the Welfare Fund or Welfare and Retirement Fund that is carried presently as a provision in the contract of the United Mine Workers of America with the operators? A. It was negotiated on May 29, 1946 with the Secretary of the Interior who was acting as the agent of the president in the administration of coal mines seized by executive order. It had been one of the demands of the mine workers of the year previously in the joint conference with the operators and was resisted by the operators successfully. We pressed a fight for its recognition in 1945. The mines were seized by the government and then the government negotiated substantially the welfare clause that exists today, except for the changes in the amount of the royalty payment.

The declaration of principles and the purpose of the trust created under this joint contract with the government were defined, and they are still a part of the existing agreements made subsequent to that time. Substantially it was

2456 intended to provide medical service, hospitalization, pensions, rehabilitation and opportunity for injured

mine workers, training them for other jobs, if they recovered sufficiently, to make it medically possible, and was hailed as a tremendous step forward by the government in the humanitarian treatment of the men who were employed in this most hazardous of all industry.

Counsel will understand, I hope, that aside from the fatalities and hundreds of thousands of injuries a year, mine workers are affected by vocational ailments that shorten their lives, a long list of them, and the rate of fatality from many of the pulmonary ailments is much higher among coal miners than it is the rest of the population. So the mortality they suffer and the human agony that they and their families endure is greater than can be compared with any industry now in existence in the civilized world.

2457 So, the succeeding agreements that have occurred since 1945, '46, have carefully included the welfare plan, the trust agreement, and the grant of authority from the industry to operate. They might have taken away in those conferences, if they had been able to, the miners' shoes and his wages, but he couldn't take away, they couldn't take away the welfare fund, more valuable than silver and gold or pearls of great price, and the progress that has been made. The medical treatment of mineworkers since that time has been an astonishing progress, that has lengthened the lives, increased the well being, made for less widows and orphans in the industry than any other institution that has had to deal with the mine workers since the 10th century when coal was discovered in the Forest of Deane.

Since that time, may I add, since 1946, perhaps, there were no welfare arrangements or pension plans except a few weak images of plans established by a few corporations in the country and dominated by them, and now the Department of Labor reports that over seventy million

workers in American industry are covered by some form or other of negotiated welfare and pension plans.

It must have some virtue to be accepted and sought by seventy million workers whose clamor and demand for that protection has been enforced by nearly two hundred million Americans.

2458 Q. In other words, the United Mine Workers were the pioneer in the setting up through this negotiation—first rejected by the operators and then accepted by the Federal government, and then carried back into the later contracts—have been the pioneer in the establishment of welfare funds of this nature? A. That's right.

Mr. Kramer: Now, Your Honor, I want to read from the contract of 1950, the provisions with reference to the Welfare and Retirement Fund rather than ask the witness to read it, and I read from page 3 of the Collective Bargaining Agreement of March 5, 1950.

This is one, Your Honor, in which they say is the beginning of the time of the starting of the conspiracy, and I want to read what the Welfare Fund is.

"It is hereby stipulated and agreed by the contracting parties hereto that there is hereby created a Fund to be designated and known as the 'United Mine Workers of America Welfare and Retirement Fund of 1950.'' During the life of this agreement, there shall be paid into such Fund by each operator signatory hereto the sum of thirty cents (30c) per ton of two thousand (2,000) pounds on each ton of coal produced for use or for sale. Such Fund shall have its place of business in Washington, Dis-
2459 trict of Columbia, and it shall be operated by a Board of Trustees, one of whom shall be appointed as a representative of the Employers, one of whom shall be appointed as a representative of the United Mine Workers of America and one of whom shall be a neutral party, selected by the other two. In the event of resignation, death, inability or unwillingness to serve of the Trustee

appointed by the Operators or the Trustee appointed by the United Mine Workers of America, the Operators shall appoint the successor of the Trustee originally appointed by them and the United Mine Workers of America shall appoint the successor of the Trustee originally appointed by it.

"The Operators signatory hereto do hereby appoint Charles A. Owen, of New York City, as their representative on said Board of Trustees. The United Mine Workers of America do hereby appoint John L. Lewis, of Washington, D. C., as its representative on said Board of Trustees. It is further stipulated and agreed by the joint contracting parties that Josephine Roche, of Denver, Colorado, is appointed as the neutral Trustee. Said three Trustees so named and designated shall constitute the Board of Trustees to administer the Fund herein created.

"In the event of a deadlock on the designation
2460 or agreement as to any future neutral Trustee, an impartial umpire shall be selected—" and sets out the method, Your Honor, and I am going to omit that clause if I may.

"It is agreed by the contracting parties hereto that the Trustees herein provided for shall serve for the duration of this contract and as long thereafter as the proper continuation and administration of said trust shall require.

"It is agreed that this Fund is an irrevocable trust created pursuant to Section 302 (c) of the 'Labor-Management Relations Act, 1947,' and shall endure as long as the purposes for its creation shall exist. Said purposes shall be to make payments from principal or income or both, of (1) benefits to employees of said Operators, their families and dependents for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or life insurance, disability and sickness insurance or accident insurance; (2) benefits with respect to wage loss not otherwise

compensated for at all or adequately by tax supported agencies created by federal or state law; (3) benefits on account of sickness, temporary disability, permanent
2461 disability, death or retirement; (4) benefits for any and all other purposes which may be specified, provided for or permitted in Section 302 (c) of the 'Labor-Management Relations Act, 1947,'—"

That is the Congressional enactment. "— as agreed upon from time to time by the Trustees including the making of any or all of the foregoing benefits applicable to the individual members of the Operators other than those exempted from this Agreement; and (5) benefits for all other related welfare purposes as may be determined by the Trustees within the scope of the provisions of the aforesaid 'Labor-Management Relations Act, 1947,' Subject to the stated purposes of this Fund, the Trustees shall have full authority, within the terms and provisions of the 'Labor-Management Relations Act of 1947,' and other applicable law, with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, investment of trust funds, and all other related matters."

I am omitting two paragraphs there unless you want me to read them.

"Title to all the moneys paid into and or due and owing said Fund shall be vested in and remain exclusively
2462 in the Trustees of the Fund, and it is the intention of the parties hereto that said Fund shall constitute an irrevocable trust and that no benefits or moneys payable from this Fund shall be subject to any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber, or charge the same shall be void. The moneys to be paid into said Fund shall not constitute or be deemed wages due to the individual mine worker, nor shall said moneys

in any manner be liable for or subject to the debts, contracts, liabilities or torts of the parties entitled to such money, that is, the beneficiaries of said Trust under the terms of this agreement.

"The obligation to make payments to the 'United Mine Workers of America Welfare and Retirement Fund of 1950' under this contract shall become effective on March 6, 1950,—"

And then provides for dates of payment.

"It shall be the duty of the Operators signatory hereto, and each of them, to keep said payments due said Fund, as hereinabove described and provided for, current and to furnish to the United Mine Workers of America and to the Trustees hereinabove designated a monthly state-
2463 ment showing the full amount due hereunder for all coal produced for use or for sale from each of the several individual mines owned or operated by the said Operators signatory hereto."

It provides for an annual audit of the Fund by competent authorities designated by the Trustees.

I believe that is all I care to read.

* * * * * * * * * *

By Mr. Kramer:

Q. Mr. Lewis, when we recessed a few moments ago, we were talking about, or had just finished reading a portion of the Collective Bargaining Agreement of 1951, which set forth the welfare and retirement provisions, that is, the trust provisions, as contained in that contract.

I want to talk now, or ask you briefly about this—your connection with the Welfare and Retirement Fund, United Mine Workers of America Welfare and Retirement Fund.

* * * * * * * * * *

Mr. Lewis, you have been a member of the Board of Trustees of this welfare fund since 1950, and were
2464 also a trustee of the previous fund under the 1946 and '47 contracts. A. That is correct, Mr. Counselor.

Q. There has been, as I understand—if I may just lead

just a moment—there has been two changes, I guess, in the trustees—no, just one—since the 1950 fund was started. Mr. Owen died and he was succeeded by Mr. Schmidt. A. That is right.

Q. And you have been the one that's served continuously as selected by the United Mine Workers, and Miss Roche has been the neutral member since then? A. That is right.

Q. Now, according to this record, the meetings of the Trust are held five or six times a year—

Mr. Kramer: Any objection to leading a little here?

Mr. Rowntree: No.

By Mr. Kramer:

Q. —five or six times a year, and they are held in Washington? A. That is right. I think once or twice there have been meetings held elsewhere, but Washington is the rule.

Q. I think there is evidence here that because of
2465 the illness of one of the trustees, two meetings were held in Florida. Mr. Owen was ill down there. A. That's right.

Q. Have you attended all or practically all of the meetings of the Trustees? A. The only ones at the moment that I can recall missing was such as might have been held when I was abroad on a government commission a few years ago. I was gone some months.

Q. Mr. Lewis, of course as chairman, you preside at these meetings of the trustees? A. Yes.

Q. Are minutes kept of the meetings of the trustees? A. Are they what, sir?

Q. Minutes kept of the meetings of the trustees? A. Yes.

Q. And Mr. Mitch, who is the general counsel, is also secretary of the Trustees and keeps those minutes? A. That is right.

Q. Are the minutes of the meeting submitted for approval, correction or changes at the next meeting of the board? A. Yes, and passed on by the trustees.

Q. And passed on by the trustees and approval
2465a or correction shown? A. That is right.

Q. Mr. Lewis, in governing or giving of pensions, or the paying of pensions and of other benefits from the fund, are the methods and the requirements for those payments of benefits set forth in resolutions adopted by the board? A. Yes.

Q. You adopt resolutions? A. All the rules and procedures, the qualifications of the petitioning beneficiaries and all the matters of general policy are decided by the trustees. Miss Roche is the director of the fund, and administrator of the fund pursuant to the trustees' policies.

Q. Is union membership—and by that I mean membership in the United Mine Workers of America—a requirement in order to be paid benefits or receive benefits from the fund. A. No.

Q. Has it at any time since this 1950 agreement came into effect been a requirement? A. No.

Q. Have benefits—do you know of your own knowledge that benefits from time to time have been paid from this fund to members—I mean employees of signatories who were not members of the union? A. Yes.

2466 Q. Of course, I don't suppose you know how many of them. A. I do not, and necessarily they would be limited in number, because it is very rarely you find a man who wants—who is working in a mine and not a member of the union who wants the Welfare Fund to compensate him.

Q. And you do not know how many there may have been of that kind? A. No, I do not.

Q. That have been paid since 1950? A. I do not.

Q. Mr. Lewis, has there ever been a demand made by the Trustees so far as you are aware that a man who was receiving a pension or other benefits from the Fund was required to appear on a picket line in order to maintain his benefit status? A. That is an absurdity that never existed in reality, never is the answer.

Q. There never has been any such requirement at all, has there? A. No, sir.

Q. Made by the trustees? A. No.

Q. Okay. Mr. Lewis, do you receive any salary
2467 incidental to serving as a trustee? A. No.
2468 Q. Have you ever accepted any salary? A. No.

Q. Have you attempted to in any manner dominate the actions of these trustees over and above the votes of the other two trustees? A. Well, I think a great many meanings have been attached to the word "dominate" but I do not think that any of those meanings could refer to me as a trustee of the Welfare Fund.

I am merely one of three trustees, and to the best of my knowledge and belief I am the least vocal of all the trustees. And never at any time have I undertaken in any improper manner to change the view of any one on the Welfare Fund.

Q. Have you ever at any time attempted to force or to compel or to get the trustees to favor employees of one signatory over the employees of another signatory in the receipt of benefits? A. Never.

Q. Has anybody else ever attempted, any of the other trustees, so far as you know, ever attempted to do any such thing? A. I think it would be quite useless for anybody else, including myself, as long as Miss Roche is trustee and administrator of the fund.

2469 Q. You think she is going to see it is going to be carried out in a proper way? A. Not that there would be any intent to do so under any circumstances—

Q. I take it she is the most vocal of the three, isn't she ordinarily, in the meetings? A. Well, it is my wish not to testify on that point.

Q. All right, Mr. Lewis, we will not press the question inasmuch as she happens to be sitting in the courtroom this morning.

There is something in this record about an informal meeting—I guess we would call it—of the trustees, you and Senator Bridges, under the previous trust, not under

the 1950 contract, before the 1950 trust came into existence, when there was some question about Judge Dawson attending a meeting or coming to the gathering. Do you recall that incident? A. Yes.

Q. Did Judge Dawson come to Washington when the other two trustees were there, you and Senator Bridges? A. Yes.

Q. Do you recall when that was? A. I don't. In the sequence of the years I don't recall the date of it.

2470 Q. It was in 1949, according to this record, because it was before the 1950 trust came into existence. A. That fits in with my recollection.

Q. Would you care to comment on what occurred there, very briefly, Mr. Lewis, just briefly. A. Mr. Van Horne, who was the operators' trustee on the—

Q. Under the old fund before the new one came into existence? A. Yes.

Q. Go ahead. A. —was receiving a salary from the coal operators in Ohio, holding office for them, and he also took a salary which had been fixed by the Government in the case of Captain Collison, a previous Government trustee, of $35,000 per year, and the operators claimed they were not advised of the double salary and he came into disrepute and disfavor and he got mad and gave a qualified resignation. He was not angry at the trust fund. He was angry at the operators who were criticizing him in his own organization.

Q. That was Mr. Van Horn? A. As I understood his attitude. So Judge Dawson appeared on the scene, having retired from the federal Bench, and said he had been retained by the operators and elected by them as the

2471 trustee-elect, and he was given a hearing at two informal meetings of the trustees, remaining trustees. But it was our opinion that there was no vacancy and the trustees could not legally accept him in a qualified position on the board of trustees because there was no vacancy.

Van Horne's resignation had not been accepted and it was not in a form that could be accepted.

So that is all there is to it.

Judge Dawson later ceased his efforts to be seated as a trustee. There were only two conferences at which time the trustees informally discussed the matter with him, with the greatest of courtesy, I might add. And the vacancy remained until Van Horne finally did resign.

I hope I have made myself clear there.

Q. Yes, Mr. Lewis. Was there any business transacted when the three of you were there—you, I believe Senator Bridges was the other one at that time? A. Yes.

Q. You and Senator Bridges and Mr. Dawson were there, was there any business officially transacted at that meeting, those two sessions? A. No. This is an informal discussion with Judge Dawson.

Q. Did Senator Bridges, the neutral trustee of that fund, that other previous fund—did Senator Bridges
2472 agree with the position you took generally or with the position that Judge Dawson took or sometimes one and sometimes the other; what was the situation? A. Well, I think in general without remembering the exact facts now and the sentences and words used, that on some points Senator Bridges agreed with Judge Dawson and that on some points he disagreed with Judge Dawson and agreed with me, which did not disturb the balance.

Q. That was shortly before the 1950 agreement was signed, was it not? A. As I recall it.

Q. Then in the 1950 agreement the three trustees were named, you as designee by the miners, Mr. Charles Owens as designee by the operators, and Miss Roche as the neutral trustee? A. That is true.

Q. Judge Dawson never came back any more, did he; no more meetings with him? A. No.

Q. I will pass back, Mr. Lewis, to your connection with the United Mine Workers of America—going back from

the trustees, or transferring over from the Trustees' portion.

Do you know of a coal corporation by the name of West Kentucky Coal Company? A. Yes.

2473 Q. It has been testified here that the United Mine Workers of America has or is the owner of some stock in the West Kentucky Coal Corporation, the first of it having been bought sometime not far from the year 1951; do you know? A. Yes, I know it was purchased.

Q. You know the stock was purchased? A. Yes.

Q. For what purpose did the United Mine Workers of America buy stock, shares of stock, in this corporation? A. Because the United Mine Workers had idle money that they wanted to put to work to invest. They wanted to do so in such manner as would benefit the members of the United Mine Workers of America and be to their advantage in the industry, and because we were familiar with any of the problems of the coal industry and have a reasonable understanding of the problems of any major coal company in any district of the United States.

* * * * * * * * *

Q. Did you and the other representatives of the United Mine Workers of America charged with the investment of United Mine Workers of America funds think

2474 this was a good investment? A. Yes. Yes, that was a very good investment, because we were familiar with the assets of the company, the type of the coal, and strategic location on river transport, and we think that that company has an intrinsic value many times worth what it appears to be in the market.

Q. As I recall in the deposition that was taken of you, and perhaps some other time, someone raised the question that the current market price of the stock of West Kentucky Coal Company has at times been less as quoted on the New York Stock Exchange than what the United Mine Workers of America fund paid and that you did not sell the stock at that time. A. That is right.

Q. Why didn't you? A. It was not to our advantage because we did not invest in the West Kentucky Coal Company stock for the purpose of making a capital gain or a profit. We wanted to make a contribution to the wider employment and the greater employment of the members of the union in that area, and we thought that the company had a great future and a great intrinsic value which would develop when they were able to refinance themselves and catch up with the obligations that they incurred on the purchase of many of the assets of the company.

2475 For instance, one of those assets was the Nashville Coal Company which West Kentucky acquired. And the West Kentucky went off a dividend basis largely, I understand it, in order to pay the payments for the Nashville Coal.

No reason at all in the face of existing circumstances of the industry that the West Kentucky Coal Company could not appreciate its market value in the future, and I recall, counselor, this vital affect.

The stock was selling at 35 for a long time while our investment in it did not average 26. We could have sold out for a profit and taken our small profit and got out, but that would be merely speculation on stock market values and it is of no advantage to the members of the United Mine Workers.

Q. So you did not sell when the stock went above what you paid for it and neither did you sacrifice it when it went below? A. That is right.

Q. But you continued to hold it because of its future prospects and the opportunities for increased employment, and so on, in the area as an investment? A. That is correct. As far as my knowledge of the subject goes and my judgment.

Q. Mr. Lewis, there is something said in this record
2476 about—that the United Mine Workers of America made some loans to Mr. Cyrus Eaton, and that he

used it to buy some stock, perhaps he or some of his companies, in West Kentucky Coal Corporation.

Would you comment on it, please. A. Yes. Mr. Eaton was a man of acknowledged industrial success and one of the leaders in the financial and industrial world of the country whom I had known for a long time, and we invited him to make a joint venture with us in the West Kentucky purchase of stock, and we loaned him some money to buy stock. We took the stock as security, and that is the arrangement that was worked out.

Q. Something has been said here with reference to those loans made to Mr. Eaton, or made to some of the companies like the Chertsey Company or one of the other companies he was interested in, as to the type of provision in the notes given with reference to interest in dividends and that the interest, or about a part of the dividends that would be received from the stock if paid by the company.

Would you comment on it, please. A. That is right. Any profit occurring from the joint enterprise in the investment were to be split mutually, 50 per cent to each. We could not ask Mr. Eaton to do so and lose his own money, so we divided the profit like joint partners in any enterprise.

2477 In addition to that, in the argot of the market place he gave us a call and we gave him a put. That is the way it is described in the security market day by day and there are hundreds of thousands of such agreements made daily and weekly.

2478 In other words, the notes, I think the promissory notes, secured by the hypothecation of the West Kentucky stock. They have been renewed annually since that time, or whatever their maturity dates are. They may have been changed since I have been gone. I don't know.

There was no thought when the market dropped in value of West Kentucky of asking for more security because

there was no intent to sell the security, and we were conscious of the intrinsic value of the West Kentucky Coal stock and familiar with its reserve assets. It had over a billion tons of reserve coal adjacent to the river, strategically located in the center of the steam coal consuming market at the present and in the future.

Chemical plants are going to locate on our riverways and many other industries. The DuPont Company in its stockholders' report as of last week predicted that the chemical industry will expand for the next ten years twice as fast as the national rate of economic expansion. And it is going to come near the rivers where there is cheap coal and transportation and access to markets.

So we think that West Kentucky Coal Company is something worthwhile as a long term investment, not only financially but in the interest of our members in that area who are given employment, who have been raised out of their previous servitude and are more prosperous
2479 than they ever were in all their lives. And in that respect, the money of the United Mine Workers invested there, which is primarily acquired, paid in by the members for the use of the union in promoting the well being of the members, that has brought a great return already, enough to justify the investment.

Now on the question of why didn't we ask for more security. Our complete confidence in the final success of that corporation, if efficiently managed, and that is an obligation of the management and their board of directors, with which we have nothing to do and do not attempt to exercise any influence in the management of West Kentucky mines or any other coal mines in the United States. We have a standard clause in our agreement that has been there for decades of time, quoted as follows: "The management of the mine, or mines, the direction of the working force, is exclusively vested in the coal operator and the United Mine Workers of America will not abridge this right."

We follow that out. We hold the operator responsible for the management of the mine, and far be it from the United Mine Workers of America to encroach on his prerogative, because we have troubles of our own and work to do.

Q. Even though United Mine Workers is a substantial holder of stock of the West Kentucky Coal Cor-
2480 poration? A. Even though the United Mine Workers is a substantial holder of West Kentucky stock, we do not interfere with the management and have not done so at any time and have no future intent to do so. There can be no conflict of interest between the obligation of the officers of this union to its membership. I would rather see the entire West Kentucky account go down the drain than to permit the losses or injury of the members of the United Mine Workers of America. We owe fealty to no other consideration except to the men who employ us, who gives us their confidence, and as far as I am concerned, whose bread I eat, whose song I sing.

Q. West Kentucky Coal Corporation today, I believe, is a signator to the 1950 collective bargaining agreement as amended, is it not? West Kentucky Coal Company is a signator to the agreement? A. Oh, yes.

Q. They were not at one time members, were they? A. No.

Q. I will ask you whether as a stockholder you people have put pressure on them as a stockholder of the corporation or on Mr. Eaton to get them, to force them to sign a contract, or has that been voluntarily signed? A. None whatever, because Mr. Eaton was obviously a sagacious businessman of wide repute and eminent success and enjoys the reputation of being liberal in his
2481 viewpoints in relationship to labor and its industry.

We knew that as a practical proposition it would have been foolhardy and not wise judgment to attempt to operate an industry of that magnitude without having the goodwill of the miners as expressed through membership in this union.

Q. Now going back just for a closing question on the value of these securities, why of course I recognize that you are not a securities information house, advising the crowd here this morning to buy any particular stock, West Kentucky or anything else, but you still say the investment of United Mine Workers, in your opinion and in the opinion of the United Mine Workers, was a good and is a good sound investment? A. Oh, yes. Oh, yes.

Q. All right. A. I have the fullest confidence in the future of the company.

Q. Do you know anything about the pricing policies as between West Kentucky or others and Tampa Electric Company? A. No, I do not know, except in general that there is a controversy. I don't know what it is about or none of the details.

Q. You have not been interested or taken any
2482 part in that? A. No.

Q. Nor United Mine Workers, so far as you know, has not taken any? A. No.

Q. Now there is a lot of proof in this record here with reference to sales made by West Kentucky and perhaps some others, coal companies, to Tennessee Valley Authority. What, if anything, have you had or United Mine Workers had to do in connection with those sales? A. Nothing of any kind. I read public accounts of the letting of contracts by the TVA. I see where contracts are awarded to a long list of suppliers. I see the contracts of West Kentucky in there. That is all we know. We are not consulted. We are not privy to it. We have no knowledge of it.

Q. And so far as the pricing policies that are adopted by West Kentucky or others in making sales to TVA, have you anything to do with the pricing policies that are followed? A. Emphatically no, not in any sense of the word.

Q. Mr. Lewis, there is some proof in this record with reference to the United Mine Workers of America buying

some stock in the National Bank of Washington. Did
2483 the United Mine Workers buy some stock or did it own some stock, shares of stock in the National Bank of Washington? A. Yes, that is correct.

Q. In other words, did the United Mine Workers acquire any stock in the National Bank of Washington? A. Yes.

Q. And why and under what circumstances was the acquisition of this stock? As an investment, it would grow in value, and for additional advantages of having a place to use a common depository for our several funds, a matter of convenience.

Q. Of course, the United Mine Workers of America has had some funds, a substantial amount of funds perhaps over some years. Prior to the acquisition of the stock in the National Bank of Washington, where were your bank accounts carried? A. Well, as I recall, they were different places. We dealt with two or three banks in Washington at various times. We tried to deal with one bank, but we weren't welcome there. We just did the best we could.

Q. Then did you acquire, the United Mine Workers did acquire stock in the National Bank of Washington for an investment? A. That is right.

2484 Q. Was it acquired for the purpose of forcing out of business any small coal operators or large coal operators either? A. Emphatically not. No relation to it. I don't see how it could, but that is immaterial.

Q. Mr. Lewis, it has been testified in this record, or there is some indication that the United Mine Workers has attempted to favor certain mines, because it was trying to get them mechanized to the injury of smaller or other mines. Would you mind going briefly into the United Mine Workers' philosophy with reference to mechanization in the coal industry? A. I think the first mining machine came into the industry when I was in my teens somewhere and it was a shearing machine. The mine workers called it the "Iron Man", and some of them expressed dissatisfaction with it because it ultimately would put men out of jobs, so they

said. As the years went by, they were improved. Machines of greater versatility and maneuverability underground were developed so the coal was undercut, in addition to being sheared in a vertical fashion with the old machine. And from time to time it got so the operators of those machines and perhaps one man assisting on those machines were paid sums of money above the going rate that affected the daily wage rate of the men employed by the day with the company.

2485 And in later years the union never opposed the union machine—

Q. Never what? A. Never opposed the introduction of the machine, because we recognized that if this free enterprise system that exists in the United States, investment for profits, reward for incentive, capitalism, call it what you may, could only endure in the world of international competition, if it could expand its processes, increase productivity and given participation in the bounties of free enterprise and the natural resources which providence provided here in the United States; that otherwise there would not be an opportunity for your young men and women coming in increasing number each year in a rapidly expanding population, that we just had to improve the processes of mining coal, and we accepted the machine.

2486 We maintained this principle which we enunciated from time to time, that God didn't put in the mind of a genius an idea to create a machine that would do the work—displace ten men and do the work of ten or more, for the sole advantage of the coal operator, or the company that manufactured the machine, and we demanded a participation for all the employees in a mechanized mine in the advantages of the increased productivity. So that has been the case through the years.

The competitive relationships of the industry to the rest of the economy required the production to raise it.

Q. Explain what you mean by that, Mr. Lewis. A. I meant

if the coal industry hadn't lowered its cost to increase productivity per man employed, it would succumbed to its competitor.

Q. What? A. To wit, oil, gas, diversified fuels made from either coal or petroleum bases, and world competition.

So, it was necessary for the coal industry to sell its wares in a market that critically looked at prices always, and turned to substitutes if the prices didn't suit the way of the marketplace.

At the time and in those years, the railroads were
2487 the chief consumer of coal in this country. They consumed one-third of the annual national production.

* * * * * * * * * *

A. At the time the railroads were buying one-third of the national production of coal, and were the biggest customer. They consumed it in their steam locomotives and transported freight and passengers throughout the country.

Sixteen per cent went into private homes, domiciles and mercantile establishments. Other percentages were used in the chemical industry, in the coke industry to a degree.

We used to have annual appreciations when certain markets were tapped. In late June and July, the harvest would cause an appreciation of coal sales and provide more work for the miners, because all threshing machines throughout the country were coal burning and people looked
2488 forward to the time when the harvest came.

In the fall of the year, schoolhouses came, because the schoolhouses throughout the nation, some of them far remote from settlements, had to be filled up with coal for the winter, most especially in those areas where the climatic conditions would make it difficult to transport coal in the wintertime.

Then we had the lake trade that took coal up in the summertime to the northern provinces of Canada and our own areas up there.

That is changed. The railroads went to diesels; the schoolhouses were consolidated, had central heating, generally with oil or gas; and the little red schoolhouse far out in the country that used to have a stove and the scholars would carry the coal in and the school teacher would build a fire in the morning, the coal house is gone, but there is a butane tank there, gives them heat out of a gas tank made from a petroleum base. So that is gone.

So constantly the coal industry has had to change the basis of its hope for business. In recent years, one of the great things has been in the increase in the usage of electric power, and the fact that within the distance of reasonable transport, coal will produce power more cheaply than oil or gas, and much more cheaply than water power when one considers the original investment in water power.
2489 Only the government can develop water power projects such as the TVA, because a private investor couldn't make a return on the vast investment required for the costly constructions of dams and retaining areas for water. Very rarely has any of those projects been finished in this country except under government aegis.

Now the industry is growing, and the electric power industry is the largest consumer of coal now. We think that research is coming into its own, and for the first time the government has charted a course now in cooperation with the mining industry for exhaustive future studies of the chemical resources of coal, and what can be liquified and segregated.

I am sure counsel knows that contained in our coal measures are all of the organic values of ends of time that can be compressed into this storehouse represented by our coal seams, and everything of organic value that the world developed or created during those periods when coal was formed is contained and locked up in the chunks of coal that we bring out of the ground.

We already know how to eliminate — how to take out

thousands of products. Some I think can be taken out competitively. Others cannot be taken out competitively, and we know there are other thousands of sub-divisions rests upon our genius and our technique and our
2490 educational potentials to isolate those values and make them of value to the current world who are given them by nature and providence.

So the Mine Workers never opposed the introduction of machines, because they believed that it was inherently necessary to preserve free enterprise and our concept of the freedoms inherent in the American form of government.

Right now free enterprise is on trial all over this world by more absolute forms of government, with power to commandeer the services of men under any conditions they describe, and for as little as they may elect to provide, and we have these expanding populations that are going to flow over the boundaries of these political subdivisions of the earth in great lands to the tune of millions of people, because they are asking also for bread and participation and some of the liberties inherent in the concept of government we have here in our home country.

The Communist threat that blooms on the horizon and occupies the daily attention of every citizen of this land, what about it? They are increasing their production by commandeering the brains and the hands and the strength of the population that is a multitude, and there is visible what some of the things they are doing.

2491 Three years ago, I addressed the American Mining Congress in Cincinnati, in June, and I told them that at the end of that year, Russia would exceed in gross value the coal production of the United States, and it did. It did.

What are they doing with that coal? They are putting it into the Mediterranean and driving out American coal; they are putting it into the Baltic countries and driving out American coal; they are putting it into the continent.

The Polish mines under their direction are turning out increased volumes of coal at prices that will shove the American exports out of those countries. They are driving us out of our consuming areas in South America for coal, the Argentine and the other countries down there, so who is the man who can say that we don't need to lower our cost of production in the United States, that the machines displaced manpower in the mines, and therefore is a curse?

He is the man whether he understands it or not, who is advocating that America not improve its technical processes and wait to be overwhelmed by the gigantic quantities of goods which other nations at lower wages and under abominable conditions and under dictatorship will dump into the world market to the entire exclusion of the free enterprise economy.

There is more at stake in this proposition than the welfare of one coal company or any group of coal com-
2492 panies.

We are a free enterprise nation. We are dedicated to the principle of retaining competition in our free enterprise institutions. And to say that we can live in this advancing world and find employment and participation for the 220,000,000 estimated population we will have in 1975 is just an absurdity. And unless we can find jobs and participation for this million-and-a-half or so of young people who come into the work employment market every year with their professional educations and their vocational educations and their training, representing great sacrifice upon the part of the families and the students to seek that, unless we can provide employment for them it is not a reason to expect that they will long remain proponents of free enterprise that don't permit them to enter and participate.

That is the problem of America and the coal industry can't be too proficient because progress is going on and we have a scientific renaissance in America and in the

world today and no one can predict the invention of tomorrow, so we have not opposed the mine machine.

We have sought to make advantages out of it and a participation in its elements of virtue on the part of the people we represent. And let me tell you in doing so it has been to the advantage of the coal consuming public of the United States because the price of coal at
2493 the mine today in the United States is from 40 to 65 cents per ton less than it was in 1950 or 1948.

Q. Due to what? A. Due to improved efficiency in the production of coal and the taking of it from the ground, and to the manner of its preparation that removes the impurities and makes it burn.

Q. Mr. Lewis, let me stop you just a moment and take up on a similar line but a little different approach.

Can you give us some idea of the difference in proficiency or efficiency of coal production per man, take tons per hour or tons per day, today as it was at the end of World War I, beginning of World War II and the end of World War II? A. Well, after eleven years — no, probably 14 years — of nationalization of the coal mines in Great Britain by an Act of Parliament, they are nationalized, the government operates them —

Q. The government took them over in Great Britain? A. Yes. First they took over the coal mines and then later they took over the operating companies, made it a complete nationalization, and after all those years of experimentation they have got the coal produced per man day in Great Britain up to 1.23 tons per day per man.

On the continent it is somewhat less. The last set
2494 of figures I remember was .83 ton per man employed per day in Belgium and in France and Austria.

In Japan their production per man per year employed in their mines is equal to the tonnage produced in one of our coal mines in 18 days by an American miner. The

American miner produces a value in 18 days amounting to the entire value of a year's work of Japanese miners.

In India, at its greatest open surface mine, which is the greatest of all their mines, it produces 10,000 tons a day and it only required 16,000 employees per day to do it, working three shifts, around the clock, 10,000 tons, 16,000 employees. The average wage for the men is 37 cents a day.

Q. How much? A. Thirty-seven cents a day. The earth is removed by women carrying the earth in baskets on their head. Some of the women clean the small particles but small children pick the particles of dirt and scrubble out of the coal. Men, women and children work in that mine around the clock, three shifts, 16,000 in number, getting 10,000 tons.

Q. We want to finish this before we have to recess. Now bring us down to the United States. A. Twelve tons per man day as I speak to you, the average of all the mines in the United States, and that average is depressed by the fact that in that average there are several thousand
2495 small or inefficiently equipped mines that produce a much lesser tonnage, so it depresses the national average.

We have mines right now that are producing 28, 30 and 40 tons per man day — not the average. The average is 12. That includes every little mine that produces coal that is reportable.

In World War I the average produced was three tons per man day.

Q. In the United States? A. In the United States. And in World War II there was an average of six tons per man day, but in World War II they produced 125,000,000 tons more coal in the maximum year of our production with 300,000 less men. The Armed Forces — the United Mine Workers had 178,000 of its men in the Armed Forces.

That is the record of efficiency, and since World War I the increase has gone up from an average — since World

War II, from an average of six tons at that time until the national average of 12 tons right now.

That is the reason we are able to put our coal down in Germany and in continental areas in Europe at as high as two and three dollars a ton cheaper than that country can produce it in its own mines with its own nationals.

2496 Germany has barred us out except for a limited tonnage. They put up a roadblock against our imports. They have got a tariff against American coal of $4.78 a ton. I think that is right. I am quoting from memory but I think that is the accurate figures.

They can't compete with us in the field of economics so they erect this import barrier and only against American coal — not against anybody else's coal.

Those are the things that are happening and all these questions run to the future of America and the stability of its economic establishment, and a sick industry can't exist in the United States with impunity because it affects other industry and under the modern integration and complexity of our economic system if the coal industry is depressed, or the steel industry is depressed, every major industry will likewise feel the effects of their misfor-

2497 tune.

Q. And now in conclusion — it is 12 o'clock — but without mechanization as it exists in the mining industry today, it would be a hopeless industry in America, would it not? A. Quite so, sir. Quite so. I don't see how they could ever get — well, in the first place, the economy wouldn't have advanced currently like what we have now.

* * * * * * * * * * *

2498 Q. Mr. Lewis, are you familiar with the Walsh-Healey Act and its enactment by Congress? A. Yes, sir.

Q. Did the United Mine Workers and you as president of the United Mine Workers advocate the enactment of that statute? A. Yes.

Q. Why? A. Because it created an American standard of employment level and living conditions and, in effect, a minimum wage in those industries that supplied the government with the various commodities, and became in the intent of Congress the American standard, below which wages shouldn't be paid, entering into the field of pauper labor and sweatshop production. We favored that as an act of general policy to increase the living standards of Americans, increase their buying power, give them
2499 a greater participation in the value of their services and the work of the government. We favored it in principle.

Q. In connection with the carrying out of the provisions of the Walsh-Healey Act, I believe the Secretary of Labor of the federal government conducted certain hearings, did he not? A. That is right.

Q. Did the United Mine Workers of America participate in those hearings insofar as they affected the production and sale of coal, or the sale of coal? A. Yes, in cooperation with the hearings and the Secretary of Labor, in securing the establishment of the recognized Walsh-Healey base in the coal industry in which given concerns spend tax money, the TVA among others.

Q. And under a finding by the Secretary of Labor, there is an established prevailing wage for the commodity in a given area, is there not? A. That is right.

Q. And people selling that commodity to an agency of the federal government, in order to get awards or contracts with the federal government, must comply with that
2500 prevailing wage? A. That is right, in all contracts exceeding in value of $10,000.

Q. Now in connection with the Walsh-Healey Act and the TVA; did you have and the United Mine Workers have any connection with TVA in connection with the enforcement of the Walsh-Healey Act? A. We have at times had representatives confer with the officials of TVA urging them as

an establishment operated on tax money to patronize those concerns that paid the American standard of wages as defined by Congress, not with respect to any individual buyer, not with respect to whether the United Mine Workers of America had contracts with those interests. It was immaterial. We wanted to protect the American standard of wages. And to go on from there and improve as circumstances would permit and our influence bring about. That is all.

Q. In other words, to urge that TVA comply with the requirements of Walsh-Healey in the award of contracts? A. Yes. TVA had a practice of buying from exploited industries or debased industries or substandard industries in lots of less than $10,000 so as to escape the provisions of the act. They would give multiple contracts of that kind, so sometimes they would sell the TVA 50,000 tons, or 100,000 tons by having a series of less than $10,000 value contracts. We protested that as a subterfuge and not good faith compliance with the statute enacted by the
2501 Congress.

Q. And in that connection you never made any protest, did you, whether the coal purchased was from a union mine or from a non-union mine? A. Never at any time. Nor with respect to any particular or specific coal company in the industry.

Q. In that connection, was there any effort made to put any small or large mine or any other mine operator out of business? A. Never at any time and was furthermore from our intent or our thoughts.

Q. Mr. Lewis, has the United Mine Workers of America at any time joined with or agreed with any coal operator, made any agreement with any coal operator to influence either pricing or operation of mines for the purpose of any putting any operator out of business? A. Never in the entire history of the union as I know it.

Q. Have you ever been a party to any agreement with

reference to the pricing of coal? A. I have not, neither in an individual capacity nor an official capacity as representative of the union, nor other labor organizations when I was representing other labor organizations.

Q. Or with any capitalist group or financial group? A. With no capitalist and no vagabond.

* * * * * * * * * *

2502 CROSS EXAMINATION

By Mr. Rowntree:

* * * * * * * * * *

Q. I believe it has been your position or your statement that fewer and fewer units of production will take over the production of coal in this country? A. Due not to any action of the United Mine Workers of coal industry, but the trend of the American economy under the free enterprise system in competition with all the other producing countries of the world, yes, and I embellished that reference by giving some of the reasons for it, as I recall it.

Q. And I believe it is your statement that these combines that are being formed through mergers in
2503-2504 the coal production industry are able to make tremendous savings in their operating costs through — A. Not —

Q. Just a moment, please. Through mechanization, through term contracts with the coal market and other things, savings of costs that are not available to the smaller companies. A. Those combines to which I do not refer with the qualifying language that you use, I say that it is a matter of common knowledge that a larger company in our competitive world, producing any commodiy of national usage, certainly can make some saving by having a larger volume of production, or if combining a number of units of productivity in that particular field. Certainly it is recognized that a large company needs to spend less money for sales cost for larger volumes of coal. The same is true on management. The same is true

on the purchase of supplies. The same is true in regard to managerial responsibilities and preoccupation. That is attested to in every industry in the country by the law that exists there in competition with lesser units of capital that are invested in that industry, and it is common practice thinking, merely a recognition of the trend of the economy, for the reasons that are understandable.

2505 Q. And the same is true with respect to investment of millions of dollars in mechanization, the employment of one hundred yard stripping shovels, the use of continuous mining machines? A. United Mine Workers have no restraint on how large a piece of equipment should be, or what its capacity may be. There is constantly experimentation and research in the field of manufacturing by the equipment manufacturing companies in this country, and it is like our present-day maritime fleet, bears no resemblance to the maritime fleet of World War I.

The Liberty ships are obsolete in this modern age, and they can't compete on the high seas with the improved units, faster and greater capacity, with less overhead, a quicker turn-around, all of those things having to do with the cost per unit that they deal with.

Q. And so these large combines are able to make a savings in cost? A. I do not know what you refer to as large combines.

Q. Well, we will go back to that right now. A. But it is obvious if a man has a department managing his mine and his sales organization selling coal, that it is conceivable that both departments can account for more tonnage if they had it in the market and could sell their coal
2506 at a price sufficiently low to attract buyers in the market. Those things are axiomatic and fundamental and plain "abc" in the management of modern industry.

* * * * * * * * * *

2507 Now, Mr. Lewis, you have brought into this case this struggle between Communism and the free enterprise system, and I should like to review that question from our standpoint.

Is it not true that the backbone of the free enterprise system is equality of opportunity? A. You may have that viewpoint. At the moment, I am a little cloudy how to fit it into the complex economy and the interdependence of our economic units upon each other.

Q. All right, sir. I think the record is clear that the United Mine Workers have one contract, one contract for all companies, large or small, regardless of working conditions, regardless of finances, regardless of ability to pay, is that not right? A. That has been the policy of the union through the years, but not achieved in its entirety, and while we like to negotiate contracts similar in nature on the theory that equal service or specially skilled service in a coal mine is worth just as much to the individual in Tennessee as it is in Pennsylvania, we hold that the mine worker in Tennessee is entitled to the same wages for the same work and service performed underground or above ground as the case may be. However, we have not been able to achieve that goal in its entirety, although it has been a policy of the organization for many many years,
2508 it's only in certain areas that we have achieved that, and we have many contracts that do not equal all of the provisions of the National Bituminous Coal contracts. There's differential still in increasing the —

Q. It is true that the increases since 1950 have been uniform throughout the country for all companies? A. No, I think — no, I think there are certain differentials inherently — the wage increases are applied uniformly.

Q. That is what I asked. But the basic features that previously existed, different yardage rate, different car rates, different day rates for the same classifications.

* * * * * * * * * *

2509 Q. Now these men in Tennessee are entitled to work on an equal oportunity basis with the miners of the large companies, are they not? A. Are you talking, sir, from the basis of equity?

Q. I am talking — A. Or economic circumstances and the limitations that places upon negotiating parties?

Q. I am talking about fundamental rights under our free enterprise system, that men should have the equal opportunity to work all over this country. A. No, I think that is a generally recognized principle.

Q. All right, sir. A. Accepted abstractly and academically by the population, and yet all is not existent locally and in communities and areas.

Q. And another important aspect of this struggle that you have mentioned that exists in the world today is the extent of unemployment in our country. Don't you think that the unemployment factor is an important item in this struggle with Communism? A. I never knew the time in my life when I didn't believe that, that the oppor-
2510 tunity for employment is very, very important.

Q. Yes, sir. Now with respect to this business of the coal industry being organized into fewer and fewer units and larger and larger combines, I take it that there you are talking about large companies organized with the United Mine Worker contracts, that is your picture, is it not? A. No, I do not agree with you on your analysis of that subject.

Q. Do you expect the United Mine Workers of America will not maintain its position as the bargaining representative in these large Mines? A. I expect that the United Mine Workers of America will continue to protect the interest of its members in the future as it has in the past, but without assuming responsibility for determining whether there should be a merger of coal companies, or what you prefer to allude to as a combine, or whether there shouldn't be, and as to the identity of the party, that is a field in which

the United Mine Workers of America does not operate for the reasons I advanced in the hearing on direct testimony this morning.

2511 Q. Now with respect to these large organized companies I would like to examine the leadership that would be in control in this struggle that exists in the world which seems to have been a factor in your direct examination.

The United Mine Workers in World War II, what kind of record did they have? A. You mean a war record, or economic record, or patriotic record? What do you mean?

Q. I mean record on strikes. A. Record of what?

Q. Strikes? A. Strikes?

Q. Yes, sir. A. Our proud record is that despite all the aggravations and the impositions imposed on the members of the United Mine Workers in World War II that we kept the wheels of industry running. The war effort was never impaired. We produced all the coal that our organized domestic commodity could consume without impairment. We produced all the coal that our allies could not produce to sustain them in their war effort.

And I call attention to the fact that for a long period of time the Mine Workers of America agreed to work six days a week, nine hours a day underground, to furnish coal for our British allies who were working five
2512 days a week, eight hours underground, and the rest of the world accordingly.

Q. And how many times did the Government have to seize the coal industry to keep the mines going? A. Four times, as I recall.

Q. Four times during — A. Not during the war, however. That was in the period of the 1940s.

Q. Well, the war was from 1941 to 1955. A. That seizure, if I may add —

Q. I mean, 1945. A. — was the seizure of the operators'

coal mines. The Government did not seize anything that belonged to the United Mine Workers.

Q. Why did the Government seize the mines? A. Because the operators were so woefully inadequate in the handling of — in the negotiation of their contracts and ignored the rights and the hope of the coal miners who were making this terrific effort to uphold the government, that the Government took their mines away from them and made the contracts themselves, as witness my testimony this morning.

Q. I believe there was a seizure — A. Then in order, may I add this — that the operators were anxious to get their mines back from the Government, to whom
2513 they had given them, that they were compelled to agree to the terms of the agreement negotiated by the government with the United Mine Workers of America.

Q. I believe the first seizure was in 1943, is that right, and I will read from this statement which the Union made, and this is already in the record, just to refresh your recollection. 1956, page 82.

The 1943 seizure. This seizure lasted for five months and twelve days from May 1, 1943 to October 12, 1943.

Twenty days later, on November 1, 1943, the industry, was seized again. This seizure lasted for six months from November 1, 1943, to May 31, 1944. This seizure was not terminated in the southern producing area until June 21, 1944.

There was a third seizure of certain coal mines that became involved in supervisory strikes during September and October, 1944.

There was a fourth seizure, involving certain mines from April 10, 1945, until June 3, 1945.

Do you recall those seizures?

A. Oh, yes, I recall them as an abstract proposition although the details of them are somewhat dimmed in my

mind due to the passage of years.

2514 Q. Now, Mr. Lewis, in this world struggle that you have mentioned, let's examine the management side with respect to these great combines, fewer and fewer in number, that are to take over the coal industry.

I believe that you have seleced Mr. Cyrus Eaton as the manager to whom you have loaned some—loaned or invested in his companies some $40,000,000; is that correct? A. I would not know the exact amount but certainly we have engaged in a business arrangement with Mr. Eaton as effected West Kentucky Coal Company.

Q. And would you say that Mr. Cyrus Eaton is a man to control these great combines in this world struggle against communism? A. I don't know anything about any great combines. There are some great combines I know of, like the American Telegraph and Telephone; the big companies in the steel industry. But I don't call a merger of two or three companies a great combine because none of them are very great in relation to the total tonnage of coal mined in this country and the future prospects for increased tonnage necessary to meet the requirements of our increased population.

Q. We are talking about a tendency—a tendency to combine into fewer and fewer units. It may be just getting started, but still we are talking about a tendency,

2515 and I will ask you if Mr. Eaton is the kind of man we want to lead and control a basic industry like coal in this world struggle? A. Why, sir, I have no knowledge of what is in your mind, and I think—I assume you are including yourself in the first person plural "we" there.

Q. Yes, sir. A. But I don't think Mr. Eaton's political opinions, pro or con, as to whether he is for war or against war, have anything to do with economics of this coal industry and certainly has never been given any consideration by the representatives of the United Mine Workers.

Q. So the world struggle is really not in question here?

A. I do not so concede. I maintain now, as I have previously uttered, that free enterprise, as we know it, is under heavy assault from the commodities being produced in at least three countries including the communist bloc. And that if we are to compete in the world of commerce with this gigantic group of people over whom the flag of Russia flies with their skillful adaptation of the modern sciences to improve their production and make advances in the scientific world, some of which we have not yet approached ourselves, that we have to compete with them; that we have to make free enterprise more efficient; that we have to expand our economy at a faster rate than it has been expanding in order to provide a participa-
2516 tion and job opportunity for the young people we are turning out of our schools and universities year by year in increasing numbers.

Certainly there is a grave question of the effect upon youthful minds of not being permitted to participate in the blessings and the privileges of the Land of The Free and Home of the Brave. Those are matters of concern and those are the questions to which I alluded in talking about the communist menace, and it is not only recently I am talking about that because the United Mine Workers of America petitioned Congress in 1924 to investigate the communist propaganda in this country when the rest of the country had scarcely heard of the question. It is all of record and for all to read.

2517 Q. And the United Mine Workers was one of the two major unions in this country that refused to subscribe to the anti-Communist affidavits? A. That is right, sir. That is right. And they maintained that position until Congress altered the law and the statute on that question. So we must have been right.

Q. They require reports? A. I assume we were right if Congress found that it was wrong.

Q. And Congress at the same time required unions to fill reports of the internal organization? A. Congress never

enacted any law that required us to take the anti-Communist oath. It is a privilege that Congress gave.

Q. But it required the union in 1959 to file its report with respect to its internal organization and finances and the union had never done it before that time? A. Perhaps if the technicians and lawyers so advised, that is what we did.

* * * * * * * * * * *

2519 Q. I would like to talk about checks and balances. Mr. Lewis, our democratic, our republican, institu- are founded upon a system of checks and balances,
2520 is that not correct? A. I do not know your premise or what you are going to say.

Q. Look at the constitution. A. I can't affirm or deny your premise until I know what it is. What do you mean by checks and balances, if I may be permitted to ask?

Q. Look at the constitution. A. The constitution of the United Mine Workers?

Q. No, the United States. A. That is clear now.

Q. We have a system of checks and balances, do we not? Yes, we do, don't we? A. Your question.

Q. We have a system of checks and balances, not talking about checking account at the bank, I am talking about checks and balances, the system of running things. A. If you want to call—if you wish to refer to the subdivisions of government as between the executive department of government, the legislative branch of government and the judicial branch of government, then of course the constitution provides what you allude to, I suppose, as checks and balances. That is obvious, as any school boy is familiar with those things.

2521 Q. All right, sir. And in business and in industry, there are also checks and balances under our economic laws? For instance, we have the anti-trust law, with respect to monopolization, and at the same time our law recognizes a business or a man's right to get ahead by enterprise and initiative. There are checks and balances in your economic laws, is that not right? A. Well, one

could call them diminutive checks and balances as they pertain to the operation of a factory or an industry, but they are minor in consideration to the checks and balances that are inherent in our constitution as affecting the stability and the future of this form of government. It has no relation to them.

Q. No, but I am talking about systems of checks and balances. A. In the light of experience, these so-called checks and balances in industry are quite feeble and not operative.

Q. All right. A. Just like some of the provisions by statute are not operative in certain areas.

Q. That is why in this area of economic law, that is why suddenly there merges a great giant enterprise that has monopolize the field and that is why the government then has to then go after it? A. Well, may I say to distinguished counsel, that I am trying awfully hard to be responsive to what I think your questions are.

2522

Q. I realize that. A. But at times I am bewildered to know whether you are testifying or whether I am. Are you testifying about certain types of checks and balances that you want to portray the equities and beauty of it this afternoon and then get my reply, affirmative or negative, as to which side I am on?

Q. No, sir, Mr. Lewis. We have been through this before. I am just asking you a question there. If we don't have checks and balances as a means of running government, as a means of carrying on our free enterprise system. A. Well, I am not sure that you and I agree on what a check may be or a balance may be, and that becomes an abstract discussion.

Q. Well — A. Where the law of supply and demand —

Q. Let's turn to the traditional management-labor relations field, and there are checks and balances in that field, too, aren't there, protecting the rights of management on the one hand and protecting the rights of labor, the employees, on the other hand? Isn't that right? A. I think that every individual has a check by his own inherent limita-

tions. He may be able to sustain a viewpoint at some
2523 loss to himself and some sacrifice to his family for a limited length of time, but not indefinitely. The same way with miners and operators. When the operators are afraid the government will seize the mine, the government took their mines and operated them to the account of the government. Then they made an agreement with the people and representatives that the operators refused to agree with. Then they asked for their mines back.

Well, they were in position of wanting to negotiate, but they didn't have mines upon which to negotiate. And all the mine workers had to do was wait until they got into a mood of accepting the basis of settlement which the government of the United States, with the approval of the president and with the consent of the Congress, had approved.

Q. Let's go to — A. Now they were checked and
2524 limited and balanced to death there, weren't they?

Q. Let's get over here on this check and balance with respect to employer and employee. Now the employees look to their union to take care of their rights in an organized business, isn't that right? A. Well, I have been under that assumption.

Q. Now isn't the most basic need of an employee, the need to have a job so that he can make a living to support his family, survive, isn't that right? A. I think it is elementary.

Q. All right. A. There's about seven million of them now in the same position now in the country.

Q. And the United Mine Workers diligently pursued the rights of the employees in the coal industry until 1950, did they not? A. Until this date.

Q. All right. A. Until this date.

Q. And until 1950, you maintained that there should be equal opportunity to work among the coal miners of the country? A. We have always maintained the same posi-
tion, and the principles and the objectives were writ-
2525 ten and defined long ago, and there has been no departure by the United Mine Workers from those prin-

ciples and those policies on the date you seef enamored by, 1950, or any other date that you might dig up in the calendar. I would prefer you to use the Gregorian calendar.

Q. But in 1948, 1949, and early 1950, you were urging the industry to spread the work, to equalize the work opportunities, to reduce the working time to three days a week. In spite of the great, tremendous investments that these companies had and these modern mechanized mines, you were urging them to cut down on their working time to three days a week and spread the work throughout the industry, to all the employees, pursuing the basic right of employees everywhere to work. Isn't that true? A. It pains me greatly to disagree with the nice speech of the counsel, but the answer to all of your accusations in that short narration is no, you are wrong, we did not urge the stablishment of a three-day week in this country, neither then, before, or since.

However, it was alleged in the public press, ofttimes by the utterance of opinions of men of little knowledge on the subject, that there was going to be an immediate shortage of coal and a crises in the country if the strike wasn't settled.

2526 Q. You are talking about the negotiations in the 19--

* * * * * * * * * * *

A. The Mine Workers knew there was no coal shortage, that every facility of the nation was going to run, that there was nobody without coal, because we had a very substantial knowledge of exactly how many tons of coal were above the ground in the United States of America, where it was stored, who owned it, and its availability for usage. That is our business to know those things.

So, in order to quiet, suppress the headlines in the newspaper and detract somewhat from the efficiency of the public orators on this question, and some of our major politicians who sought to make political capital out of berating the United Mine Workers of America, we offered, pending

negotiations, and pending the final completion of a
2527 new contract, to let the mine work three days a week.

Q. And you say that that is — A. That was a stipulation that we put on merely to abate that uproar and at the same time preserve some of our bargaining rights with the operators so as to finally limit the period of negotiations, rather —

Q. You say that is all this three-day work week was? A. That is all the three-day work week was.

Q. All right, sir. A. And let me say to you, sir, what I have already put on this record, so there will be no misunderstanding about it. The United Mine Workers of America could not have been persuaded to accept a three-day week, and if it was offered to us, we would have rejected it then and now, because it limits too much the earning powers of our membership, and we think it is an idle, useless thing, to require a man to live around a coal mine for the opportunity of working three days a week and being idle four days a week.

Q. Mr. Lewis, isn't this testimony directly contrary to what you testified in your deposition? A. No, I did not.

Q. All right, on page 68 of your deposition, I refer you to this statement that you made in 1948 before these negotiations over the 1950 contract.

2528 "Quote: 'So next year in 1949 or at any other time when evil days come upon this industry, you will find the United Mine Workers of America moving in, and if there are only three days work in this industry, we will all have the three days work. These things are of the utmost importance. Conditions are not now as they were in the old days.'

* * *

"Do you recall this statement?

"Answer: Oh, yes, and I may say that those observations merely relate to one thing: The equitable distribn-

tion of work opportunity in the coal industry and the desire of the United Mine Workers to have the work opportunity more equitably distributed. It had nothing to do with any other subject."

Now isn't that the correct testimony on this question? A. Well, I reaffirmed those words now.

Q. Well, Mr. Lewis — A. And I point out, which you seemingly are unfortunate that you are not familiar with all the technical details of the coal industry and it is a reasonably assumption that I am —

Q. I will admit readily that I am not. A. But the rule was that when demand fell off, certain companies
2529 having more than one mine, or perhaps a group of mines, would completely shut down one mine and leave those men idle, concentrate their tonnage — they may shut down two mines or three mines, before it is over, or four mines, to concentrate their production to fewer mines and giving a certain part of the employees of that company steady, every-day employment, while the rest of their employees were cut off from any employment whatsoever.

Q. Sure, that is exactly what I am talking about. A. It relates to the equitable distribution of the available work, and not as a limitation to production to a three-day week.

Q. Well, I am not talking about the limitation of
2530 production. I am talking about the union pursuing the rights of the men to an equitable distribution of the work, looking about the interest of the employees in all the mines of the country. A. It still recurs, counselor, that ancient observation you have just pointed out there, has no relation to the three-day work week in principal that you were discussing previous to reading it.

Q. You are talking about the three-day work week in there. A. It just happened to be used there as a symbol, what the work might have been produced under certain circumstances. You have got to start somewhere in the week and it is in the middle of the week.

Q. And the next question:

"And in 1949 and 1950, during the period that negotiations for the 1950 contract were going on, you did set three day work weeks and other types of work weeks in the industry?"

Answer: "We set a three-day work week, yes, to distribute the work and the opportunity for work; and for no other reason."

A. You mean that was a three-day arrangement made qualification to bargaining?

2531 Q. Yes, sir. A. Well, they would not have worked three days if there had not been market enough to take the three days. That was used as a yardstick there and had no relation to the things that seemingly you have in your mind that there was a conspiracy to which we were a part that was designed to reek evil or disadvantage on other companies not under contract with the United Mine Workers of America. That is not true now and never has been true.

Q. I am not talking about that right now. I am talking about your purposes, your motives, your position taken before the 1950 contract. And this testimony that I have read from, that is correct, is it not, Mr. Lewis? A. To what do you allude? Do you mean the transcript of the deposition?

Q. Deposition; that is right. A. Anything in that transcript certainly is verified.

Q. All right, sir. Now — A. You will find nothing in that transcript, counselor, that undoes or conflicts in interpretation with any expression that I have voiced here today in this Honorable court, and all attempts to confuse me by comparison of words will undoubtedly not confuse me.

Q. Mr. Lewis, this was an important item. You
2532 came in today and testified that this three-day work week was a problem of just satisfying Government authorities, or some authority, or the people, with respect to the shortage of coal that was going on during the course of these negotiations because of the strike, and now I bring

up — A. I disagree heartily with your conclusion that is all that it was.

Q. Just a moment. I bring up — A. Your understanding of these terms and mine are apparently somewhat dissimilar. I am talking from my knowledge of the industry. I assume you are talking from an abstract knowledge of it and a superficial indoctrination of some of these terms in question.

Q. I am not trying to be — what term did you use? I am not trying to indoctrinate anything. I am trying to figure out what happened in 1950, Mr. Lewis, and I say that this testimony you gave in your deposition is true.

Isn't it true, Mr. Lewis, with respect to the three-day work week and the limitation on the working time in the industry, to distribute the work? A. Sir, with all deference I have tried to explain in layman's language that the three-day work week suggested for a limited time pending negotiations made on that day and date and during that period to which you allude, was merely a piece of bargaining strategy to place our opponents at a disadvantage.

2533 Q. And you reject now your testimony — A. And it is a technique sometimes used by distinguished attorneys in the profession, as I have cause to know.

Q. And you say now that you did not mean what you said back in 1948? A. No, I do not so say, sir, and I don't take kind to your constantly trying to put words in my mouth.

Q. Well, I was reading from your deposition, Mr. Lewis. A. Yes, but you were interpreting the deposition in a manner that I though was inaccurate.

Q. I was reading it, Mr. Lewis, and comparing it with what you testified here today about the supplying of coal for a shortage that existed during those negotiations as being the only thing you had in mind about a three-day work week.

* * * * * * * * * *

2534 Q. Now, Mr. Lewis, since 1950 the union has imposed this contract on all the small mines of the country and the union has known that these small mines

could not pay these union terms, isn't that right? A. No. It has never imposed a contract on anyone it has bargained collectively with who is not a signatory of the industry contract, and it is not true that while doing so we were aware that they could not meet the provisions of the contract.

That is an assumption entirely erroneous on the part of counsel, and I dislike to have words of that character put in my mouth.

Q. All right, Mr. Lewis. You have tried to sign up every mine in the country, haven't you, under the contract? A. When?

Q. Since 1950. You started an international organizing committee in 1950, did you not? A. We probably had the work in our organizing facilities then as in the time before and the time since.

Q. Well, there was an international organizing committee established by the International Union in 1950
2535 after the contract of 1950? A. I do not know what you mean by "international organizing committee," and I don't recall that verbage but if you mean that was their renewed emphasis on organizing, yes, because the United Mine Workers did not have to engage in a long struggle and it had finances free therefore to pursue its regular organizing work.

Q. I read from the 1952 minutes, page 267:

"In October, 1950, an international organizing committee was set up by the International Executive Board to promote an intensified and integrated organizing campaign in the non-union areas of the bituminous coal industry."

That is correct, isn't it? A. The Board may have authorized renewed emphasis or renewed organization of the constant organizing effort at that time, but it did not mean any departure from recognized policies that had been more or less in effect all the time depending again on our resources to sustain their effort.

Q. But you did not put such emphasis on organizing efforts or set up that organizing committee until October,

1950? A. Probably did not have any funds, that we had our resources free. You will remember in the 1940's practically, '50, we frequently had our funds tied up by injunctions and court procedure.

2536 Q. Why was that? A. And harrassment generally speaking, from all quarters, both governmental and private.

Q. Particularly the large coal operators, right? A. Particularly the large coal operators withheld our funds, yes, including the funds of the Welfare Fund.

Q. And you haven't had any trouble like that since 1950, have you? A. Merely because there wasn't any controversy —

Q. That is right. A. — that broke out into a stoppage of employment.

Q. Now with respect to this organizing, Mr. Kennedy said in 1952, page 279:

"We have had very little difficulty in organizing large units, but we have extreme difficulty in organizing strippings where the workers are taken from the farms and small towns adjacent to the stripping operations, but we are making pretty good progress and we shall continue to do so until the banner of this organization flies over every mine and every strip pit in the United States and Canada."

That was the purpose, wasn't it, to impose this

2537 contract on every mine in the country? A. There are flowery phrases with which orders are given which remind me of a quotation from former President Lincoln when he said that "The day would come when the sun would shine upon no man in this country who goes forth to unrequitted toil."

That is the way orders are expressed, in sentiment. Those are the objectives, of course, the ultimate objective of any well-defined program but we do realize it is often interrupted and the objective is not reached as fast as might have been.

So certainly, Mr. Kennedy, if it was Mr. Kennedy, was

making a speech to inspire our representatives of the necessity of going forth and achieving some success in the task of organization.

You will understand how vital new members are to a labor organization, or to the United Mine Workers, counselor, because there is a natural day by day decimation of the ranks, numerical ranks, of a labor union due to natural reasons that are inherent, and unless they can attract new members and new blood that organization is doomed to ultimate dissolution.

And the barrier is put in the way of organizing effort in some of our statutes which are now designed to lessen the efficiency of labor unions by making it more diffient
2538 for them to attract new members.

Those are practical facts to be taken under consideration, but a labor union must struggle on or it will die. You got to breathe life into the people, they have to be encouraged when they are discouraged or when they are oppressed or when their privileges are denied to them.

All of this was consistent and quite independent of any alleged conspiracy beginning in 1950 or any other time with the United Mine Workers with any co-conspirators anywhere in the United States — companies, corporations, individuals, private or otherwise.

Q. Mr. Lewis, can you give us — A. When I make that averment and you come back with a distortion of some word or some sentence in some ancient record, I get the feeling that we are just fighting a windmill. There is no reality in it.

Q. Mr. Lewis, --- A. What this does, it means that any man, whether a man made an error in his speech or misquoted a word, or he was not gifted in the facility of choosing his word too well — lots of honest men who are not very articulate yet they are worthy men and they are fine citizens. They may be able to do something else with the gift God gave them and excel but in the art of talking they would not qualify as a lawyer or a representative of labor.

I will include myself there to make that palpa-
2539 ble.

* * * * * * * * *

2540 By Mr. Rowntree:

Q. Mr. Lewis, the president of District 19 is appointed by the international executive board, is that correct? A. That is right.

Q. And his salary is paid by the international executive board? A. It was. I think it still is.

Q. Is it not true that the president of District 19 employed organizers or field representatives to carry on the organizing work in the district? A. I assume so at times, yes.

Q. And Mr. Taylor Maddox and Mr. Ed Daniel were sent into the field by the district president to organize all the mines that were not organized at that time? A. Not authorized — to organize as many people as they could.

Q. That was their job? A. Presumptively, yes. Any special assignments, I don't know anything about that.

Q. These organizers would take caravans of cars
2541 out to these isolated mines with men in the cars, and the caravans, and proceed to organize these mines, is that right? A. I don't know of my own knowledge.

Q. That was their job? A. Their job was among other things, to service the union men with their business affairs, members of the union, and to bring in such new members as were possible in connection with their work. Primarily that is the job of all representatives of the United Mine Workers.

Q. Mr. Taylor Maddox has given his deposition in this case and he has related his job duties and he is in a position to know what his job duties were, I take it? A. I have no knowledge about Mr. Taylor Maddox or anybody else working in the field since I retired as president. I do not keep up with those things. I do not know whether he is now employed or otherwise of my own knowledge.

Q. I think you have recognized on the record, Mr. Lewis, that many of these "palid, undernourished mines" would

not be able to pay the kind of terms in this contract, the National Bituminous Coal Wage Agreement, and using another expression, "the weak shall trail the strong til they fall"; these things are true, aren't they, that many mines could not pay this wage, this royalty of the welfare and that they would fall after they became assigned to
2542 the contract? A. I had no knowledge about any of them as to the capacity to meet the obligations of an industry contract, except that they averred and promised to meet those obligations when they executed the contract and they assumed a moral and a legal obligation when they entered the contract, when they signed it, and that no one has any information about the assets or the reserves or the credit or the managerial ability of any mine of his own knowledge. That information is all known to the company, and to the company alone.

Q. But you knew the assets, the financial position, the abilities to pay of the major coal companies; I believe you have testified about that, haven't you? A. I don't recall major coal companies right now. An isolated special case? I don't recall it at the moment what significance it has.

Q. But your testimony was that the mine workers —

Mr. Kramer: He asked you what case.

By Mr. Rowntree:

Q. This case here. This case here, you have testified that the mine workers were thoroughly familiar with the abilities, the financial standing and so forth of the major coal companies. A. But not the miscellaneous coal companies.

Q. That is right. A. And not the remote coal
2543 companies.

Q. That is right. A. And not the companies of which we had no knowledge at all.

Q. And the small coal companies? A. Well, naturally it would be included in the list of a lot of small companies in that category, but also a lot of large companies, family owned mines, of some sizable production, that suffer loss in assets and in credit every time there is a change in the

family tenure of office and inheritance taxes impose another obligation on those companies. They ofttimes have insufficient credit to buy the modern equipment that they would like to buy, but they are hanging onto the corporation and the job as long as it lasts, until some day the sheriff will come along inevitably.

Q. These coal companies in that category were offered the same contract, the same contract terms as the large mechanical companies? A. That is right. That is right. They were offered the same, the contract with the same wages, advances that took place elsewhere, but not the fundamental conditions that nay have been previously negotiated in that district, and in some areas there is a differential existing, as I have heretofore said.

Q. But that differential doesn't help this part of
2544 the country here, the southern region No. 2? A. Well, that is an assumption on your part. I don't gainsay it if you think it.

Q. We have had the minimum wage list before us in this case under the Walsh-Healey, which followed closely the United Mine Workers contract wage, is that right?

Mr. Kramer: Just a moment. It is not minimum wage. You don't mean that. Prevailing wage.

Mr. Rowntree: Prevailing wage.

Mr. Kramer: I have tried to avoid it. It is prevailing wage, which can be vastly different and will be before we get through the lawsuit.

Mr. Rowntree: I think both the witness and counsel have referred to it as minimum wage.

Mr. Kramer: I have tried to avoid .ti It is prevailing wage, is what it should be.

By Mr. Rowntree:

Q. And Southern No. 2 is among the highest of those prevailing wages so-called, or are you familiar with it? A. I couldn't quote the figures right now, the difference on the prevailing wage in Tennessee as against any other area at the moment, without consulting the record.

Q. These organizers in the field, with their caravans of cars, would not offer any lesser contract than the
2545 terms contained in the national contract? A. They were not authorized to take any less wages than was the policy of the organization.

Q. And the union has been very successful in its organizing work under the international organizing committee, is that not so? A. I wouldn't say so, no.

Q. Well, what per cent of production has been organized under the contract? I believe you said one time 82 per cent as compared to 18. A. I think it would be around 80 per cent, 82 per cent, 83 and maybe back to 78 sometimes, due to the fluctuations of the demand for coal, the differences between period demands for coal. Roughly about 80 and 20 per cent.

. . . . . .

2546 Q. When the companies, say the little companies in upper east Tennessee coal field, would sign the contract, the men in the mines would pay their dues to the union? I mean generally. A. Where?

Q. We make reference now to Exhibit 4, record book of defendant and cross plaintiff, referring to amounts paid out in 1955, May 12, to United Mine Workers of America, dues, initiation fee on men, $126; June 4, 1955, same items, $126; July 12, 1955, same items, $126; August 8, 1955, same items, $126. A good substantial part of those dues were going to the international union, I take it? A. Prorated, whatever the constitution required.

Q. And the union took these funds, did it not, and accumulated these funds together with funds of a lot of other small coal miners, company coal miners, and together with a lot of other funds that the union had and invested these funds in West Kentucky Coal Company in the latter part of 1955, is that not correct? A. No, I think that is entirely an assumption that is erroneous because the organization had funds available for investment at that

period that didn't necessarily come from these small mines that you allude to.

2547 Q. These funds would go into the treasury of the union? A. They went into the common treasury of the union, yes, for the purposes held there in trust, for the purposes defined in the objectives of the organization and the constitutional privileges and obligations imposed on the officers.

Q. And the investment funds that were invested in West Kentucky Coal Company and the Nashville Coal Company came from the general treasury funds of the union? A. The general funds of the United Mine Workers that they had been able to build up through years of economy and careful management of trusts. No distinction between those funds after it had become the common property of all members.

Q. From time to time the international union imposed special assessments on the men, the members of the union, including the members in the small mines? A. Only after negotiation of substantial wages advances and the expenditure of larger than normal amounts of money in accomplishing that objective. Those assessments were modest in comparison with the amount of benefit the men were getting from the wage advances.

Q. These special assessment funds were likewise put into the general treasury of the United Mine Work-

2548 ers? A. Went into the general treasury and became the common property of all the members of the United Mine Workers of America in the United States and Canada.

Q. And were used for investment purposes from time to time? A. There was an obligation upon the trustees of the union to invest its funds prudently, secure what additional income was possible from their investment, the same obligation that rests upon all trustees acting in a fiduciary capacity.

Q. And these funds were invested in such companies as

West Kentucky Coal Company and Nashville Coal Company? A. They were invested because we thought it would be in the interest of all the members of the United Mine Workers of America to so invest and we had no other principles and no other obligations except to use our judgment.

Now fiduciary agents sometimes exercise bad judgment. The membership always has to take a chance in any interest, corporation or fund, no matter what it is. Have to assume a certain hazard that their trustees will act with efficiency and intelligently. We have tried to do so.

Q. And in the latter part — A. We are convinced with respect to West Kentucky Coal Company it was entirely justifiable; has already brought substantial returns in em-

ployment and wages under this industry contract
2549 to thousands of men in west Kentucky.

Q. Do you know how many employees there were in the West Kentucky Coal Company in 1950? A. No, I do not, not from memory.

Q. Do you know how many there were in the year 1960? A. No, I do not.

* * * * * * * * * *

2550 Q. Now, Mr. Eastin testified that there were three thousand employees in West Kentucky in 1950, and approximately 2,200 in 1960. Now, I would like for you to explain how the union has attained its objective in investing the funds if its objective was the employment of members of the union. A. By merely contrasting the annual wages, the daily wages of the men who remained employed in the mines with what they might have made before West Kentucky Coal Company signed the industry contract. West Kentucky Coal Company has been there for seventy-five years and the wages were always substandard, and the conditions of employment were always not up to the normal of the industry.

Q. Well, Mr. Lewis, Mr. Eastin also testified that the

wage paid by West Kentucky Coal Company before it signed the contract with the union were equal to greater than the union rate, and that the welfare provisions of the company with its employees was equal to or greater than the welfare provisions under the union contract. A. That is possible at that time. Doesn't make any difference, because the West Kentucky Coal Company was probably afraid of unrest among their employees and they give them as little as they could that would content them. That is a device that is used by lots of companies in this country.

2551 Q. Well, as little as they could, does that characterize the terms contained in the National Bituminous Coal Wage Agreement? A. As little as they could?

Q. Yes, sir. A. We had no contract with them.

Q. Yes, but the testimony was that the company rate of pay was equal to or greater under the company before it signed the contract as it was afterwards. A. That don't make any difference with the merit of the proposition, because it is quite possible that they got it all back by increasing the company store prices in which the men were obligated to trade.

There are a lot of devices in the coal industry that employers utilized to exploit to the maximum their employees and get back all the amount of money they pay them for working in the mine: company store accounts, with them in charge of the prices, non-competitive, obligatory to trade there; rental of company houses, been amortized a dozen times at high rent; selling of coal; paying of electric lights; charges for water; the innumerable things that the company imposed upon employees they were free to do so and unrestricted by any collective bargaining contracts.

So those rates that you allude to mean nothing.

* * * * * * * * * * *

2554 By Mr. Rowntree:

Q. After the union invested these funds in the West Kentucky Coal Company and Nashville Coal Company, those companies have offered bids on the TVA market, particularly the spot market of TVA at low and dropping prices time after time with gigantic tonnages, isn't that right? A. I do not know of my own knowledge. I have no knowledge of any negotiations, coal contracts, conversations, sales, or rejection of bids of any character affecting the West Kentucky Coal Company, or any other coal company, until I receive the lettings of the TVA's which was published as to who received the contracts.

Q. And from — A. I do know from reading the public press that there are other companies there that furnish coal in greater volume to the TVA and were contracted for longer periods than has been reported publicly by TVA as affecting West Kentucky, but my own knowledge, I know nothing.

Q. While these coals were being put on the spot market by West Kentucky, were you not urging the TVA to eliminate the spot market?

* * * * * * * * * * *

2555 A. We were urging them not to defeat the purpose of Congress.

Q. And you were— A. By giving repetitious less than ten thousand dollar contracts, because we thought that was evasion and was not in accordance with the intent of Congress, and it enabled them to buy coal from brokers who acquired it from mines not recognizing the American standards as expressed by the Walsh-Healey Act.

* * * * * * * * * * *

Q. The Walsh-Healey Act expressly exempted from the minimum wage determination contracts for less than ten thousand dollars? A. And they were expressly exempted by Congress from the Walsh-Healey Act, Yes.

Q. Yes, sir. A. Contracts of less than ten thousand dollars. All right, Congress however, in our estimation, did

not mean that the TVA Company, could just put a ten thousand dollar limit on all their contracts and con-
2556 tinue repetitiously to buy it from the same people time after time, $9,999.00 worth of contracts. That was not intended.

Q. You are not saying that Phillips Brothers Coal Company was doing that. A. I don't know anything about the Phillips Brothers Coal Company, and I never alluded to them.

Q. All right, and all companies were not doing that, were they? A. And you asked me what recommendations we made to the TVA.

Q. What recommendations did you — A. We urged them two things: not to practice evasion on the letting of the ten thousand dollars contracts, and defeat the intent of Congress; and secondly to buy coal from mines recognized by the Congress as paying the American standard, and not sweatshop coal.

Those were the two things that we recommended to TVA, and that is all, at any time, in any contract, or conference, with any representative of TVA with whom our representatives conferred.

Q. And you were urging the TVA to eliminate the spot coal market. A. No. It could buy all the spot coal they wanted as far as they could get it in the market, but we urged them to comply with the law as we understood it on the ten thousand dollar contracts.

2557 Q. And the law permitted tonnage which would amount to less than ten thousand dollars? A. It obviously permitted one, but there was nothing in it that would signify that it permitted twenty or fifty repetitious contracts of the same character with the same purveyor of coal.

Q. Would you not concede that the TVA market is a greatly depressed market with respect to price? A. No, only as the area is affected by low wages and the people's buying power is restricted by those low wages. That is all,

and that is true in any section of the country where those conditions prevail.

Q. Well, what companies have gotten the big coal contracts with the TVA? A. I only have knowledge of those things by reading about the allotments.

Q. They are not — A. Peabody Coal Company, I understand, has far more tonnage scheduled and contracted for future delivery than anybody else in West Kentucky. What their terms are, I don't know; what their prices and bids are, I don't know; how many tons a year they are going to deliver, I don't know; but it is reported that it is for a long period of time, and that they have dedicated reserves —

2558 Q. And in West Kentucky— A. — to deliver that coal.

Q. And West Kentucky Coal Company is the other company that is getting the big contracts, isn't that true? A. Sir?

Q. And West Kentucky Coal Company is the other company that is getting the big contracts. A. Oh, undoubtedly. What proportion of the contracts they have, I do not know.

Q. And Peabody Coal Company and West Kentucky Coal Company work together in supplying coal markets, are you advised of that? A. You are saying that, I am not, because I do not know that to be true, and I have no reason to think it is true. I decline to indict anyone of a grievous offense merely because you assume that to be true and ask me to verify it.

Q. I am asking — A. I think that is rather an insult to my intelligence.

Q. I am sorry, Mr. Lewis, I am asking you if you know these things; or if you are advised of these things. A. I have answered on the record.

Q. All right, sir. One thing that was testified about on the last day of this trial was with respect to this

2559 meeting of the trustees with Judge Charles Dawson, and I would like to clarify the record on that.

Mr. Val Mitch did not have minutes of that meeting, Mr. Lewis, or those two meetings. He said there was no meeting of the trustees, just an informal discussion. Do you have any recollection about that? A. Yes.

Q. Was there a called meeting of the trustees? A. It was a meeting for the informal purpose of discussing with Judge Dawson his position as to his right to become a trustee. It was called for that purpose, and it was not a formal meeting, and not a convened meeting, because we invited Judge Dawson into the trustees room, and the discussion was all informal and the meeting of the trustees was not assembled.

2560 Q. Well, isn't it true that these were called meetings?

A. They weren't called meetings. They were conferences with Judge Dawson.

Q. You had called the meetings, had you not? A. Quite possible that I had asked Senator Bridges whether he thought it was advisable for us to get together and give hearings to the judge. The judge was applying for a hearing.

Q. Do you recall the exchange of telegrams between you and Mr. Van Horne with respect to his resignation? A. Accepting it —

Q. With respect to his resignation. A. Perhaps so. I would not remember that now.

Q. And you sent a telegram on November 14, 1949 to Mr. Van Horne in which you asked him about whether or not he had resigned. Do you recall that you saw that? A Very likely I was inquiring about the validity of his letter and how he interpreted his letter. I don't know now. That is quite a while ago and I don't carry those details in my head.

Q. The last sentence here is: "Do you confirm resignation and validity of action of parties represented by Truman E. Johnson. Will you advise."

Mr. Johnson was representing the committee of
2561 the National Bituminous Coal Wage Operators Negotiating Committee and you inquired here as to whether or not Mr. Van Horne has resigned. Do you recall that? Do you recall that, Mr. Lewis? A. If that is a valid copy of the telegram it must be true. But those are details that I explained to you the sequence of conversations and messages that I don't now recall in their proper order.

Q. And Mr. Van Horne replied, and I believe that you examined the at the time of the deposition. Don't you recall that?

Mr. Rowntree: Will counsel stipulate that?

Mr. Kramer: Yes, we will stipulate they were shown to Mr. Lewis when we took his deposition—when they took his deposition.

Mr. Rowntree: and Mr. Van Horne replied:

"Re the telegram of November 16, I again confirm my resignation of September 14 as trustee of the U.M.W. of A. Welfare and Retirement Fund. I will not be present at the meetin the trustees on Monday morning at 10 o'clock, November 21. I am notifying Judge Charles I. Dawson of this meeting, who has been appointed by the Coal Operators as my successor, according to the information I have received. I have no doubt that this appointment has
2562 been made in a proper manner and that Judge Dawson is a member of said board. Sending a copy of your wire and this wire to Senator Bridges and Judge Dawson."

By Mr. Rowntree:

Q. Now do you recall that was a called meeting of the trustees? A. I admit it is in the record.

Q. There are no minutes of that meeting? A. What difference does it make? What bearing on the case?

Q. We would like to know what happened, Mr. Lewis. A. What happened is already on the record here from my testimony this morning. For all intents and purposes, con-

clusive, as far as I am concerned Judge Dawson was not seated at that time.

Q. You say — A. And evidently Judge Dawson must have had some change of heart because he never returned, only the two times, and we heard no more from him.

Q. Well, the contract was signed right after that, wasn't it, Mr. Lewis? A. I don't know what date now. I don't know what the relationship is of the two dates. It did not
2563 affect the merits of whether Judge Dawson was a trustee because the operators had no authority to determine a trustee.

Q. And Mr. Owens — A. They selected an individual and recommend him for the trusteeship, but the acceptance of the trustee depended upon the Board of Trustees itself and seating and qualification.

* * * * * * * * * *

Q. Now some of the previous witnesses have said that the requirement of union membership to participate in welfare benefits ceased in 1950 but the requirement of union membership continued on after 1950, did it not, Mr. Lewis? A. I don't know. Whatever the evidence is it is down in black and white on the record of the Fund and I suppose that is available. I don't know those dates.

Q. Well, I refer to your deposition. Question —

Mr. Kramer: Page, please.

Q. (Continuing) 154, bottom:

2564 "We refer to pages 488 and 489 of the same Minutes, 1952, where you made this statement:

"'Based upon present computations governing the'"— this is 1952—"'Based upon present computations governing the life expectancy of individual members, $18,000 will be paid on the average under each pension award. Certainly we cannot continue to pay out that $18,000 over a long period of years without fully protecting the legal membership of that individual and causing him to maintain his constitutional membership in this organization. The basis of his monthly dues was previously fixed by a Convention

as being the minimum that would qualify, as Vice President Kennedy says, as a proper consideration in the premises.' "

Answer: "Those statements were predicated upon the conditions existing at that time and not necessarily the law and the prophets in 1961."

Question: "But this was 1952 after the signing of the 1950 contract?"

Answer: "Exactly so. Exactly so.

"But the whole question has been clarified since that time, and it is definite that a pensioner does not need necessarily, to take his pension, to obtain membership in the United Mine Workers of America; and it is not true that only members of the United Mine Workers are eligible
2564a for awards."

Now that question is —

A. I reaffirm the questions and statements made in there.

Q. When was this question clarified? A. Whenever applications come in in due course. The dates, I don't know, but you have on the record here testimony from the representatives of the Fund, and myself, that it is no longer a restriction and has nothing to do with the working of the 1950 industry contract as amended from time to time.

Q. But the question is when and by what means this question was clarified after — A. The records of the Fund —

Q. After '52. A. —would show that. I cannot give you the information out of my head because I do not have —

Mr. Kramer: The 1950 agreement is here and itself contains the phraseology and shows that union membership is not required after that time. It does not show when before that, or if ever, it was terminated. It was required under the 1947 agreement and was never required under the 1950 contract, and those agreements are all here, your Honor. I don't know what we are driving at.

2565 By Mr. Rowntree:

Q. But your statement here, Mr. Lewis, was that it was a consideration and a requirement in 1952, and my question is when was it later clarified or changed? A. You

have my answer, that I personally do not possess that information.

Q. And what — A. And I do not concede your extraneous remark based upon your understanding of the so-called interpretation.

Q. And what steps did the trustees take to show to the industry and the men in the industry that there was a clarification and that there was a change in this requirement? A. The whole question was of insignificance and affected few men that I doubt there was any general nation-wide publicity put out about it. It was merely a matter of routine performance.

The welfare fund and its provisions had previously been reported to the membership time after time in the nation-wide publication, United Mine Workers Journal, which goes to every member of the union and is read by everyone, almost, in the coal industry or who is interested in the coal industry and in the communities where the mines exist and the mine workers live.

2566 Q. Isn't it true, Mr. Lewis, that you felt or that you believed that the union could run the Fund, the welfare fund? A. I never attempted to put such an idea into effect. We always conceded the right of the industry to be represented in some capacity, and we conceded the right of the Government to be represented through a neutral trustee from the very first day of negotiations on this fund with the Government and never an issue. We had no such allusion. We did not necessarily want that responsibility.

I have always considered that the first function of the operators' trustee is more or less to be able to assure all and sundry that the trust was run honestly and its expenditures were for the purposes authorized in the trust agreement, and it has been proved so many times that it needs no reiteration.

Been investigated by the United States Senate, the public

auditor reports annual on the excellent condition they find it in. That verifies the averments I just made. What greater character could come to the Fund?

Q. Referring again to the deposition, page 24 at the bottom:

"Did you not realize sometime in that period that a welfare fund, run by the union itself, would also be—

2567 illegal?"

Answer: "No."

Question: "Was it your concept all the way through that the welfare fund could properly be operated by the union?"

Answer: "Certainly."

A. I don't recall recognizing that point during the period to which you refer because I had no need to. The question was finished. And I wasn't digging up things that were not pertinent to the current issues of the case, whatever they were. I was not dwelling in the past and was not going on it. We had settled that question in the coal industry—

Q. Yes, sir. A. —and I have made my contribution, or tried to, to the success of that policy.

Q. And Mr. Love testified in the case that the name of the trustees, who they would be, was an issue in the 1950 negotiations. A. Why what, sir?

Q. Mr. Love testified that the name of the trustees, who they would be, was an issue in the 1950 negotiations? A. Well, I recall that statement.

* * * * * * * * * *

2569 By Mr. Rowntree:

Q. Mr. Lewis, are you advised that the contract, the National Bituminous Coal Wage Agreement has been imposed upon small mines in east Kentucky and east Tennessee by means of violence? A. No.

* * * * * * * * * *

REDIRECT EXAMINATION

By Mr. Kramer:

Q. Reference has been made in this record on page 68 of your testimony as given on deposition taken by the cross plaintiffs some time ago, and I fear we do not have a clear impression of what is in that deposition, and I desire to read it, may it please the Court. Part of it was read by opposing counsel. The question was asked by Mr. Rowntree:

"I would like for you to read particularly the first paragraph under your name there, the name of President Lewis."

And he is reading from some of the minutes of the international convention.

"The first paragraph and also the paragraph starting at the bottom of page 296. Those two paragraphs.

2570 And also the second full paragraph on page 297.

"And the paragraph after that reads:

" 'So next year in 1949 or at any other time when evil days come upon this industry you will find the United Mine Workers of America moving in and, if there are only three days work in this industry, we will all have the three days work'."

And that is the quotation that was referred to you rather than that you were advocating the three day work week, your Honor, and that is all I have.

The Witness: Of course —

Mr. Kramer: That is all right. I just wanted to get it straight. You needn't answer. That is all.

May Mr. Lewis be excused?

Mr. Rowntree: Yes. You may go.

Juror: Before the witness steps down, I would like to ask two questions. On concerns the recruitment of members. We have had testimony here, at least from one witness, of violence being used up in this Jellico area in which the member was beaten up until blood run from his mouth. Is that the policy of the United Mine Workers or yourself, or if it

is not, what discipline has been given to the members who did that, which included Mr. Maddox, I think, Mr. Daniel and many other union members?

2571 The Witness: Sir, it is not the policy of the United Mine Workers. It is not my policy as an individual or representative of the union and never has been. We assume that if that is true, that the resources of the law will be put in protection behind the man thus treated by whoever the parties were who committed the assault, and I have no knowledge of that.

The United Mine Workers cannot undertake with any degree of success to regulate the personal actions or the impetuous undertakings of members of the United Mine Workers situated in their own home areas and far removed from any connection with the basic office of the United Mine Workers.

Men who become agitated or enraged over a local circumstance sometimes commit actions of violence of which no one could restrain them, and we are totally inadequate the private lives or the morals or the understandings or the convictions of individual members.

Juror: If it comes to your notice, would you discipline those members for doing such a thing?

The Witness: Certainly, certainly, if it comes within the purview of our right to do so under the constitution as defined by the delegation at the convention, but you un-
2572 derstand there is very little we can do, because we are restricted by statute on the amount of discipline we can impose on an individual member, the federal acts, and we find it very difficult sometimes to carry out the policy of operating lawfully under the law while Congress has taken away our rights to discipline the individual member.

Juror: That answers my question at way.

Now the other question is a question of the validity and I would better say certainess of contracts. I was reared in

a home where if I gave my word or my father gave his word —

The Court: Now, Mr. Juror, I am afraid you are going too far. We don't want error in this record. If you want to ask Mr. Lewis some questions involving fact, you may do so.

Juror: This is involved in the testimony we have had, your Honor.

The Court: Well, let's just keep it right on the facts, because we must be careful not to get out of the record.

Juror: I realize that.

The Court: And we must be careful about quoting the record. It is not proper for counsel to tell what some other witness has sworn. I ask the juror to follow that
2573 rule. The Court has been liberal with counsel because counsel have worked so hard in this case and the facts are so complicated. That is one of the reasons that the Court has been liberal with counsel, but I want to be careful now not to get error in this record by the juror or counsel undertaking to quote to a witness from memory some parts of the record, Mr. Juror. Keep that in mind.

Juror: I will try and stay within the limitations, your Honor, and if my question is not proper, I want you to rule it out.

The Court: All right.

Juror: We had testimony here the better part of two weeks ago that one coal firm signed up a contract with your United Mine Workers. He talked with you directly and he signed the agreement, your national agreement, where you had a gentlemen's agreement with this man in which he was allowed to lease out, or at least that was the indication, he could lease out some of the property without affecting the agreement. He said that you kept it.

Here a little later in the St. Ellen mine near O'Fallon, the Progressive Workers, as I understood the testimony, had a valid contract to run for some months. When they

came back from the vacation, which the contract al-
2574 lowed them to have, they were given the word apparently that they either had to belong to the United Mine Workers or be out, period.

That was a breaking of another contract by another company, with Peabody incidentally. Now then, this suit here was started by the trustees of the Welfare Fund wanting to hold up a contract and make the Phillips Brothers hold to that to the letter to the last penny.

Now my question is this. By what notation of ethics or moral law or legal statute can you explain these differences of handling these three types of contracts?

The Witness: I can only say —

The Court: Just a minute, Mr. Lewis.

Mr. Kramer: Of course, your Honor, it is argumentative in that it assumes facts. I dislike to say anything about a question by a juror, but I fear it is improper.

The Court: I do, too.

* * * * * * * * * * *

2575 JOHN OWENS

called by and on behalf of the cross defendant.

* * * * * * * * * * *

2576 DIRECT EXAMINATION

By Mr. Combs:

Q. Will you state your name? A. My name is John Owens.

Q. Where do you live? A. I live at Cambridge, Ohio.

Q. What position do you hold with the United Mine Workers? A. I am international secretary-treasurer of the United Mine Workers of America.

Q. Just in passing, Mr. Owens, who is the present president of the United Mine Workers? A. Mr. Thomas Kennedy.

Q. Do you know where Mr. Kennedy is now? A. He un-

derwent surgery last month and he is recuperating at his home in Hazelton, Pennsylvania.

Q. He is still under doctor's care? A. Yes.

Q. Mr. Owens, how long have you been secretary-treasurer of the United Mine Workers? A. Since January 1, 1948.

Q. Did you work in the coal mines before you became associated with the United Mine Workers? A. Yes, sir.

2577 Q. At what age did you go into the coal mines? A. I went into the coal mines in September 1901, when I was ten years of age.

Q And how long did you work in the mines? A. I worked in and around the coal mines until April 1, 1921.

Q. What mines did you work in, Mr. Owens? A. Well, a number of mines in the State of Ohio, some in Illinois, but mostly in the coal mines in Guernsey County in the State of Ohio.

Q. Did you suffer a serious injury in the mines? A. When I was 15 years of age I had a serious accident. I lost my right limb.

Q. From an accident in the mine? A. Yes, sir.

Q. Mr. Owens, when did you first become a member of the United Mine Workers? A. In September 1901 when I was ten years of age.

Q. And when was the first official service that you had with the mine workers, that is working for the organization as such? A. Well, I did everything there is to do in and around a coal mine and in various capacities as an officer of the local union and was elected vice president of what is known as Sub-District No. 6 and District No. 6 in the State of Ohio in 1920 and took office April 1, 1921.

2578 Q. How long did you hold that office? A. Well, I became an international representative, I think, in perhaps 1927 or '28. Later on I became, in 1934, president of District No. 6 of the Ohio miners, and was president un-

til January 1, 1948, when I became international secretary-treasurer of the mine workers union.

2579 Q. During part of the time, just prior to your assuming the office of the secretary-treasurer, did you act at one time as an assistant to President Lewis in contract matters? A. As president of District Number Six, I was requested to participate as an assistant to President Lewis, I think those, on a temporary basis, prevailed from approximately 19[illegible] up until I was made International secretary-treasurer, and I have been working under his direction ever since.

Q. Now, Mr. Owens, as president of District Six, on up until you became secretary-treasurer, did you participate in the bargaining of the various contracts between the operators and the union? A. I have attended practically all of the national conferences that was convened for the purpose of negotiating a wage agreement between the operators and the union? A. I have attended practically all of the national conferences that was convened for the purpose of negotiating a wage agreement between the operators and coal miners, either as a president of District Number Six, or a representative of the International union, since 1922.

Q. Would you describe to the Court and the jury the methods that the union used to select its bargaining representatives and also the customs and practices of the operators in selecting their representatives who met with the union to bargain for a contract? Would you briefly describe how those people are selected? A. In fact,

2580 it works like this: in all of our geographical locations, and there's twenty-eight states where coal is produced, there is a certain number of coal operators and a certain number of miners, and the United Mine Workers of America, in its conventions, creates what is known as the policy committee, which is authorized to meet with the representatives selected by the coal operators in some agreed city prior to the expiration of the contract.

The representation of the miners are selected by the delegates from that section that creates a representation in that state, and it is the coal miners from the coal mines who elect them and they are on the policy committee as negotiators when we convene as prescribed by the contract or agreed to by communication between the operators and the coal miners union.

And likewise the operators' representations, representation is selected by the members of their local associations—Southern Appalachian sends so many representations, Alabama, Western Kentucky, Island County, Hazard Field, Northern West Virginia, Southern West Virginia, and all of the associations constitute those geographical locations that are enumerated in their contract as being associations that have a right to participate in the joint conferences.

Sometimes, there—there were up until the industry insisted upon reducing the representation, we would
2581 meet in joint conference in some convenient city with the representatives of the press present, sometimes as many as a hundred and seventy-five on each side, and the representatives of the miners would present their suggestions that they inserted in a new contract and the representatives selected by the coal operators would either —would present their reasons why the suggestions made by the representatives of the miners should not be included in a new contract, and after about two or three days of public discussion, with the press present, they would move to reduce the representation on both sides to a committee perhaps of sixteen or eight, who would meet from time to time to try to negotiate a successor contract.

Q. Did the United Mine Workers of America, or do they, have any standing in connection with the selecting of the representatives of the operators, do they interfere with that, or do they have any standing there? A. No, sir.

Q. Now, the contracts negotiated in these bargaining conferences that you just described; is that contract sub-

mitted for approval to the policy committee by the negotiating committee? A. We cannot accept an agreement. We might agree tentatively subject to the approval of the policy committee. Never in the history of negotiating wage contracts has the executive officers of the
2582 organization ever signed an agreement until it was approved by the men on the policy committee elected by the men who work in the coal mines, and they authorize them to consummate the agreement.

Q. Was that agreement, as consummated, does it then become the industry agreement as far as the union is concerned? A. Yes, sir.

Q. Now, in connection with the negotiations of those contracts, those operators who are not represented at the conference in what way are those negotiations carried on? A. If there is an operator that isn't represented in the national wage conference, he isn't a member of any association, then our representatives generally confer with him and in most instances, they work out arrangements where the contract can be executed in conformity with the national agreement.

Q. In connection with the district presidents and the district field workers who make these contracts with operators who were not represented at the conference, do they have authority to change that agreement in any way? A. Well, not without the consent of the representatives of the Mine Workers Union, or the policy committee.

Q. In other words, if negotiations or contracts are made with individual operators who desire a change in
2583 the contract, that would have to be submitted back to the policy committee on whether or not to negotiate on a separate contract, or whether or not they would approve a different contract? A. Yes, counsel, if you didn't do that, you would vitiate the whole procedure, make it inoperative.

Q. Has that been the practice over the years? A. Since the inception of our union, as far as I know.

Q. And that was true from 1950 to the present day? A. Yes, sir.

Q. Now, Mr. Owens, we have in the record here contracts that were negotiated from 1941 up to and including the contract negotiated in 1958, commencing with the Southern Wage Agreement, July 5, 1941; the Southern Appalachian District Agreement, April 1, 1943.

Now the contracts, the 1950 contract, did it incorporate certain provisions that were contained in the 1941 and 1943 contracts, carry those provisions over to the 1950 contract? A. In the 1950 contract?

Q. Yes. A. Yes.

Mr. Combs: Now, in order to go back to the con-
2584 tracts, Your Honor, in order to get a continuity, I suggest a stipulation with counsel.

The Court: Yes, sir.

Mr. Combs: The 1943 contract that was in evidence here in this book goes from 1943—it goes to the National Bituminous Coal Wage Agreement of 1945.

Now there is a gap of some two years. Now during that gap, the mine workers and the operators negotiated what is known as the First Illinois and the Second Illinois Agreements of 1943; they negotiated what is known as the Ickes-Lewis Agreement of 1943; they negotiated what is known as the December 17th Agreement to the Ickes-Lewis Agreement of 1943; but all of the provisions of these contracts that I named that are not in this booklet were carried over by supplemental contracts as stated in the record, and I would like for counsel to stipulate if he would without the necessity of putting these extra contracts in for that purpose.

Mr. Rowntree: That is perfectly all right, Your Honor.

The Court: All right.

By Mr. Combs:

Q. Now, Mr. Owens, I would like to briefly go
2585 over these contracts that are in the record and ask you whether or not that you participated in the

negotiations of these contracts. A. Yes, sir.

Q. 1941 Appalachian contract? A. Yes, sir.

Q. The Six-Day Supplemental Agreement of 1943? A. Yes, sir.

Q. The National Bituminous Coal Wage Agreement of 1945? A. Yes, sir.

Q. That National Bituminous Coal Wage Agreement of 1947? A. Yes, sir.

Q. The National Bituminous Coal Wage Agreement of 1948? A. Yes, sir.

Q. The National Bituminous Coal Wage Agreement of 1950? A. Yes, sir.

Q. The National Bituminous Coal Wage Agreement of 1951? A. Yes, sir.

Q. The National Bituminous Coal Wage Agreement of 1952? A. Yes.

2586 Q. The National Bituminous Coal Wage Agreement of 1950, as amended September 1, 1955? A. Yes.

Q. The National Bituminous Coal Wage Agreement as amended October 1, 1956? A. Yes, sir.

Q. And then the National Bituminous Coal Wage Agreement amended 1958? A. Yes, sir.

Q. So that is presently the current agreement, the 1958 contract, in the industry at this time? A. Yes, sir.

Q. And you participated in the negotiations of those contracts? A. Yes, sir.

Q. I call your attention to the negotiations to a successor contract or the contract, the record shows, was terminated in 1949, I believe in April.

Would you tell the Court and jury some of the circumstances that brought about the termination of the 1948 contract in 1949? Who terminated that contract?

2587 A. The International Union received a communication signed by Mr. Joe Moody, president of Southern Coal Operators Association—I think it was dated April 21, 1949—terminating the agreement, giving 60 days notice terminating the agreement effective June 30, 1949.

Q. Now did the northern operators give similar notice? A. No. The northern operators had not served any notice due to the economic conditions of the country in 1949. The United Mine Workers of America had no intention of terminating the agreement, and if the operators had not terminated there wouldn't have been any cessation of work until more favorable conditions prevailed. So we wanted to negotiate a contract without any cessation of work at all. They elected themselves to do it.

Q. That was the so-called 60 days notice under the contract? A. Under the law and under the contract.

Q. Did conferences ensue to try to negotiate a successor contract to the one that was expiring or terminated? A. We met at the request of the southern coal operators on May 25th at Bluefield, West Virginia.

Q. Was there another group that met at White Sulphur Springs? A. And a northern group was assembled
2588 at White Sulphur, West Virginia.

Q. Mr. Owens, were you assigned to either one or both of these conferences; did you participate in them? A. I attended off and on both of the conferences, but I was assigned by President Lewis to direct negotiations at the Bluefield conference.

Q. I take it from time to time that you reported back and forth about both conferences? A. Yes, sir.

Q. Mr. Owens, at the time that these conferences convened would you tell the Court and jury the position taken by the mine workers and the position taken by the operators as to a successor contract? A. The mine workers went into the conference with an open mind, not knowing what was in the minds of the representatives of the operators. We had no fixed plans.

We attended it at their request and was there to listen to any proposal, real or imaginary, that they may suggest to have written in the contract to succeed the one that was expiring on June 30, 1949.

And we listened and we discussed every proposal, real or imaginary, concerned in the conference or handed to them on the street, they would present formally to the joint conference.

2589 Q. What position were the operators taking? A. The position of the coal operators as they expressed themselves in that conference, we believe that they wanted to emasculate the existing welfare and retirement fund and deny the senior citizens employed by them when they became incapacitated the right to enjoy a pension that they may endure in the senior years of their life.

2590 A. Naturally we had some lengthy discussions about accepting that proposal.

Q. During the time these negotiations were going on, after June 30th, were the mines operated? A. Sir?

Q. Were the mines operating after the termination of the contract, after June 30th? A. Not under contract.

Q. Did the question come up about working three days a week in some manner between the operators and the union? A. The question of supplying coal to any market that may be in distress is always of uppermost interest to the representatives of the Mine Workers Union, and we suggested formally that the industry should work three days a week, which would alleviate any apprehensions upon the citizens of America that they would be in want of coal. And we volunteered to do that in the face of them terminating the agreement without consulting with us. Did it unilaterally.

Q. Did the operators accept the proposal? A. Well, some of them worked their mines, some of them. But they refused to pay, in some instances, stipulated requirements that was in the contract that they had terminated on June 30th. Statements of the industry didn't pay forty cents a ton, or thirty cents a ton.

2591 Q. What did the operators, what position did they take with reference to the union's offer to work

three days a week in the mines? A. The offer of working three days a week in the mine was just a device or a condition that was required, we thought, to the needs of the country. Mine workers don't want a three-day week. Coal miners want to work at least five days a week, and they want to work at a wage scale that they can maintain their families, educate their children, clothe them properly, and give them the proper requirements so they can grow up morally, mentally, and physically to be good American citizens. And you cannot do that unless those conditions are sustained by an income that will permit them to put it into effect.

If it wasn't true, India and China would be the greatest nations on earth.

* * * * * * * * * * *

2593 By Mr. Combs:

Q. Mr. Owens, when we finished yesterday afternoon we were talking about the wage negotiations of 1949. I had asked you about the position of the union with relation to the three-day work week.

Now did those negotiations continue on through the summer and winter of 1949? A. They continued from May 25th, 1949 intermittently, until we consummated the agreement on March 5, 1950.

Q. During that time did you have frequent conferences
with the operators? A. Yes. At their convenience
2594 we met both with the Southern Appalachian group and the northern group.

Q. Did there come a time in December of 1949 and January of 1950 when the operators brought certain charges against the union before the War Labor Board? A. Yes, sir.

Q. Do you recall whether or not—the National Labor Relations Board rather than the War Labor Board, counsel advises me. A. Yes, sir.

Q. Do you recall whether or not that the federal District

Court at Washington issued a restraining order on the application of the counsel for the War Labor Board? A. Yes, sir.

Mr. Combs: I am sorry. I keep saying War Labor Board. It is the National Labor Relations Board, your Honor.

The Witness: I was a witness.

By Mr. Combs:

Q. Do you remember just generally what those charges were about, Mr. Owens? A. No, I don't, counsel. I don't recall in general.

Q. Do you recall whether or not that it had to do with the so-called union shop? A. Yes, sir.

2595 Q. And memorial periods? A. Sir?

Q. The memorial periods? A. Yes, sir.

Q. And did it have something to do with the qualifications or eligibility of members to receive the welfare benefits? A. Yes, sir.

Q. Now in the restraining order issued against the union was there a provision in that order that required the parties to negotiate to settle that dispute? A. Yes, sir.

Q. Now again do you recall whether or not that the Attorney-General sought an injunction under the emergency provisions of the Labor Management Relations Act? A. I think he did, sir.

Q. Do you recall whether or not a temporary restraining order was issued on the application of the Attorney-General? A. I think so, sir.

Q. Do you recall whether or not that in that temporary restraining order the Court required the parties to bargain to try to settle the dispute? A. Yes, sir.

2596 Q. I believe those restraining orders were issued sometime in February, were they not? A. I wouldn't be positive as to the date, but I think it was in February.

Q. Did the parties negotiate pursuant to those restraining orders? A. Yes, sir.

Q. Would you tell the Court and jury what terminated

those negotiations. Was a contract executed? A. We executed a contract on March 5, 1950.

Q. And that became what is known as the National Bituminous Coal Wage Agreement of 1950? A. Yes, sir.

Q. Mr. Owens, at the time that that contract was negotiated in 1950 between the union and the operators, was there any other kind of agreement of any character besides the 1950 contract? A. No, sir.

Q. Was there any understanding or plan or aim agreed to for concerted action on the part of the operators and union at that time? A. No, sir.

Q. Mr. Owens, I would like to ask you some questions in regard to certain provisions of that contract.

Number one: Do you recall the increase in wages
2597 that was provided in that contract? A. Seventy cents a day.

Q. Were the welfare payments increased? A. Nineteen—

Q. 1950. A. I don't think so. Yes. It was increased to 30 cents, wasn't it?

Mr. Combs: Your Honor, I would like to refer to the exhibits in the record here, the wage agreement, and recite, with permission of the Court, the increases in the welfare fund from 1946 at the time the welfare fund was negotiated with the Government.

By Mr. Combs:

Q. This 1946 contract in evidence provided that payments into the fund should be five cents. A. That is right.

Q. Per ton of coal produced for use or for sale.

In the 1947 amendment to the contract the payments per ton were increased to ten cents per ton. A. That's right.

Q. In 1948 the payments were increased to 20 cents per ton. A. That's right.

Q. 1950 to 30 cents per ton. A. That's right.

2598 Q. 1952, 40 cents per ton. A. That is right, sir.

Q. Is that the amount per ton that is paid in on the present contract, that is the 1958 contract? A. It hasn't been changed for approximately eight years.

Q. So from 1946, commencing with five cents per ton negotiated with the Government, the payments into the welfare fund have increased to 40 cents, a period of some 15 years. A. Yes, sir.

Q. Mr. Owens, I would like to have you tell the Court and jury briefly just how these wage increases were applied, commencing in 1943. Just generally how were those wage increases applied on up to 1950. A. In 1941 the wages of the coal miners as stipulated in the contract was $1.00 an hour. We entered into a two-year contract. The United States Supreme Court entered a decision, I think sometime in 1947, that the coal miners were entitled to be paid for travel time.

The 1941 contract provided seven hours a day, time and a half for all time over seven hours at the working place, including travel time.

The Court: Would you mind repeating that.

A. (Continuing) The 1941 contract provided for
2599 $1.00 an hour per day for a 7-hour day at the face or working place. The Supreme Court, under petition of the various courts, decided that the miners were entitled to pay for travel time.

Q. Would you explain, briefly, to his Honor, what you mean by travel time. A. That is from the time they enter the mine until they return at quitting time.

They created a commission and said the average travel —the commission reported that the average travel time was one hour in the coal mines in the United States, after an exhaustive study all over the United States. And the Supreme Court ruled that we were entitled to pay for travel time.

Q. I believe that decision was under the Fair Labor Standard Act, was it not? A. I forget the terminology.

Mr. Combs: That is what it was, your Honor, the Fair Labor Standards Act.

A. (Continuing) We elongated the contract under re-

quest to work eight hours a day in conformity with that agreement, which brought the wages up under the contract without modifying it to $8.50 a day. That raised the miners' wage in the coal mines of America to $1.06¼ per hour. The War Labor Board then, under proper
2600 petition, said that we were entitled to time and a half at two-thirds of the hourly wages after 40 hours for travel time.

2601 We worked under that and it never was changed. We elongated the contract in 1945 to include nine hours to $10 a day, and that was the first increase, and it wasn't in fact an increase, which brought the miners wages up to $1.11, $10 a day for nine hours' work. And that brought about the turmoil and the dissatisfaction in the industry that caused the cessation of work that was participated in by the miners because they never received an increase in wages that wasn't provided for in the 1941 contract until the year 1946, and they worked all during that period.

Q. Now during that time, 1941 until 1946, were the government seizures of the mines during that period? A. Yes, sir.

Q. How many times? A. I wouldn't be positive, but I think perhaps twice or three times at that time.

Q. All right. Now 1946, what was the increase, or did you have an increase in the 1946 contract? A. The national increases that was recognized that was being put into effect in all the basic industries in the United States was 18½ cents per hour, and we increased the wages $1.85 an hour—a day.

Q. Your reference to that for the clarification of the Court and jury, that was the government executive order that recognized the cost of living had increased that
2602 percentage, was it not? A. That is the first time we enjoyed it.

Q. All right. Was there government seizure of the mines in 1946? A. Yes, sir.

Q. Do you recall what brought that about? A. Well, the failure to negotiate contracts was primarily responsible for it.

Q. Now when was the next wage increase? A. You mean after 19—

Q. '46. A. '46, 1947 agreement provided for $1.20 a day, I think it was.

Q. $1.20 a day in 1947? A. Yes, sir.

. . . . . .

2603 Q. Did you tell us what the '48 increase was? A. I don't recall the exact figures in the 1948 contract without looking it up, sir.

Mr. Combs: All right, we can refer to the contract later on that, your Honor.

I would like to get it in chronological order, if you will give me a second.

Your Honor, I refer to Exhibit 77 in the record here, 1948 contract, under the heading wages and hours, B, which provides as follows: "All mine workers, whether employed by the month, day, or tonnage, yardage, dead-work or footage rate, shall receive $4.05 per day in addition to that provided for in the contract which

2604 expired March 31, 1946."

The Witness: Counsel, that is $1 a day increase.

Mr. Combs: So that would be a dollar a day.

In other words, your Honor, these contracts impacted the increase from '46 and it doubled up that way so it was a dollar a day.

The Witness: From $1.85, $3.05, 1948, $4.05.

By Mr. Combs:

Q. Then in 1950, I think you testified that the increase was 70 cents per day? A. That is right, sir.

Q. Now the welfare payments, Mr. Owens, were on a tonnage basis, were they not? A. Yes, sir.

Q. That applied to mechanical mines or hand loading

mines, without any difference as to how the coal was produced? A. Yes, sir.

Q. Did that necessarily have the effect that the mechanized mines would be paying more than the smaller mines? A. It is 40 cents a ton. They produce 20 tons or two tons, 40 cents a ton.

Q. In other words, the hand loading mines, if they produced 10 tons of coal or 6 tons per day— A. They paid less.

Q. They paid less. In other words, it was based on
2605 tonnage ratio. Now, Mr. Owens, you participated in the negotiation of all of these contracts and contracts that have been negotiated before. Now in the 1950 contract was the wage scale or the payment of the Welfare Fund in any way tailored to suit any particular type of mine or any particular size operator? A. No, sir.

of mine or any particular size of operator? A. No, sir.

security clause that we call it in the 1950 contract. I read a provision from Exhibit No. 77, I believe it is, as follows: "It is further agreed that as a condition of employment all employees shall become members of the United Mine Workers of America to the extent and in the manner permitted by law."

Mr. Owens, was that particular clause in the '50 contract—was that clause in the 1948 contract, the predecessor of the 1950 contract? A. That succeeded the 1948 clause.

Q. Was the clause different in the 1948 contract? A. Yes, sir. Just a minute, sir.

2606 Q. I refer—I think I can do this a little faster, Mr. Owens, if you don't mind. I am going to refer to the 1941 Southern Appalachian Wage Agreement contained in Exhibit 7, on page 20. And I read the following:

"It is agreed that the United Mine Workers of America is recognized herein as the exclusive bargaining agency representing the employees of the parties of the first part;

"It is agreed that as a condition of employment all employees shall be members of United Mine Workers of America."

Now, was that clause that I just read carried forward in the contracts between 1941 up to and including the 1948 contract? A. Yes, sir, as I understand it.

Q. And the change in the wording as I have read it to you was made in the 1950 contract? A. Yes, sir.

The Court: What contract?

Mr. Combs: The 1950 contract, Your Honor.

Mr. Rowntree: If your Honor please, I would like to know did the National Bituminous Coal Wage Agreement of 1950 adopt the Southern Appalachian Contract to which you just referred or not?

Mr. Combs: In reply to that, Your Honor, the
2607 contract itself says that the preceding contracts were carried forward except as modified and supplemented by the contract of 1950. So where it is modified and supplemented, it is not carried forward.

Mr. Rowntree: The Southern Appalachian District Agreement was a separate agreement from the national contract.

Mr. Combs: That is true, and if counsel would like, I will refer back to the Southern Appalachian agreement, the Southern Wage Agreement. That provision in there is all the same provision. There is no difference in any of it.

* * * * * * * * * *

The Court: Originally the contracts provided for a closed shop, that is to say that all employees had to be members of a union where there was a collective bargaining agreement in order to work.

Mr. Combs: Yes, Your Honor, but—

The Court: Was that in 1941 and continued up until the time it was changed by the Taft-Hartley Law, and if so, when was that changed?

Mr. Combs: It is what we call—and it does have a legal

difference—it is a "union shop" not a "closed
2608 shop", and I would like to say, Your Honor, I think it might be well to explain the difference because I think it is important.

A closed shop contract as we understand it requires an employer to only hire people who belong to the union before they are hired.

The Court: I see.

Mr. Combs: Now the Mine Workers have never had a closed shop contract in all of their career. They have taken the position that they do not interfere with the hiring of the employer. That is his right. But once a man is hired, there and under the union shop clause, generally the provision is that he shall become a member of the union during the life of the contract within thirty days, say.

The Court: I see.

Mr. Combs: Then to get back to Your Honor's question, the provision that I just read was contained in the 1941 contract relating to the union shop, and that provision had been carried over from the thirties in those contracts, but I don't think it is important to go back that far.

Now, 1947, the Taft-Hartley Act became effective about the time the '47 contract was in effect. It was enacted one
date, and became effective in August of that year.
2609 That contract was carried over, the '47 contract with the same provisions in it, after the Taft-Hartley law was effective until—and was carried over in the '48 contract.

That was the charge that the operators were making that this old provision in the 1948 contract was in violation of the Taft-Hartley Act, which had become effective the latter part of 1947.

The Court: Now, the Taft-Hartley Act in 1947 proscribed union shop, is that right?

Mr. Combs: Yes, Your Honor, to this extent. In 1947, the Taft Hartley Act provided that if a union had a contract

or if the employer and the union entered into a contract containing a union shop, at first they must have an election in the unit, the appropriate unit where a majority of the employees would authorize their union to execute the union shop. And in addition to that that the officers of that union would have to make certain reports to the Secretary of Labor, and would also have to file what we call the "anti-Communist" oath, in order to be allowed to have a union shop. That was the law.

I believe it was in 1952 that the Congress repealed the section providing for a vote of the employees on whether they would have a union shop or not.

2610 In 1959, the Landrum-Griffin Act repealed the entire section relating to that union shop and required the union to report on these financial business regardless of whether they had a union shop or not. Got nothing to do with it.

The Court: Well, did the Taft-Hartley Act say that you could not have union shops in states that had open shop? When was that?

Mr. Combs: I think that provision was in Section 12 of the '47 Taft-Hartley Act which provided that if a state had what we called — what we call, but it isn't the terminology of the Congress— what we call a "right-to-work" statute, that this Act of Congress could not prohibit that, that the state would have the right to go ahead with that, and that is the law.

The Court: So in Tennessee, in 1947, you could not have a union shop?

Mr. Combs: That's right, Your Honor. You are right.

The Court: I just wanted to get the dates.

Mr. Robertson: While we are on this subject, I would like to point out to Your Honor that the Taft-Hartley Act of 1947 does not say anything about the clause was
2612 not an effective union shop clause, and the Court so held, because concededly, the union had not complied

with the requirements to have the union shop, and they did not claim they had a union shop during the period of time that we are involved in in this suit up until the Landrum-Griffin Act was passed.

* * * * * * * * * * * *

By Mr. Combs:

Q. Now, Mr. Owens, getting back to this clause that we are discussing here, the union security clause, was there any plan or agreement or concerted action on the part of the union to use this wording of this clause in order to dominate the employees in the mining industry? A.
2613 No, sir.

Q. Was it ever used in any such manner? A. It was the desire of the negotiators of the United Mine Workers to comply with the law, and it so states in conformity to the law.

Q. Now, I would like to direct your attention to the clause in the 1950 contract known as the "application to coal lands," what we call the "land-lease" provision.

2614 I believe that that provision first appeared in what is known as the Illinois Supplemental Agreement of 1943; is that your recollection? A. Yes, sir.

Mr. Combs: That clause provides as follows — Section 11, your Honor. We have stipulated on this contract but I would like to read the provision out of that contract. We stipulated that we don't need to put it in.

Mr. Rowntree: Can you tell me where it appears in the 1945 agreement?

Mr. Combs: It does not appear. That is why I wanted the stipulation. All the provisions were carried over into the 1945 agreement. That same application of coal lands would be in the 1945 agreement.

Mr. Rowntree: Is this in this exhibit?

Mr. Combs: Yes. "Application of coal lands."

Mr. Kramer: It is in this Exhibit 77?

The Witness: Section 14 of the 1945.

Mr. Rowntree: Is it expressly set forth in the National Bituminous Coal Wage Agreement?

Mr. Combs: It is expressly set forth, and I was coming to that, in the 1952.

Mr. Rowntree: 1952?

Mr. Combs: Yes. And it is carried over by ref-
2615 erence in the 1945 contract. It goes on over and appears in the 1952. I will read that in a minute.

This Illinois agreement was signed by the union and certain operators in September of 1943. At that time all the wage agreements or amendments thereto had to be submitted to the War Labor Board for approval.

The decision of the War Labor Board with reference to this particular provision was handed in on October 26, 1943 approving, and disapproving certain provisions of the contract; that the Board recited it had no jurisdiction and had no interest in the land leasing provision since it did not involve wages. However, Section 11 of this contract of Illinois, dated October, 1943, contained the following provision.

"The operators agree that they will not lease any operating mines subject to the supplemental agreement as a subterfuge for the purpose of avoiding the provisions of this supplemental agreement."

By Mr. Combs:

Q. Mr. Owens, is it your recollection that that was in the contract at that time? A. Yes, sir.

Mr. Rowntree: Just for clarification, your Honor,
2616 this Illinois agreement, what was that? What territory did it cover

Mr. Combs: The Illinois agreement covered primarily the section of Illinois. There may have been other mines that were members of the Illinois association but primarily Illiinois. That contract was negotiated and submitted for approval to the War Labor Board with the intention of the mine workers, if possible, to make that the industry agreement. It did not become the industry agreement as such.

But through the approval of the War Labor Board of the wage provisions leading to the negotiations of the contract between Ickes and Lewis, all of them were carried over, and it was not until April, 1945 that a contract was negotiated between the miners and the operators because the Government was doing the negotiating from the time the Illinois agreement was submitted and the Ickes-Lewis agreement — the agreement made with the Government, and the contract on its face specifically carried forward these provisions.

I will be glad to go over it with counsel.

The Witness: May I —?

Mr. Combs: Yes, Mr. Owens.

The Witness: In the 1945 agreement negotiations between the Southern Coal Operators Association and the Northern Coal Operators Association in national conference, there was inserted that same clause, and it is Section 14 in the 1945 agreement.

2617

Mr. Combs: On page 54 of Exhibit No. 77.

The Witness: Number 14 in the 1945 agreement signed by all the coal operators, north and south. It was signed by Senator R. Burke, a distinguished senator, who was employed by the Southern Coal Operators and was their representative in the conference.

. . . . . .

By Mr. Combs:

Q. You say that appears in the 1943, and it is your recollection it appears as I read it in the 1943 Illinois agreement? A. Yes, sir.

Q. And the first agreement that was negotiated by the mine workers after this Illinois agreement with the operators that this was inserted, this paragraph 24 of the 1945 Bituminous Coal Wage Agreement? A. Same language; yes, sir.

2618

Q. I direct your attention to page 108 of Exhibit 77, a provision of the 1952 contract, and I want to read that provision.

"Application of contract to coal lands. As a part of the consideration for this agreement the operators signatory hereto agree that this agreement covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production. The said operators agree that they will not lease out any coal lands as a subterfuge for the purpose of avoiding the application of this agreement."

Now, Mr. Owens, was this provision here, now, that I have just read in the 1952 contract, was that carried over in the successive amendments to the 1950 contract up to and including the 1958 amendment to the 1950 contract? A. I believe so, sir.

Q. Was there any change in the wording after the
2619 1952 contract? A. Not until — no, I don't think so.

Q. In this particular clause. A. No.

Mr. Rowntree: If your Honor please, the 1952 language I think is important to show what change was made in 1952 from the preceding language.

Mr. Combs: Would counsel like to ask the witness, it is certain all right with me.

* * * * * * * * * *

By Mr. Rowntree:

Q. Mr. Owens, would you tell us what language was added to this land leasing provisions in 1952? A. Well, the difference is as he read in the 1945 and 1952. He read the two sections. That is the amendment to it.

Q. And is it not true that the following language was added to the subterfuge provision that previously existed, the following language:

"As a part of the consideration for this agreement, the operators signatory hereto agree that this agreement covers the operation of all the coal lands owned or held un-
2620 der lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or ac-

quired during its term which may hereafter (during the term of this agreement) be put into production."? A. Yes, sir.

* * * * * * * * * *

By Mr. Combs:

Q. I would like to ask you, Mr. Owens, the purpose that the union had in asking or negotiating with the operators to put this provision in the contract, the land leasing provision? A. For 75 years or more coal operators in some section of the production in the country would sign an agreement stipulating the tonnage rate and the wages provided for in the contract for their employees.

The contract was hardly — the signature was
2621 hardly dry on the contract and they would go back and they would subcontract sections of their mines to individuals or two or three men. Then those two or three men would insist on employing what they called laborers and get men to work, contending it was in conformity with the contract, to work for less than what the contract provided for.

And the abuse became so aggravated that it became sort of a cancerous sore in the industry among our men that the operators would sign an agreement then as a subterfuge they would lease or subcontract a section of that mine, or some other mine, to one man and insist that they weren't under contract for that section of their property and they weren't responsible legally as a contractual party to the agreement, and in order to require the industry or the operator to carry out the terms of the contract we wrote such a clause in the agreement — insisted upon it, demanded it.

Q. Did the operators resist it? A. They resisted it.

Q. Have they resisted it at each contract? A. In every conference we discuss it they resisted it.

Q. Do you recall —

The Court: Just a moment.

Mr. Rowntree: If your Honor please, I am afraid that this case is hard to follow — I know it is hard to
2622 follow. I would like to clear up this point right here at this time.

The Court: You have a right to do that, and your adversaries have a right, and you need not apologize about it.

* * * * * * * * * * *

By Mr. Rowntree:

Q. Mr. Owens, isn't it true that the purpose you have just discussed was a purpose to avoid subterfuge. A. To repudiate their contract.

Q. And that was the purpose in putting the subterfuge language in the 1945 and the prior Illinois contract. A. I don't follow you, counsel.

Q. That language pertained to subterfuge, did it not? The language — the earlier language that was discussed. A. Counsel, the word "subterfuge" is inserted in the agreement ---

Q. Yes, sir. A. --- as a charitable word in phraseology instead of accusing them out and out for doing what we know was violating the agreement and repudiating the contract.

2623 Q. I agree no one should repudiate the contract, Mr. Owens. But what I am getting at is this: that the subterfuge language was the portion of this clause that relates back to 1945 and the earlier Illinois contract, and is it not true that the language that was added in 1952 does not have subterfuge language in it? It talks about leasing, that the contract will cover all coal lands whether then in production or later put into production. Isn't that right?

A. That is right.

2624 Mr. Combs: I would like to keep this completely straight now, your Honor. I want to point out to counsel the wording of this. I am following counsel — that sentence, in the 1952 contract, there is an additional sentence. It has different purposes, but I want to point out to

the Court and to counsel that this says here—now let's read it:

"As a part of the consideration for this agreement, the operators signatory hereto agree that this agreement covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement."

It is the operations of that, because obviously the union did not have members on land holding lease with no production in it. There is nobody there.

Mr. Rowntree: Thank you.

Mr. Combs: We concede that. We are following that. I am just going to ask the witness some questions on that. We are not right to say it is a subterfuge. There is an additional problem here.

Mr. Rowntree: Thank you.

By Mr. Combs:

Q. Mr. Owens, we were talking about the consideration of the first paragraph of the coal lands. I think you
2625 were following this here. Did a problem arise during the enforcement and the negotiation of these contracts as to whether or not that certain coal companies who owned numerous mines when they signed that contract, that claims came about that the contract only covered certain of those mines and the union was arguing that by signing the contract that he had agreed that it covered all of his coal lands in operation at the time that he signed the agreement? Is that true or not? A. We always assumed that.

Q. And is the purpose of adding this part to the application of the contract to coal lands to remove any doubt as to whether or not at the time that an operator signs his contract, he is signing it on the part of all of the mines that he is operating at that time or all that he operates within the life of the agreement, is that true? A. That is right, sir.

Mr. Combs: Just to make it clear so we won't have any confusion about it, I am going to read the last sentence. I

read the first sentence of the application of contract to coal lands. Counsel is talking about subterfuge is dropped here.

The Court: I see it is getting alive. I see Mr. Kramer is on his feet.

Mr. Kramer: I just want to be sure, your Honor, that the jury understands and your Honor understands
2626 that the word "subterfuge" was not dropped in the 1952 agreement and that it continues.

Mr. Rowntree: We didn't say that.

* * * * * * * * * *

Mr. Combs: Still reading from the application of contract to coal lands, the second sentence, Exhibit No. 77, page 108: "The said operators agree that they will not lease out any coal lands as a subterfuge for the purpose of avoiding the application of this agreement."

So that "subterfuge" still appears in the 1952 contract, and I believe the witness has testified that the 1952 provision was carried over in each succeeding amendment to the 1950 contract and was a part of the 1958 agreement.

By Mr. Combs:

2627 Q. Is that right? A. Yes, sir.

* * * * * * * * * *

By Mr. Combs:

Q. One more question, Mr. Owens, in regard to his land leasing provision in the contract. Was there any purpose on the part of the union to use this clause for the furtherance of an agreement or understanding with coal operators, or any person, to use this to gain control or to dominate the employees in the industry or to eliminate the small coal operators from the industry? A. No, sir.

Q. I believe you have testified that the purpose was to protect the miners or your members that you represent, to protect their standards that they had obtained in their contracts? A. Solely. We just represent the coal miners who we were negotiating the contract for.

Mr. Combs: Now I would like to refer to the 1950
2628 contract as amended in 1958, and reading from Exhibit 77, I would like to read this part of the clause, your Honor. Part of it has already been read in the record, but I would like to read this particular part.

The Court: Which contract is that?

Mr. Combs: This is the 1950 contract as amended December 1, 1958, so it is the 1958 contract:

"The objective of this contract is to provide the maximum possible continuity and stability of employment under the conditions set forth herein. The parties hereto agree that bituminous coal mines shall be so operated as not to debase or lower the standards of wages, hours, safety requirements and other conditions of work established by this contract. The parties recognizing their obligation, each as to the other, to exercise all possible efforts and means to obtain these objectives further agree as follows:"

And then there is considerable more in the clause that I will not read at this time.

By Mr. Combs:

Q. Mr. Owens, I believe that this particular clause first occurred in the 1958 contract, is that correct? A. That is right, sir.

Mr. Combs: Now in substance, this clause, your
2629 Honor, if I can summarize this, in substance this clause provides that the operators signatory to the contract, that is the 1958 amendment to the '50 contract, will not during the life of that contract buy, process, sell, produce or handle coal produced at standards lower than the provisions of the contract applicable in 1958.

By Mr. Combs:

Q. Now, Mr. Owens, could you briefly tell the Court and the jury the purpose of the union in trying — first let me ask you this. Strike that, please.

First let me ask you this. Did the union insist upon this clause to the operators? A. Yes, sir.

Q. Did they negotiate in the conferences? A. Yes, sir.

Q. Did the operators resist? A. They resisted it as much as they could, in every way they could.

Q. Would you briefly tell the Court and the jury the purpose of the union in insisting on a clause of this character in the contract? A. Well, it is a continuation of our efforts over a period of years to have an agreement that would be applicable to the interests who negotiated the contract with us and signed it in good faith. We have labored
2630 under the impression always that a contract entered into in good faith should be carried out.

Our experience over the years, every succeeding contract and its duration built up an experience with us that was responsible for us insisting in season and out of season that the negotiators representing the coal operators insert a clause in the contract that would prevent them from in reality vitiating the agreement by entering into some kind of a lease or by purchasing coal, closing their own mines down, from sub-standard mines that were paying sub-standard wages, and it was a conclusion after all these years of experience. First, without any requirement as to — as far as language is concerned, we took them at their word that they were signing the agreement. It applied and would be applicable until it expires. And after years without any clause of that kind in the contract, we inserted it as it was read here, the 1943 clause in the contract. We had experiences with it. 1945 contract was inserted in there. We had experiences with it, and on through the life of all of the agreements we negotiated.

All we wanted done was the terms of the agreement be applicable to operators who signed the contract and their companies and their mines and the coal lands they owned.

So we argued and pressed for such a clause as here in
2631 this contract.

The operators resisted it. It wasn't retroactive. It was for the future. We recognized because it was a fact that there was mines under lease by the signators to this

agreement, we knew that you could not violate that agreement if it was a valid agreement. We talked about the future, after the effective date of the contract.

Q. In other words, Mr. Owens, this provision was directed toward the problems of sub-contracting and contracting out of an operator after he had signed a contract that he would comply with certain wages and standards set up in his contract, is that right? A. That is right.

Mr. Combs: Now I read from Section D, your Honor, of the 1958 contract, an exhibit herein, No. 77, which reads as follows:

"Within one hundred and twenty days after the execution of this contract and each six months thereafter each operator signatory hereto shall certify in writing to the Joint District Contract Committee for the district where he maintains his principal place of business where such a District Committee exists, or to the Joint Industry Contract Committee where no District Committee exists, that he is in full compliance with all the terms and conditions of this contract . . ."

2632 I point out, your Honor, that this amendment, the 1950 contract, was effective as of December 1, 1958, and that the clause that I have just read shows that the effective date of this particular clause would have been in April of 1950, the first effective date, 1959.

By Mr. Combs:

Q. Is that according to your recollection? A. That is right, sir.

2632A The Court: Now is that the union clause that you are talking about?

Mr. Combs: It is the protective wage clause.

The Court: It is the protective wage clause?

Mr. Combs: That's right.

The Court: Became effective when?

Mr. Combs: April 1959.

The Court: All right.

Mr. Combs: In other words, it shows on its face, Your

Honor, that the amendment was effective December 1, but this particular provision in the contract, by its own terms, provided that it would not be effective until one hundred twenty days after the effective date of contract which would have been April of 1959.

By Mr. Combs:

Q. Now, Mr. Owens, I have asked you questions concerning provisions contained in the 1950 contract as amended up through and including 1958. I have asked you about the provisions concerning wages, the land-lease, the application of contract to land-leases, to the protective wage clause, and to the union security clause.

I ask you now if it was the purpose of the union to have — or agreement of the union — to have inserted in the contract these clauses for the purpose of eliminating
2633 any operator of any size, large or small, from the coal industry? A. No, sir, nothing could be further from the truth.

Q. Was the purpose of these provisions, as far as the union was concerned, to protect the wages and the standards and the working conditions of your members? A. Yes, sir, exclusively, have nothing to do with operating the mine, large or small.

Q. Now, Mr. Owens, I want to ask you some questions about the union's investments in the West Kentucky Coal Company.

We have exhibits here, but I believe they are on the table, so I won't refer to them. The evidence here, the records here show that the union invested in certain stock of Western—of the West Kentucky Coal Company. Can you tell the Court and jury about when these investments were made and why they were made? A. Well, I think it started in 1951, started lending money to Mr. Cyrus Eaton and his associates to buy stock in the West Kentucky Coal Company. Stock with stock pars attached to it was locked up in a lock box in the Bank of Washington as security for

those loans. We invested some money in the stock, and we think it is a very good investment.

2634 The West Kentucky Coal Company, located where it is at, we think has a great future. It is reported to have a billion dollars of — or a billion tons of reserve coal. Well, if fifty per cent of it can be mined, marketed, twenty cents a ton in its raw state without river transportation and investments they got, without operating mines, with all of its equipment, but a billion tons of reserve coal, valued at twenty cents a ton, it would be worth a hundred million dollars, fifty per cent of it being recovered.

We think as a labor organization representing the coal miners, that if we can invest money in the industry that may be helpful, directly or indirectly, to the industry—the men that we represent in the industry—we think it is a sound investment.

Q. Mr. Owens, at the time, in 1951, that the union began buying stock and was beginning to loan money to Mr. Eaton and to others for the purpose of buying stock and taking the collateral, at that time those investments commenced, was the West Kentucky Coal Company a signatory to a wage agreement with the Mine Workers. A. Later it became signatory to the miners.

Q. I mean were they at the time that you commenced the — A. 1951, no.

Q. You say later on, when did they become signatory
2635 to the contract? A. In '54.

Q. Now, during prior years, had West Kentucky ever been under contract with the United Mine Workers of America? A. No, sir.

Q. And how long — do you know how long that coal company had been in operation? A. Sixty-five or seventy-five years, I think.

Q. And about how many employees did they have, approximately? Would you have any idea? A. Well, I think that they had, oh, from twenty-five to three thousand em-

ployees, maybe more than that in the combined operation — Nashville and West Kentucky.

Q. During the 1940's, do you recall whether or not that the Labor Relations Board certified the United Mine Workers as the bargaining agent for the employees of the West Kentucky Coal Company, and do you remember that the Supreme Court of the United States enforced an order of the Labor Board requiring the company to bargain in good faith with the United Mine Workers of America?

Do you recall that? A. I recall. I am not positive about the dates.

Q. You don't recall the details? A. No.

2636 Q. Now the West Kentucky Coal Company then, you say, executed the contract in October or sometime in 1954? A. I think that was the date. I am not positive about that exactly.

Q. And did the West Kentucky Coal Company later acquire the stock in the Nashville Coal Company? A. Yes, sir.

Q. And did the Nashville Coal Company become a party to the Bituminous Coal Wage Agreement after it was merged with West Kentucky? A. As West Kentucky, yes.

Q. Do you recall about what year that was? A. Well, it was right after they acquired the property.

Mr. Combs: I believe the records will show here, Your Honor, that it was 1955.

The Court: All right.

By Mr. Combs:

Q. Now, Mr. Owens, in connection with West Kentucky and with Nashville Coal Company, has the union in any way participated or tried to participate in the management of the West Kentucky mines? A. We have not had anything to do with the management of the West Kentucky mines, either directly or indirectly.

Q. You enforce the contract as to West Kentucky,

2637 the same as you do any other coal company? A. Yes, sir.

Q. Has the United Mine Workers, or its officers, participated in any way with the policies of West Kentucky Coal Company with reference to its sales of its coal? A. None.

Q. Has the United Mine Workers, or its officers, in any way tried to influence the management of the West Kentucky Coal Company or the Nashville Coal Company as to selling coal to the TVA or to the utilities or to any other person? A. No, sir.

Q. Has the management of West Kentucky consulted the union or its officers in any way with reference to its sales policies? A. No, sir.

Q. Now, Mr. Owens, there is in evidence here in the record, an exhibit, that shows that the United Mine Workers in 1959 —

Mr. Combs: I would like to make clear, Your Honor, that we are asking this without waiving our objections, if it is all right, to the time, that is in '59.

The Court: Yes, sir.

By Mr. Combs: I think the exhibit will show, Mr. Owens, that at sometime in 1959, that United Mine Workers
2638 underwrote credit to the National Bank of Washington for the North Fork Coal Company. Do you recall anything about that? A. Yes, sir.

Q. Now, I think it is in the record—I won't try to hunt it—that they applied for a line of credit with the United Mine Workers? A. Yes, sir.

Q. And did they state the purpose—are you aware of the reasons that they— A. Well, I think everybody knows the condition that prevails in and around Hazard, Kentucky, Hazard field, and the North Fork Coal Company made application for a line of credit for a million, five hundred thousand dollars.

Q. National Bank of Washington? A. National Bank of Washington. We bought a certificate of deposit, one million, five hundred thousand dollars, and the line of credit was granted to them for the purpose of trying to develop the

industry in that section so that it would relieve the distress that was publicly known—almost every citizen in the United States.

Q. Did the union or its officers have any understanding with North Fork Coal Company as to what leaseholds it would acquire or production facilities it would buy? A. None at all.

2639 Q. Did the union or its officers, any of them, have any knowledge of any leases that North Fork may have sublet? I make specific reference to a lease of the Kentucky Oak Coal Company. Did you have any knowledge of that? A. No, sir.

* * * * * * * * * * *

2641 Q. Mr. Owens, do you recall when the union began acquiring stock in the National Bank of Washington? A. I think it was in March, 1949.

Q. Would you tell the Court and jury, briefly, the manner in which the stock was acquired; what happened and the purpose of the union in acquiring this stock? A. The National Bank of Washington was a small institution, one of the oldest banks in our Capital. Great patriots of our great government had deposits in that bank back in 1808 and '09.

Q. I believe the record shows it was chartered by an Act of Congress, is that true? A. Yes, and for some reason or other it became known that the stock could be acquired. In fact, other banks, other groups of banks in the city of Washington were trying to buy the stock.

The United Mine Workers through that this bank was a good investment. We knew that our great capital was going to grow. It is now recognized as the capital of the world, and it is going to grow by leaps and bounds, and any investments in banks, we believe, in the city of Washington will increase in value. So we simply bought stock in that bank as an investment, and the bank became the depository bank for the funds of the United Mine Workers, and it has

grown until it is the third largest bank in the city
2642 of Washington.

Q. Did this National Bank of Washington acquire the Hamilton Bank sometime in the course of its business? A. Yes, sir.

Q. Do you know how many branches the National Bank of Washington has in Washington? A. I think it is twelve now.

Q. Twelve? A. I think it is now—eleven or twelve.

Q. Is the business of the bank restricted to the District of Columbia? A. I think so, sir. Yes, sir. I think so.

Q. Mr. Owens, does the union have a majority of the directors or the officers in the National Bank of Washington? A. No, sir.

Q. Does the union or its officers attempt to influence or control the policies of the business of the National Bank of Washington in any way? A. Neither Mr. Lewis, Mr. Kennedy or I, and now Mr. Boyle, who is an executive officer of the United Mine Workers, have anything to do with it.

Q. Are any of the officers of the United Mine Workers, that is the officers of the International Union, United Mine
Workers, are any of them directors or on the Board
2643 of the National Bank? A. No, sir.

Q. Is it your information that this bank is governed by the Federal Reserve System? A. Exclusively; yes, sir.

Q. Mr. Owens, has the United Mine Workers, or any of its officers, underwrote any credit for anyone at the National Bank of Washington with the purpose or the intent to eliminate any operator, large or small, from the coal industry? A. No, sir.

Q. I believe you testified you started working in the coal mines when you were 10 years old? A. Yes, sir.

Q. And that you became a member of the United Mine Workers when you were 10 years old? A. Half member at that time.

Q. Did they have half members at that time? A. That is the only way I could. Half member.

Q. Is that because of your age? A. Because I was only 10 years old. All boys were admitted as half members at that time. It took two of us to make a member.

Q. Now I would like for you, briefly, Mr. Owens, to state to the Court and jury, from your long association with the United Mine Workers as a member and as an officer,
2644 the policy of the United Mine Workers as it affects mechanization of coal mines, the use of machinery in the coal mines

I would like for you to be as brief as you can, but I would like for you to hit the high spots of the policy of the union and the history of mechanization in the coal mines. A. The history of modernizing a coal mine dates back —

Q. I think, Mr. Owens, without interruption, I think it would be easier for the jury to follow you if you would first state the policy of the United Mine Workers now and as it has existed over the years with reference to mechanization of the mines. A. The policy of the United Mine Workers of America has always been that we have nothing to do with the management of the mine, directing the work force, hiring or discharging of the men—that we will not abridge it —the purchasing of equipment, the installment of it in the mine, is invested exclusively in the rights of the men who operate and own the coal mine. And the Mine Workers union has never interfered with the installment of any machine or any equipment that the owner of the coal mine believed that it would be for the best interest of the corporation or bring more return for the investment they had in that mine.

2645 If we did it would be interfering with the right of capital to invest its money. It would be contrary to the very principles, as we understand it, of free enterprise, the right to invest your money, the right for return on the investment.

The only thing that we have insisted upon or requested that we participate in is a sort of a three-way participation. That the men employed by the company, the public who consumes it and the operator who installs it, all participate ——us by wages, the public by the reducing of the production cost, and the investor by increased production which increases his profit.

We have never interfered with that. We think it is a fundamental American principle that if it is interfered with, retired by any segment of our people in the country, it will affect the security of our great nation in competition with forms of government that installs them at will and increases their production in every line of endeavor until it will overwhelm us and make our country, its ideals and institutions, in greater jeopardy than they are today.

Q. Mr. Owens, in connection with that, when you started working in the mines, would you tell the Court and jury, briefly, just how the coal was mined. I take it it is hand loading? A. All hand loading, so much a ton.

2646 Q. How was the transportation? A. All transportation was mules. Had some road haulage, what we call dillies, and some of it was pick mine.

Q. What kind of work did you do when you first started? A. I first started, attempted to try to load coal in the mine, but I couldn't load very much. Next I became what they call a trapper boy in the mine, opening and shutting the door for ventilation purposes.

Q. Did you ever drive a mule? A. Then later on I became a mule driver.

Q. I believe you testified, and I don't want to get into anything personal; but I believe you testified that you lost your right leg. How did you lose that? A. Well, I went into a trap door.

Q. Were you driving a mule? A. Driving a mule. No safety regulation at that time. There wasn't any catch on that trap door.

Q. Did they undercut the coal? A. They were undercutting it then with a machine.

Q. How was ventilation put into the mine? A. Well, the ventilation was regulated, of course, with a fan from the outside and regulated by these doors these kids worked at or boys worked at. Sent into various sections and turned through the mine.

2647 Q. Now later on on the mechanization, and I would like to travel about 10 year periods on down— A. All right.

Q. Later on how was the coal cut for loading? A. It was undercut.

Q. By machines? A. Yes.

Q. And how was it transported to the surface? A. Well, later on it became motors and displaced the dillies in the mines. They displaced the mules in the mines from gathering it to what we call—get on gathering switches. Mules gradually went out. Motors came in. Now they have got what they call buggies and conveyors, displacing motor transportation in the mines.

Q. On the transportation, at the time that the transportation became by motor and undercut by machine, did they continue loading the coal by hand? A. Yes. They loaded—shot the coal down mostly with black powder, loaded it with a shovel into cars.

Q. Commencing about World War II, do you know about what percentage of the coal was loaded by hand and what percentage was loaded by machine? A. In 1940?

Q. About 1940. A. I couldn't give you the exact

2648 figure without looking at the record.

Q. Just approximately A very little mechanization south of the Ohio River, outside of what strip coal was being mined in 1940.

Q. Do you recall about what the average tonnage was mined by the average miner per day at that time? About 1940? A. About 4½ or 5 ton per man.

Q. Now after World War II, say in 1948, '49 and '50, do

you know about what percentage of the coal was mined by mechanization and what by hand loading? A. Well, it gradually increased. The mechanization increased til it has gotten now there is only about 36,000,000 tons mined by hand in 1960 and all the rest of it mechanically operated.

Q. In percentage, would you know about what per cent? Would you say 84, 85 or what per cent is loaded by mechanical means? A. It is more—I think about 90½ per cent, maybe 91, mechanical.

Q. Mr. Lewis testified that as of now that the average—well, I shouldn't say. Well, he was in the court room, your Honor, as a party when the witness testified.

Mr. Rowntree: If your Honor please, we don't think the rule applies to these officers of the international union
2649 and he is privileged to point out testimony.

* * * * * * * * * *

2650 By Mr. Combs:

Q. I ask you, Mr. Owens, do you have the latest figures or could you give the Court and the jury the approximate average production of the coal miner in the United States at this time? A. I can answer your question. In 1959 they produced 412,027,502 tons of coal. In 1960 they produced 413,000,000 tons, an increase of 2/10ths per cent. In 1959 the average production per man per day was 12.22.

Q. Do you have 1958? A. '59.

Q. Do you have 1958? A. No, I don't have 1958.

Q. From what source are those figures? A. These are taken from the Bureau of Mines, Keystone Broyhill Publication.

In 1960, I might say they worked 188 days in 1959; the average number of men working daily of 179,639. In 1960 there was 160,200 men, or 19,400 less, and they worked 180 days, eight days less than they did in 1959, and
2651 they produced approximately a million more tons than they produced in '59, on a daily average of 13.10 per man per day.

Q. All those figures come from the Bureau of Mines, federal? A. Yes. This is compiled by Broyhill Publication, branch of the Federal Bureau of Mines.

Q. Now, Mr. Owens, in connection with the mechanization of mines, commencing in 1950 through 1958, or at any other time, has the union or its officers made any agreement or had any understanding that they would aid any operator financially to mechanize his mine for the purpose of eliminating any operator, large or small, from the coal industry? A. No, sir.

Q. Has the policy of the union with reference to mechanization been consistent over the years that you have described here? A. As far as I know, year in and year out.

Q. And that policy was unchanged from 1950 through 1958 and is unchanged at this time? A. Yes, sir.

* * * * * * * * * * *

2652 Q. Mr. Owens, in 1954, did the United Mine Workers of America petition the Secretary of Labor to set a prevailing wage in the bituminous coal industry under the terms and provisions of the Walsh-Healey Act? A. Yes, sir.

Q. Did you participate in those hearings? A. Yes, sir.

Q. Were there others participating in the hearings? A. Yes.

Q. Would you describe to the Court and to the jury just briefly who participated in the hearings? A. Well, you mean representing the miners?

Q. Representing the mine workers and just who the participants were in the hearings before the Secretary
2653 of Labor. I believe it was in February of 1954. A. In the hearing before the referee or —

Q. Yes. A. Well, I think I testified, and two or three operators, and — I don't know whether Mr. Boyle testified at that time or —

Q. No, Mr. Owens, I don't care about who testified I just want to know the different groups. The United Mine Work-

ers participated? A. There were operators, miners, operators that were opposed to it and operators that were in favor of it, and the Mine Workers Union representatives.

Q. Were operators who were operating under the union, were they present and testify? A. Yes, sir.

Q. Do you remember about how long those hearings lasted? A. I don't recall the number of days, but it was a lengthy hearing.

Q. Did there come a time according to your recollection when the Secretary issued an order setting a prevailing wage in the bituminous coal industry for the first time? A. Yes, sir.

Q. That was sometime in 1955? A. Yes, sir.

Q. Do you recall whether or not that the District
2654 Court of the District of Columbia issued a restraining order prohibiting the Secretary from putting that order into effect? A. I think he did, and required a hearing under it.

Q. And then after the hearing, did the Court dissolve that petition? A. Yes, sir.

Q. That restraining order? A. Yes, sir.

Q. Now, Mr. Owens, why did the United Mine Workers participate in this hearing, or why, rather, did they petition for an order? Would you explain briefly to the Court and to the jury? A. Well, it was the law of the land, and it was simply a request made by the United Mine Workers that such law be made applicable to regions where coal was being — where coal was produced, so that governmental purchases be made in conformity with the prevailing wage in those regions, and after due hearing, why the order was issued, and it did — it is not only — that application affecting the bituminous coal industry, but other applications affecting other industry have been proposed, and in effect, and rightfully so.

Q. Now after the order was propagated in 1955, I believe,

was that order amended later to increase the prevailing wage rate after a finding? A. Yes.

2655 Q. Now, Mr. Owens, was there any purpose, or was there any understanding or agreement on the part of the United Mine Workers that they intended to try to get the Secretary of Labor to set a prevailing wage for the purpose of eliminating an operator, large or small, or any operator, from the mining industry? A. No, sir, just the reverse is true. It was done for the express purpose; or requested for the express purpose to effect the wage standards and working conditions and safety regulations provided by law in the coal mines whether it was in a small operating mine by a small operator, or a large operator. We had no interest in the industry investment in petitioning them. We wanted to protect the wage standard of the men who worked in the mine, union or non-union.

Q. Now, Mr. Owens, has the United Mine Workers of America had occasion from time to time to criticize or to comment upon the buying or purchasing policies of the TVA? A. The most information we receive about the purchases of coal by the TVA is what is published in the press, when a letting has been made for certain number of tons of coal, and sometimes we see the publication. We have nothing to do with it. It is none of our business. They

2656 can sell their coal for whatever price they want to sell it. That is the prerogative of owners of industry. It must never be taken away from them, because if you do, that right of owning and operating a mine or an industry for profit, under our form of government will be inoperative, and the only thing that we are interested in under the Walsh-Healey Law, or under the consumption of coal by TVA or by any other consumer in America, that we want to see that the men who produce that coal and who are the only ones that we represent, that they get the prevailing scale as provided for in the contract which we think is an American standard that should be paid in the coal industry in this country. All we are interested in.

Q. Has the United Mine Workers or any of its officers ever tried to get the TVA purchasing agents, to try to influence them with reference to who they would buy coal from, or to favor any individual company in any manner? A. No, sir.

Q. Now, Mr. Owens, part of the preamble of the constitution of the United Mine Workers was read in this record yesterday. It's an exhibit — I don't know just what the number of it is — but it is in evidence.

I call your attention to part of the preamble which reads as follows:

"We have formed the United Mine Workers of
2657 America for the purpose of establishing by lawful means the principles embraced in the body of this constitution."

I ask you in connection with the objectives of the union that you have testified to, in connection with its activities I have inquired about, whether or not that you have tried to accomplish these means by lawful means or by means of violence or otherwise? A. We believe in that sec-
2658 tion without any reservations. All my life I have recognized that where law ends tyranny begins.

We are a government by law, and I believe that personal persuasion by conversation in presenting whether it be a question of joining a union or civic club, or a church, or a lodge, or the Grange, or any other institution that is recognized as being an asset to our country, can better be accomplished by conversing with them, consulting with them, and dealing with them in conformity with the law and not violence. That is our principle.

Q. I ask you, Mr. Owens, whether or not that the United Mine Workers or its officers have authorized or participated in or ratified in any way any act of violence against the Phillips Brothers Coal Company or any other coal company in the Tennessee area or anywhere's else? A. Not by specific action or in any other way, to my knowledge, and I

certainly would oppose it if I had any information of it because it does not contribute anything to the welfare of the industry, the welfare of the United Mine Workers of America.

Violence leads to tyranny, leads to the destruction of law and order, and destroys our form of government if it is permitted to exist, and we have been opposed to it from our inception and anybody who is personally acquainted
2659 with us knows that is a fact.

Q. Now Mr. Owens, among the objects that were also read into the record on yesterday in this constitution, an exhibit in this case, I notice that the first of the objects is to unite in one organization all workers eligible for membership, employed in and around coal mines.

You have testified you have been a member of the United Mine Workers since you were ten years old. Has that been in force and has it been followed since you have been a member of the United Mine Workers and an officer of the United Mine Workers? A. Yes, sir. As long as I can remember the purpose of the United Mine Workers organization is to try to organize all of the coal miners eligible for membership excluding the managerial force, the directors of the work force or the executives of the company, into an organization that we may be able to unite in collective bargaining arrangements with the industry to regulate as far as wages are concerned, hours of employment, and safety in the coal mines in America. That is all we have been interested in, and that is all we are interested in now.

Q. Mr. Owens, has the United Mine Workers under its contracts with signatory operators or under its constitution or policy, has it ever tried to insist on who the employers would hire as their workers? A. Under our contract
2660 and under our policy, every member of the United Mine Workers of America since I have been a member of it, has been first employed by a coal company. He selects him regardless of his creed or color or nationality.

He is not eligible to become a member of our union until some coal operator employs him, hires him, and we have nothing to do with it. He can hire anybody he wants to.

Q. And that is without reference to whether he belongs to the United Mine Workers or whether he does not belong to the United Mine Workers; is that true? A. He does not have to belong to the United Mine Workers. He can hire an Eskimo from the far north and employ him in his mine if he wants to.

Q. During your experience with the United Mine Workers as a member and as an officer, has there ever been a time when the United Mine Workers had anything to do with who would become a coal operator or how he would operate his mine? A. Counselor, the purchasing of coal acreage, the location of his tipple, the sinking of a shaft or a slope, what kind of track or conveyance, or machinery, or any part of a coal mine, that the United Mine Workers has nothing to do with.

We recognize that we just represent the employees
2661 that he selects to work in his mine.

He can buy a 70-yard stripping shovel — we would have nothing to do with it. He can buy a 10-ton motor; he can buy a 50-ton motor; he can buy a hoist that may hoist 10 tons of coal up a shaft in one trip — we have nothing at all to do with that.

We recognize that that is a prerogative of the owner of the mine. It is his money, he invests in it and he can start a small mine, he can join with others that he may entice into a corporation and have a larger operation. He may sell stock in that company? That is his right under the law and we don't attempt to abridge it.

And, counselor, that is the trouble with the British production that only produces 1.23 tons per man until it got so bad the government had to take over the mines and they almost collapsed at the end of the war standing on billions of tons of coal because there wasn't enough foresight con-

nected with the industry that pointed out to them that if they wanted to live they had better modernize their mines and increase their production.

Q. Another objective, Mr. Owens, that I would like to ask a question about, I notice it was read in this record yesterday, the fourth objective is to strive for a minimum wage scale for all members of our union,

Was that an objective when you first became a
2662 member of the union? A. It has been one of our objectives which we believe that if a — well, to make it a homely illustration, we believe that if a man is working on a machine in the State of Kentucky that he ought to receive the same wage that a man working on the same kind of machine in Pennsylvania or in Tennessee is getting. Nothing unusual about that. It is done by Congress in their wages. It is done in the public utilities regulating the power rates. It is done by the interstate commerce regulations of the freight rates. It is done by the Agriculture Department with the authority of Congress in regulating wheat, cotton, tobacco, and a hundred and one other things.

2663 Certainly it can't be a violation of the law to have the ambition that you represent men that they all receive a minimum wage, so that they can exist under an American standard of existence, and that is one of the objects of our union.

Q. Now, Mr. Owens, I want to ask this question. Commencing in 1950 and up through 1958, or any other time, has the United Mine Workers, or its officers, agreed, conspired, or have they through concerted efforts in conjunction with the Consolidation Coal Company, Peabody Coal Company, the Island Creek Coal Company, the Pittston Coal Company, Pittsburgh Midway Coal Company, West Kentucky Coal Company, the Nashville Coal Company, trustees of the United Mine Workers Welfare and Retirement fund, conspired with those named corporations and companies, or with any other company or corporation to

eliminate the small operators or any other operator from the mining industry? A. No, sir.

Mr. Combs: You may ask him.

CROSS EXAMINATION

By Mr. Robertson:

Q. Mr. Owens, on your direct examination this morning you spoke of the portion of the land lease clause, as it has been called here, as having been in the 1945 so-called Illinois agreement, I believe.

2664 Mr. Combs: 1943.

By Mr. Robertson:

Q. 1943 Illinois agreement, and I believe one additional agreement. A. 1945 I said.

Q. 1945. And I believe it was pointed out at that time that in those earlier agreements that the provision read: "The said operators agree that they will not lease out any coal lands as a subterfuge for the purposes of avoiding the application of this agreement." Is that correct? A. I think that is substantially right, sir.

Q. And I believe that it was the purport of the testimony this morning that in the 1952 agreement that provision was carried forward in the '52 agreement, but had added to it this provision: "As a part of the consideration for this agreement, the operators signatory hereto agree that this agreement covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its term which may hereafter during the term of this agreement be put into production." Is that correct? A. I don't follow your reading of it, sir. You have a different contract there.

Mr. Robertson: Will you stipulate?

Mr. Kramer: Oh, yes.

2665 Mr. Combs: We were following it.

Mr. Kramer: That is not quite all of it.

Mr. Robertson: I think I read it all. I read the last sentence first and asked if that provision was carried forward in the '52 agreement and then the first sentence I read was added to it.

By Mr. Robertson:

Q. Mr. Owens, is it a fact that that provision that was added to that '52 agreement does apply to any properties which are acquired by a company after the contract is signed, even if those mines, after acquired, are already
2666 represented by other union members, members of another union? A. No, sir, not unless the procedure covered by law would change the status of an agreement that was in effect, because it wouldn't be a valid contract.

You have in mind that a company is recognizing some other union during the existence of this agreement, that the condition may change in conformity with the law, and the employees of that mine exercise their right under the law, and we proceed to consummate an agreement under the law, and the question of its validity can only be determined by the procedure prescribed by the law to invalidate it or validate it, not what the contract says or what you say. The law supersedes the contract.

Q. Do you agree, Mr. Owens, that the employees at these mines have a right under the law also? A. Exclusively. They have all of the right and we want them to enjoy it, without reservation.

Q. Mr. Owens, I point out a letter, an exhibit in this record, from Mr. Hugh A. White, president of District 12, United Mine Workers of America, dated July 10, 1957, addressed to Mr. H. C. McCollum, Peabody Coal Corporation, 8615 so forth his address:

"You are hereby formally advised that the joint Bituminous Coal Wage Contract to which the Peabody Coal Company is signatory, is effective at any and all mining
2667 operations operated by the signatory company. Full compliance to the terms of the aforesaid agreement

is expected from the Peabody Coal Company by the United Mine Workers of America."

Now that was in regard to the purchase by Peabody, after they had signed this UMW contract, of Midwest Radiant Corporation and Perry Coal Company, whose employees were represented by the Progressive Mine Workers of America. Does this not indicate that this provision in the contract automatically took the rights of the employees of those two coal companies at the time they were purchased by Peabody Coal Company? A. It has no bearing upon the terms of the contract at all, because of, the language of the contract supersedes any written communications between the Peabody Coal Company and Hugh White as president He is not the executive officer of the United Mine Workers organization and he is only a part—the mine workers is only a party to the contract and the only way the question of a contract could be enforced is by joint action, the operators and the miners. And the operators might write a communication or the miners may, but it has no compelling force in changing the terms of the contract, because the contract speaks for itself, and the law, counsellor, if you please, the law determines the eligibility — and eligibility of them being members of the Progressive Miners Union or the United Mine Workers, and the procedure to determine that is provided by law, not by this case.

2668 Q. That is absolutely correct, Mr. Owens, and I will ask you if this letter from Mr. White does not represent the interpretation by an agent of the United Mine Workers of America of this land lease clause? A.
2669 Well, I don't know the—what you mean by does it represent the position of the negotiators in the —

Q. He points out to Peabody that the wage agreement covers all mining operations operated by Peabody Coal Company, and this provision, this land-lease provision, is it not, is the part of the contract which makes that applicable? A. When they signed the agreement, they signed the

agreement for the Peabody Coal Company, but now you are asking me on an acquired property subsequent to the consummating of the agreement is covered by the contract when they signed it.

I say to you, sir, that the question of their right, the miners and the coal operators, is provided for under the law, National Labor Relations, may determine that and from them to the Courts and so it is a procedure of law. If there is a dispute about, it will be adjudicated by the law, not by what we say, because the Courts will determine that, after full hearing presented by both sides, and it is just an assumption on his part.

But regardless of what we say is in the contract, the Mine Workers believes in law and order, and we never signed an agreement in our lives that we didn't know that the law superseded the terms of that contract, and if there is anything in it in violation of the law, then the law
2670 takes precedent to the contract, and we abide by that decision.

Q. Now, Mr. Owens, you are talking about the UMW contract with Peabody Coal Company. A. Any contract.

Q. Now the employees of these two mines, the Millstadt and the St. Ellen mines that we are talking about, were under contract with the Progressive Miners of America, and yet here is the United Mine Workers of America taking the position that simply by the acquisition by Peabody Coal Company of two smaller companies, that that automatically terminated the rights of those employees to belong to the Progressive Miners of America. A. Well, now —

Q. Isn't that correct? A. Counsel, no. You are taking that position. You are saying that we do.

Q. Mr. White is saying that you do. A. Well, Mr. White is not the United Mine Workers.

Q. Isn't he a district president? A. Yes, sir.

Q. Are district presidents the ones who deal in the field with the companies in the negotiations of contracts? A.

Yeah, but he might be misleading, he might misunderstand what his rights are under the contract, and the ques-
2671 tion of a dispute may rise under it, just like the company might write Hugh White a letter and say that the terms of the contract is so and so, but because the company says that, it is a question of adjudication under the terms of the contract, first.

And if it is a question outside of the terms of the collective bargaining, why the law takes precedent of it, over it, has nothing to do with it. In other words, Peabody Coal Company may write President White and say that their King Mine wasn't covered by the contract. High White might say that, "I believe that it does cover their contract," but the fact the contract provides how that question shall be adjudicated with the councils of the group provided for to adjudicate it.

But if it is a question outside of the terms of the contract, why the law takes precedent, they determine it, and that is what will be done in this case, and that is what is being done.

Mr. Combs: If the Court please, just strictly for clarification—counsel said he was through asking on that.

I think for clarification of Court and counsel on the question that was asked about is questions of stipulations that we have entered into here.

Now counsel has stipulated on both sides, we have,
2672 that these letters were written by Hugh White, replies were made thereto. At the time that the letter was written, there was an organizing campaign going on there, and the rest of the record will show that Hugh White was claiming that we represented the majority of those men there.

Then we have a stipulation that the Labor Board heard the case and there was a Court decree by the Chicago Circuit, so I don't want to be misunderstood about the Mine Workers' position on that, which I think is clear in this

matter, that only when the majority of the men designate the Mine Workers to represent them, do they have a right to represent them regardless of the contract or anything else.

Now one more thing about the stipulation in regard to this contract that the company had with the Progressive Union. We stipulated also that there was nothing wrong on either side with the company terminating that contract. The Court so held, because it was terminated according to the contract terms, and all of this happened after the termination date of the contract between Peabody and Progressive Union.

Since that is a matter of stipulation between the parties, I thought I would like to have it clear at this point.

2673 The Court: All right.

By Mr. Robertson:

Q. Mr. Owens, moving on to another subject, I believe you testified this morning concerning the union shop provision of the contracts up through the 1948 wage agreement.

It was my understanding that the United Mine Workers had a union shop agreement up until the signing of the 1950 contract. Was that your position? A. Counsel, we never had so-called closed shop agreement, it never—

Q. No, not closed shop, excuse me, union shop. A. Union shop. The question never arose in our joint conference until I think about '41. We always assumed that if a man was a coal operator and was negotiating with us, and we represented his men a hundred per cent, and he signed a contract, that he signed a contract to cover for the duration of that contract all of his employees.

We labored under the impression that we represented them all, and if he entered into an agreement why naturally it covered all of his employees. We never raised the question in the conference, and they never either until I think along about '41.

After all of these years, after fifty years, the question arose down in some mine in West Virginia, and then is when we tried to write a clause in the contract that
2674 would be in conformity with the law, and from then up until the present time, we tried to write a clause in the contract that would protect the men we represented to the extent and only to the extent as provided for by law, and if we and the coal operators sat down and wrote a clause, and inserted it in the contract, that later proved to be a violation of the law, we recognized that the law took precedence over that section.

. . . . . .

2675 By Mr. Robertson:

Q. You have testified, Mr. Owens, about the making of the agreements, and I wanted to ask you, this so-called provision here what was intended by it, and that is the provision that was added on to the requirement that employees be or become members of the United Mine Workers "to the extent and in the manner permitted by law." Where was this clause intended to apply? A. To the terms of that contract.

Q. I beg your pardon? A. To the terms of that contract.

Q. Where geographically was this union shop intended to apply? A. To every operator who was signatory to the agreement.

Q. Regardless of where— A. Wherever the operator signed a contract we assumed it applied to him.

2676 Q. Are you aware of the fact that the Taft-Hartley Act prohibited a union shop clause unless the union was in compliance within the preceding 12 months with the reporting provision of that statute? A. We complied with the Taft-Hartley Act, sir, in all of its provisions as provided for by the law.

Q. You mean you have complied— A. With the Taft-Hartley Act.

Q. With the non-communist affidavit provision of the Act,

requirement of the Act prior to the Landrum-Griffin Act of 1956, is that your testimony here? A. I didn't say that. I said we complied with the Taft-Hartley Act. It wasn't compulsory for us to sign it. That section was inserted in the law — pardon me, I don't want to abridge the order as it applied by law.

Q. It was compulsory though if you had a union shop provision in the contract? A. We never contended only as it applied by law.

Q. But the employees could not become members, could not be required by contract to become members unless — A. If it was a violation of the Taft-Hartley Act it was inoperative, or any other law.

Q. Are you saying that you were operating above the law? A. I told you that if it was a violation of the
2677 law it was inoperative. It wasn't the — the language simply says that if it is a violation of the law, within the law. I don't know of any other language you could write in it.

Q. So that you concede that this provision in the contract was illegal? A. No. sir.

Mr. Combs: May it please the Court, I think that the question of counsel with reference to the application of the law, the interpretation of the law, I don't think is proper cross examination to this witness here.

He can ask him any factual —

The Court: No, the interpretation of the law is not within the purview of any witness. The attorneys and the Court have enough difficulty with interpretation of the law rather than calling on the witnesses to interpret the law.

Now the cross examination includes a broad range. I am permitting counsel to ask certain questions to test the standards of the witness in making his answers. But when you object to the question to this witness as interpreting the law, the Court sustains the objection, that that is not

a proper question. I sustain it.

2678 Mr. Robertson: May it please the Court, on the prior objection I am trying to ask the witness his interpretation of the contract rather than the law. He has testified as to being present in the contract negotiations. I feel like that we have a man here who can shed some light on it.

The Court: The Court did not intend to cut you off, Mr. Robertson, from your cross examination. You are entitled to cross examine fully. If you want to read to the witness from a particular provision in the contract and if there is any dispute about the meaning of it, or about it, how it was interpreted by the parties thereto and as a matter of testing the knowledge of this witness, I will let you ask.

Of course, the interpretation of any witness of the provisions of the contract may or may not be persuasive to the jury or to the Court, but the jury may consider the interpretation along with all other circumstances relating to the contract for whatever it may be worth.

By Mr. Robertson:

Q. Mr. Owens, let me ask you this: "It is further agreed that as a condition of employment all employees shall be, or become members of the United Mine Workers of America." That provision standing by itself, how do you

2679 interpret that provision that I have just read? A. You ask me to interpret two lines of a context of a contract covering a single subject.

Q. Well, let me ask you this: Can you interpret that? A. No, I can't interpret it that way, sir. I want to be responsive to counsel.

Q. May I ask, I believe this language, this entire language, including the provision "to the extent and in the manner permitted by law" was carried in the contract for approximately eight years. I believe it is still in the contract but it was carried in the contract during the eight years, sir, that the union shop clause was illegal unless

the reporting provision of the Taft-Hartley Act had been complied with by the union.

May I ask, did the United Mine Workers ever intend to comply with the provisions of that Act?

A. We did comply with the Taft-Hartley law, and nobody has ever questioned it — no court, no operator, no executive of the federal government, state or anywhere else.

Mr. Combs: If the Court please, I point out that counsel has stipulated on that subject. We have stipulated that during the period in this lawsuit that we were not in compliance with the so-called reporting provisions of
2680 the Taft-Hartley Act and we did not have to be in compliance, and we stipulated to that. As far as we were required to, we did comply.

By Mr. Robertson:

Q. Mr. Owens, I will ask you if this matter of complying with the Taft-Hartley Act was not a very important question in 1948 when the United Mine Workers was still affiliated with the American Federation of Labor? A. You mean the question of requirement under the law?

Q. Whether or not the United Mine Workers would comply with these provisions of the Taft-Hartley Act, the reporting provisions? A. Counsel, I am trying to inform you that the United Mine Workers executive officers and the union itself did comply with the Taft-Hartley law and nobody has ever accused us of not complying with it, and to imply that we did not comply with it, I am denying that without elaborating on it.

Q. All right. A. And I can, if you want me to.

Q. I will refer to the stipulation that they were not in compliance with the Taft-Hartley Act —

Mr. Combs: Wait a minute.

Mr. Robertson: I am sorry.

2681 Mr. Combs: He didn't intend that —

Mr. Robertson: But were not in compliance with the reporting provision of the Act.

Mr. Combs: That is right.

By Mr. Robertson:

Q. Mr. Owens, I want to read to you a portion of a speech made by Mr. Lewis at the 1952 convention of the United Mine Workers, at page 339, where he is speaking here of the split of the United Mine Workers of America from the American Federation of Labor, and he states:

"It is unfortunate indeed that the convention of the American Federation f Labor in San Francisco, shortly after this statute wa enacted, did not accept the advice of the United Mine Workers given to them at that time and withdraw from any association with this Act and refuse to sign the anti-Communist oath. If labor had just enough brains in its leaders, just a small amount of brains at that, the Taft-Hartley Act would have fallen by default and would have been long since repealed by a Congress that would have recognized its futility to bind free men in chains at the behest of the National Association of Manufacturers, operating through its supine tool, Robert Alphonso Taft.

"Even now, if the leaders of the American Federation of Labor and the leaders of the CIO had had the courage of a long-eared jack rabbit looking at a red bone hound they would withdraw their anti-Communist oaths and let this dammable statute fall now by default.

"But I don't know how to pump any courage into the veins of these syncophants who are willing to sell out the destiny of the labor movement and the future of its millions of members and their wives and families in this country for a lousy lunch or a pat on the back from some pseudo-politician in Washington. The day will come when they will rue their own cowardice, and the day will come, if this Act continues to prevail, when the rank and file of organized labor will repudiate a leadership born in weakness and conducted upon the premise that they must consistantly act respectable and in a manner that brings a

2682

smile and the compliments of the politicians of the country who are servants of the economic masters of the country."

Mr. Owens, was that representative of the opinion of the United Mine Workers of America as to compliance with the Taft-Hartley Act? A. You read that from the proceedings of the mine workers convention, didn't you?

2683 Q. Yes, sir. A. I have no—you are asking me whether it was said or not?

2684 Q. I am asking you if that was the mine workers' opinion as to its compliance with this act?

Mr. Combs: May it please the Court, I have no objection if counsel is trying to test the witness' knowledge or his memory on anything, but we have stipulated, we have conceded that the United Mine Workers, through Mr. Lewis, throughout—and Mr. Lewis has testified to that—throughout the time that the reporting provision was in the Taft-Hartley Act that the mine workers did not elect to comply with that. They never did. And the Congress repealed it.

Now I have no objection, if counsel is trying to test the witness' memory or knowledge at all, but I just don't think it is proper cross examination to keep pounding on something that we have stipulated to.

The Court: Can you tell me the purpose of that question, Mr. Robertson?

Mr. Robertson: Your Honor, here is a provision in the contract which admittedly before this last little clause was added to it, was a union shop provision. Taft-Hartley outlawed union shop provisions unless the union was in compliance with the reporting provisions of the Taft-Hartley Act.

Now it is claimed on the part of the union that this
2685 little phrase on the end saves this clause and does not make it a union shop provision.

Now the only way that it could possibly save it, that I can see, is that if they some time in the future comply with these reporting provisions of the Taft-Hartley Act, then

this provision, this union shop clause could legally come into operation, and I am reading this to show —

The Court: What I don't understand, with due deference to you, Mr. Robertson, what pertinency it has to any of the issues here. They stipulated to all those matters, and if it is a union shop clause and somebody violated it, that would be an employer-employee matter; whether it involves an unfair practice or not; whether it is a violation of any of the contracts. Those are matters, as I understand it, exclusively within the jurisdiction of the Labor Board, with which this jury and this Court has nothing to do.

I understand the point. It is your contention that the union didn't file the anti-communist oath, didn't file statements of the expenses or what certain people in the union were drawing as salary, or didn't comply with that provision, which has ben before this Court before, and since it didn't, then that union clause in that contract pre-
2686 vails. If it did, it would not have prevailed.

But what does that get us to? Does it decide anything in this lawsuit? If so, if you will let me know, I will try to pass on it.

Mr. Robertson: Yes, your Honor. There is no question but what that set of facts constitutes an unfair labor practice over which this Court has no jurisdiction.

The Court: All right.

Mr. Robertson: However, the same set of facts is a part of this conspiracy in violation of the anti-trust laws. The imposition of this contract.

The Court: I understand that.

Mr. Robertson: And the facts which happen to constitute an unfair labor practice may also violate some other statute, and we are contending here that these set of facts, even though they constitute unfair labor practice, they also constitute a violation of the anti-trust law.

The Court. It is or was a circumstance that the jury may look to in determining it.

Mr. Roberts: That is right:

The Court: I understand that, but the trouble with all that, as I understand it, these gentlemen have stipulated to everything that you are undertaking to cross ex-
2687 amine this witness about.

Haven't you stipulated to those matters?

Mr. Combs: Yes, your Honor, we have. The question of whether or not they elected to comply has been stipulated to. Witness Lewis testified to it, that it never claimed that it had a union shop clause. It never tried to enforce that, and the court so held. If the union had tried to enforce that clause, it would have been extra legal to try to do that, because concededly they were not in compliance with that. We are not claiming that.

Mr. Robertson: That is the issue. We say regardless of what they contend, it is a union shop clause and it was enforced on our people.

Mr. Rayson: May it please the Court, let me say this. This is not a union shop clause. Certainly a question of interpretation of a contract is a question of law for the Court to decide.

The Court: Now you are a hundred per cent sound on that. The reason that the Court has permitted this in some instances, for your information, is not on the theory that the witness has a right to interpret that contract and it is binding in any respect on the Court and jury; the Court is permitting that to be done on both sides to a limited
2688 extent to test the knowledge of the witness.

Mr. Rayson: I understand.

The Court: The standard that he has used. That point is cleared up.

Mr. Rayson: But having said that a question of interpretation of contract is a question for the Court to decide, it seems to me that then we run into the fact that at least a half dozen courts have already said this, that this was not a union shop contract; it was not a union shop contract,

and that runs precisely afoul with their theory that by this contract union membership was imposed upon employees.

Now if employees became members of the union, they must have become members of the union by reason of something other than this contract, because, as the courts have interpreted this contract, it could not have required them to be union members. And that is our position, your Honor, and it seems to me —

The Court: Insofar as it relates to Tennessee, the Court holds that you are right, because you can't require an employee in Tennessee, as the law now stands, to become a union member, and Judge Miller at Nashville held that that contract was written there with the knowledge that union membership would not be required in states where the open shop or the right to work prevailed. Now isn't that
2689. the law?

Mr. Rayson: He also said, your Honor, that the same rule applied in all states where the Taft-Hartley Law or by operation of the Taft-Hartley Law —

The Court: I have enough trouble with Tennessee without looking to other states.

Mr. Rayson: Certainly what you say about Tennessee is accurate.

The Court: I don't remember that part distinctly, but I assume he said it because you said he did.

Mr. Rayson: Yes. Therefore, in light of those decisions of the court, your Honor, and in the language of the contract which has been interpreted to be in accordance with the Taft-Hartley Act by appellate courts in this circuit, of course we think that their repeated reference to this contract as a union shop clause is entirely improper. We object to it.

The Court: I sustain that objection as a principle of law. I think the principle of law is sound.

By sustaining that objection, I don't mean to cut you

off, Mr. Robertson, in your cross examination to test the knowledge of the witness, memory and so forth.

2690 On this union shop business, I hold that what Mr. Rayson said is substantially the law insofar as, certainly, it applies to Tennessee.

* * * * * * * * * * * *

2691 By Mr. Robertson:

Q. On the protective wage clause in the 1958 amendment to the 1950 agreement, Mr. Owens, was a joint board of the signatory operators and the union set up to enforce this clause against any member operator violating it? A. As the contract provided for, in conformity with the contract.

Q. Do you recall who was on this board? A. Yes, sir.

Q. Mr. Owens, you testified this morning that the United Mine Workers, I believe, had never exerted any influence over the management of the National Bank of Washington. A. Yes, sir.

* * * * * * * * * * * *

2694 Q. It is true, is it not, that sums of money were loaned by the United Mine Workers to Mr. Barnum Colton, president of the National Bank of Washington? A. Yes, sir.

Q. And that did total — those loans did total did they not something in excess of twelve million dollars? A. $12,428,241.99, and he deposited as collateral to that loan 275,410 shares of stock, stock we have in a lock box with stock pars as security for the loan.

Q. And then another loan, I believe, in excess of nine million dollars, isn't that correct? A. Who to?

Q. To Mr. Colton? A. No, no.

Q. Well, that's all right. A. No, sir.

The Court: Now you wanted to ask him some questions after you stated the groundwork, which you have stated

now, and I will permit you to ask that question now, Mr. Robertson.

By Mr. Robertson:

Q. I will ask you, Mr. Owens, whether or not a loan in the amount of several million dollars to the president of the National Bank of Washington isn't an influence
2695 over the management of that bank.

The Court: Ask him in his judgment, if he has an opinion about it.

Mr. Robertson: All right, Your Honor.

The Court: All right, I'll let him ask you.

Mr. Combs: If he's asking if in his judgment we have no objection.

The Witness: I'll be glad to give you my judgment.

The Court: Yes, sir.

The Witness: The executive officers of the United Mine Workers of America recognizes that they are incompetent to even suggest to a distinguished president like Barney Colton and his board of directors how to operate, what to do, and what not to do in operating a bank, because they have no experience in that line, so they rely upon the competent, known competency of the president of the bank, his board of directors, which constitute some of the most eminent men there is in the city of Washington.

It has nothing to do with labor unions, and of course we do not impose any opinion on them, because it wouldn't be worth anything as a banker.

By Mr. Robertson:

Q. Turning to another subject, Mr. Owens, do you
2696 recall in the United Mine Workers convention of 1956 a statement made by Mr. Lewis, and for purposes of apprising you of why the question is asked, you stated on direct examination quite extensively, I believe, that the United Mine Workers has never interfered with the management of any coal companies, is that correct? A. That's right, sir.

Q. And I ask you if you recall Mr. Lewis' statement in the 1956 convention concerning an editorial which appeared in the Cincinnati "Inquirer" and he quoted from that editorial and added a comment on that editorial. The portion which he quotes —

Mr. Kramer: Will you give us the page so we can follow you?

Mr. Robertson: Yes, page 535.

By Mr. Robertson:

Q. "The operators, of course, no longer are squeezed in the price control. Nowadays they simply hand the consumers a higher bill for coal. The operators in general have been persuaded peacefully that it isn't worth the effort to dislocate coal production by resisting the UMW's demands."

And Mr. Lewis at that point states, "He left out a vital point there. It wouldn't do them a damn bit of good if they would."

2697 Do you recall Mr. Lewis making such a statement?

A. I remember the editorial; I remember Mr. Lewis commenting upon the editorial; but I don't think counsel should ask me to be specific, the language or the words that is in the proceedings of our convention, but to pick out in context some line or two in an expression of President Lewis, and imply that it means something that he had no intention of it meaning, is not pertinent to whether we violated the anti-trust law, certainly, and I don't think it has any bearing on it.

* * * * * * * * * *

Q. Moving to another matter, Mr. Owens, did the United Mine Workers purchase a large block of stock, namely 222,720 shares of the Rocky Mountain Fuel Company in 1946? A. 1946?

Q. Yes. A. No, not in 1946, as such, but they acquired that, as I had stipulated in my interrogatories that they have that many shares of stock of Rocky Mountain

2698 Fuel stock of a non-operating company, hadn't been operating for years.

Q. When were these shares of stock acquired, do you recall? A. You ask me if they were acquired prior to 1946?

Q. No, I asked if they were acquired in 1946. A. Well, I became secretary-treasurer on October the 1st, 1948, counsel, and I can't positively say they were acquired, different amounts on different dates, but we will be very glad if it would be of benefit to you to give you the day and date.

Q. Well, would you have — A. We have —

Q. You have answered interrogatories in this case about this subject. Would it be helpful if I read the interrogatories and the answer which you gave to that interrogatory? A. I stand on the interrogatories that I have filed, it's a matter of Court record, that is it.

Q. All right. A. I testified to it.

Q. So your answer here which is as follows:

"Yes, 222,720 shares of Rocky Mountain Fuel Company stock, a non-operating and inactive company located in the State of Colorado, acquired in 1946, and the shares of stock

In West Kentucky Coal Company as set out in this

2699 interrogatory 68."

That would be correct?

A. Yes, sir.

Q. All right. Do you know, Mr. Owens, whether or not Rocky Mountain Fuel Company was in operation at the time this stock was purchased? A. No, I don't think it was. I wouldn't be positive about that, but I don't think it was.

Q. This was the company in which Miss Josephine Roche was president? A. That's right.

Q. Was she president at that time, in 1946, or do you know? A. When we acquired the stock —

Q. Yes. A. — enumerated?

Q. Yes. A. I think perhaps in '39 or the early forty's, she did operate it, and I am not positive whether we acquired any of that stock until after the mine, after the property

closed down. I can't testify to that fact, sir. In either case, we have got the stock, and it is in the lock box, and it is ours.

Q. Do you know whether or not that was a new issue of stock or whether it was purchased stock? A. Oh, no,
2700 it was purchased, thousands of shares of that stock, Rocky Mountain Fuel Coal Company was a large corporation that was in operation over a period of years. There is a lot of that stock held in estates and in foreign countries, and it is sometimes available in fifty lot shares, ten or fifteen cents a share, thirty cents a share, and that is how it's been acquired over a period of years.

We think that perhaps someday — there is a lot of acreage there, a lot of surface, there is a trend of perhaps discovering oil, and those — and shale and coal that is in those — may be very valuable in years to come. We don't know, but we got the stock. We made the investment, and we so stipulated to the Court.

Q. Now moving on to another subject, Mr. Owens, as to the certificate of deposit which the United Mine Workers pledged as security for the one million five hundred thousand dollar loan by the National Bank of Washington to North Fork Coal Company, I believe you stated on direct examination this morning that that was to aid an area where unemployment was quite prevalent, is that correct? A. That was the purpose as far as we are concerned, counsel.

Q. I would like to know, Mr. Owens, how that would aid unemployment? A. Well, if they acquire acreage
2701 down there, and operate mines, put a lot of men to work, help the economy in that community, that is in distress, just the same as the city of Knoxville buying a piece of land out along the road and trying to get a manufacturer to build a plant down here which they have done.

It is a matter of civic pride, it is a matter of investment of our money in something we think that would be tangible benefit to the community, businessmen, state, country, and to the coal miners that we represent, a matter of judgment,

a matter of whether you want to do something or whether you don't want to do something. We try to do something.

Q. It is true, is it not that this money was merely used to acquire coal lands, coal leases? A. With the expectation of—I don't know what the purpose of acquiring — you couldn't operate a coal mine if you didn't acquire the property that you were going to do it with, on.

Q. North Fork Coal Company isn't an operating company? A. Well, they raised a million and five hundred thousand dollars for the purpose of enhancing production and employing men down there, so they led us to believe.

Q. Did they represent that they were going to operate that property in there? A. What property?

2702 Q. The property that they were going to acquire with this money? A. Well, they made a request to the bank for credit, and we gave them credit for it, and we haven't discussed — I don't want to discuss with them — as you say we don't want to interfere with the operating mine, their investment. We have no control over it. We don't want to have any control over it.

Q. Did you know at the time that this one million five hundred thousand dollars worth of union assets was pledged that this was a non-operating company, was merely going to use it to buy up reserves of coal land? A. No, sir, not for that purpose. I assume that they were going to use it in order to produce coal.

Q. Did you know whether or not it was going to be used for that purpose, did you — were any of the transactions — were you personally in on those transactions? A. Not with any transactions of that kind, sir.

* * * * * * * * * * *

2703 Q. Mr. Owens, in the 1960 convention of the United Mine Workers of America, I believe held in October, 1960, you made a report to the convention as to the finances of the union, and on page 15 of the transcript of your report

which you furnished to us in answer to interrogatories, you stated — A. What page, sir?

Q. Page 15.

. . . . . .

Q. This sentence, which is following statements by
2704 you concerning certain financial transactions and investments on the part of the union, and you make the following statement:

"So in doing these things, my friends, we brought about stability in the Pittsburgh-Midway properties."

My question is, what did you mean by that statement, Mr. Owens? A. Sir, that was either a typographical error or — I did not have any intention to even mention the Pittsburgh-Midway. It was either a typographical error or slip of the tongue, that it did not have nothing to do with the Pittsburgh-Midway.

Q. And one final subject that I would like to take up, and that is the signing of the contracts following the 1950 contract, from the 1951 amendment on.

I refer here to page 150 of the 1952 United Mine Workers convention minutes, where it is stated, under the subject matter "Washington Conference of 1951":

"One of the outstanding accomplishments of our distinguished President John L. Lewis, was his successful negotiation of the 1951-52 agreement without publicity or fanfare which became effective February 1, 1951, five months before the expiration of the then existing agreement.

"Mr. Lewis had many conferences with Mr. Harry
2705 M. Moses, who represented the industry. Finally, in Mr. Lewis' handwriting, the suggestions below were given to Mr. Moses, who made a copy of them and handed the copy to Mr. Lewis, retaining those in Mr. Lewis' handwriting" — and then this paragraph goes on and states what those pertinent provisions were:

Mr. Owens, was this the method used in negotiating the various amendments through the years to the 1950 con-

tract? That is, these conferences between Mr. Lewis and Mr. Moses and then after Mr. Moses death with Mr. Fox?
A. Well, the succeeding contracts after, as I related the experience of these public hearings in washing the questions before us out in the public press, the coal operators elected Harry Moses, who was recognized in the industry as perhaps one of the outstanding coal operators, spent his lifetime with the United States Steel, Frick, his father was a coal miner, and the coal operators themselves elected Harry Moses to represent them, and the United Mine Workers had President Lewis as head of their union.

And they thought it advisable to convene conferences between the parties selected by both groups to see if there could not be a meeting of minds on the terms and conditions of a successive contract, succeeding contract, and they met from time to time. And they met or conferred with
2706 their associates on both sides.

We would assemble a policy committee and they assembled their negotiating committee from the operators, and we discussed terms that they had been discussing in the joint conference and perhaps had a meeting of minds, and they would recommend the consummating agreement perhaps after additional men had been called in on Moses' side and participated in by Kennedy and I with Lewis.

That has been admitted as the most successful way, and has been operating successfully up until the present time.

That comes about, counsel, because of the fact that there is no other vehicle, that we know of, after 50 years, that can bring about in an orderly manner, without fanfare, the desires of the coal operators as to terms they are willing to pay and a desire upon our side after consultation, orderly, that we can recommend to our policy committee, and none of the conferences that precedes consummating of the agreement has the authority to make the agreement in toto until they are authorized by their negotiating committees, but ours is the International Policy and the operators have what they call their scale committee.

That is how it has been done, sir.

Q. Well, was this policy committee, did it sit in on
2707 these informal conferences between Mr. Lewis and Mr. Moses or was it submitted to the policy committee after the draft had been made by those two gentlemen? A. The granting authority to it come from the policy committee first.

Q. Yes. A. And then you can't — a policy committee consists of maybe 85 to a hundred men, so it goes that you can't negotiate a contract on both sides with 85 men on each side representing different views. You would never arrive at a conclusion as far as any stipulation of a certain contract.

So they stepped down and our policy committee gives a grant of authority to negotiate the contract, or to negotiate recommendations of a contract and to confer with like numbers named by the operators.

See counsel, collective bargaining is not a one-way street. Collective bargaining is between both groups, and we have to abide and adjust ourselves to the combinations of the industry. If they only select two men, or three men, to represent them, we have no authority under the law or anything else to tell them to bring in 50. And if they say that they are granting authority to Harry Moses or Mr. Fox, and officially advise us and they stipulate that they represent a tonnage, we are bound to meet them — bound to
2708 discuss the contract with them because that is the coal operators' right.

We have to adjust ourselves to the combinations of the coal operators and nothing in the contract is in there unless both sides agree to it. That is how it is done, sir.

Q. I take it then, that the policy committee would designate Mr. Lewis to sit in these informal conferences and then the draft would go back to the policy committee after these meetings between these two gentlemen; is that cor-

rect? A. Them and two or three or four others on each side.

* * * * * * * * * * *

2709 S. L. JEWELL

called as a witness by and on behalf of the cross-defendant.

* * * * * * * * * * *

DIRECT EXAMINATION

By Mr. Rayson:

Q. Would you state your name, please? A. S. L. Jewell. J-e-w-e-l-l.

Q. Where do you live, Mr. Jewell? A. St. Louis, Missouri.

Q. I believe you are with Peabody Coal Company;
2710 is that correct? A. That is correct.

Q. And what position do you hold with Peabody Coal Company? A. I am one of the vice-presidents of the company.

Q. What is your area of responsibility? A. Primarily in sales and company business related to sales.

Q. And how long have you been with Peabody Coal Company? A. With Peabody Coal Company itself only since 1955. With one of the companies that went into the merger that formed Peabody Coal Company since 1919.

2711 Q. Now, Mr. Jewell, since you have been with Peabody proper since 1955, what position have you held? A. The same as I just described.

Q. Now you say you have been with Peabody or one of the companies which now makes up Peabody since 1919. Was your first experience in the coal industry in 1919? A. That is correct.

Q. What company were you with at that time? A. The Southern Coal Company, Inc.

Q. Where was that located? A. Headquarters was in Memphis, Tennessee. The office that I was in most of the years was in Chicago. It had branches in different cities.

Q. Was the Southern Coal Company an operating com-

pany or a sales company? A. No, sir, it was a sales agency company.

Q. And I take it your work was in sales with Southern Coal Company? A. Yes, sir, it was.

Q. What employment did you have in the coal industry after your employment with Southern Coal Company? A. Well, Southern Coal Company, as I stated, became a part of the Peabody Coal Company.

Q. Did it become a part of some other company
2712 prior to becoming a part of Peabody? A. I recall during the transition period for a temporary time the name Peabody-Southern was used. It was the same organization. Just a change of name.

* * * * * * * * * * *

Q. In any event, you went from Southern Coal Company and Southern-Peabody into Peabody in 1955? A. Through —if I may explain that.

Q. Yes. A. Through the merger process, the Sinclair Coal Company acquired control of the Southern Coal Company.

Q. I see. A. And continued to operate it under that name, but under the ownership of Sinclair. Sinclair in 1955
2713 was merged into Peabody Coal Company, took Southern in with it, temporarily operated the sales division under the name Peabody-Southern Coal Company. Then subsequently in a relatively short time dropped that name and it operated simply as the sales department of the then Peabody Coal Company.

Q. Now, Mr. Jewell, where are Peabody Coal Company mines located? A. The company has mines in Oklahoma, Missouri, Illinois, Indiana, western Kentucky, and Ohio.

Q. Are your mines strip mines or do you have an underground mine also? A. We have one underground mine. The remainder of them are strip mines.

Q. Where is your underground mine located? A. Near Springfield, Illinois.

Q. Mr. Jewell, in your experience in coal sales, have you had occasion to sell coal to the TVA? A. Yes, sir.

Q. How long have you been selling coal to the TVA? A. Oh, for 12 years or more.

Q. Have you dealt with TVA on term contracts for coal and also on spot contracts for coal? A. I have dealt with them on term contracts considerably, very little on spot because our company has not been active in the spot market of TVA to any appreciable extent. In fact, we have
2714 not had a spot order to my knowledge in more than three and a half years.

. . . . . .

Q. Mr. Jewell, I have handed you Exhibit 101, which has been previously introduced in this case, which purports to show certain activity of Peabody Coal Company and the TVA spot contract market in the fall of 1956 and for a period in 1957. Now, first of all — A. Are those dates shown on this chart? I don't see them. Oh, yes, I do. Yes, I see them.

Q. Before we get into the figures shown on this chart, I would like to ask you this question, Mr. Jewell. What would occasion Peabody Coal Company to submit a bid on the TVA spot market? A. Desire to sell coal. Hope of selling coal.

Q. What sort of a market does the TVA spot market furnish for Peabody? A. It has not furnished a lucrative one. One we have not been able to compete in. We have bid pretty consistently, I believe. I will have to qualify — I am practically certain of it. We bid practically every month and we haven't had a successful bid in three years, I believe.

The chart may show differently, but that is the best,
2715 of my recollection.

Q. During the period of 1956 and 1957, did you have certain successful contracts in the TVA spot market? A. I wouldn't call a spot order a contract.

Q. Well, a spot order. A. We had evidently certain small

spot orders as shown here? I said we had had a few, but relatively few; negligible by comparison with our size and our tonnage and the purchases of TVA.

Q. How would you go about arriving at the price at which you bid for one of these spot orders? A. Well, by just the same processes of judgment and assessing the market as you would anybody else. You view as best you can what the recent market history has been in that selling area, compare that with what you know of the market generally, from your reports, from your sales force and your own contacts with the market, and determine what the lowest price you think you would need to quote to have an opportunity to get favorable consideration and then determine what price you are willing to sell your coal at, and wherever you can square that off, determine the price.

Q. Did you keep up with the bids that have been submitted to the TVA spot market? A. I pretty well lost interest in them two or three years ago because we were so uni-
2716 formly unsuccessful on it.

Q. Did you prior to that time? A. Oh, yes, and I do now. They come into me occasionally and say, "We would like some little bid. What price?"

And we go over it together, and I say, "Quote this and that price won't get an order probably."

And they say, "No, it might."

If we need some more tonnage, "Can we go a little further?"

And I confer with my associates. "Can I go lower than that?"

And they say, "No, that is the lowest, whether we get the order or not."

And I don't pay any attention. And a few days later they will tell me that we were competitive or we weren't. And for a long time now the report has been that we were not.

Q. Mr. Jewell, what part of the TVA system would you make your bids to, to the western division plants or to the eastern division? A. We don't specify that. I believe I am correct in saying TVA reserves the right normally and habitually of taking any tonnage it may purchase from you and sending it to any plant that it finds advisable and desirable. The plants we would have in mind being able to reach primarily from the western Kentucky field,
2717 which is where we bid from primarily, would be the Shawnee plant, the Johnsonville, Tennessee plant and the Colbert, Alabama plant.

Q. Do you know if you have ever sold coal to Kingston or John Sevier? A. I am positive we have never sold any to John Sevier. Whether the TVA ever took any of our coal as far as Kingston, I have no way of being sure. They wouldn't normally do so and have not done so. It never came to my attention if they did.

Q. Would your mines, would you consider your mines to be competitive in the Kingston and John Sevier area? A. Positively not.

Q. Why would they not? A. The distance from the market, unfavorable relative freight rates.

Mr. Rayson: Your Honor, we have placed on the bulletin board, with the consent of opposing counsel, an enlargement of the TVA map previously introduced, and, of course, I may point out that the plant that the witness has mentioned, we have here in upper east Tennessee the John Sevier plant (indicating), here is Kingston, and the three plants the witness mentioned are Colbert, Johnsonville and Shawnee (indicating).

2718 By Mr. Rayson:

Q. Now in dealing on the TVA spot market, Mr. Jewell, to the limited extent that your company did, I would ask you if in any manner the United Mine Workers of America conferred with you or suggested to you in any

way the price at which you ought to offer your coal? A. Never at any time in any way.

Q. Did any other coal companies make any suggestions to you in that regard? A. No, sir.

Q. In offering your coal and in selling your coal to the TVA on that market, did you have any intention of depressing the price of that market? A. Absolutely not. We hoped to see it get up to where we could participate.

Q. And in selling and offering your coal on that market, did you have any intention of running out of business any operators in east Tennessee? A. No, sir, we have been busy staying run out ourselves so far out of that market.

Q. Now I want to ask you about the activity of Peabody Coal Company with reference to term contracts with the TVA. What has been your first experience with a term contract with the TVA, Mr. Jewell? A. I am not sure I can recall offhand my first experience. We consider anything a term contract — well, about — I guess the shortest
2719 ones we have had have been, at any time, three years.

We may have had as early as 1949, '50 some two year or three term contracts of relatively small size. The first term contract of consequence that comes to my mind is one made in the year 1952, which was a ten year contract and which will expire next year.

Q. What was the tonnage involved on that contract? A. The base tonnage set forth was 500,000 tons annually, with the TVA reserving the right on its own option to increase the tonnage by the amount of 20 per cent or decrease it by an amount of 20 per cent.

You say what was the tonnage. The tonnage has developed to be 20 per cent less. They very shortly after the contract went into effect made the 20 per cent reduction, so we have been shipping at the rate of 400,000 tons annually on that contract.

Q. You are now and will continue to do so until 1962? A. We trust so. We are now.

Q. Have you negotiated other term contracts of consequence with the TVA? A. Yes, we have had a number of them during the interval from 1952 — we have had — I couldn't tell how many — a number of three year contracts. Principally our short term contracts have been three year contracts. Say a number of them, maybe a half-
2720 dozen of them. I would have to refer to the records to know. Most of them are relatively small contracts, maybe for 25 or 50 thousand tons a year.

I am not testifying accurately on that. It is just from memory. We haven't had any of great consequence of very substantial tonnage until the contract which was negotiated in 1959 and which has not yet become effective and will not become effective until 1952, and that is a much larger contract.

Q. You mean 1962? A. 1962. Excuse me.

Q. You have reference to the contract for the Paradise steam plant? A. Yes, sir.

Q. Is that the steam plant in Kentucky shown on this chart on the blackboard? A. It would be Muhlenburg County, Kentucky on the Green River, directly east of Drakesboro, Kentucky, near the small village of Paradise, Kentucky. Yes, sir, that is it.

2721 Q. Now, is that plant in operation at this time? A. No, sir.

Q. Do you know when it is expected that it will go into operation? A. It is expected to go in operation in the fall of 1962.

Q. What is the quantity of coal called for by that contract? A. The contract specifies that the rate of shipment, as I call it, will be for the first six months of operation at a rate of two million tons annually; thereafter at a rate of four million tons annually, until a total of — I am confident it is sixty-five or sixty-six million tons has been shipped.

Q. And over what period of time? A. Well, that mathe-

matically would require, I believe, seventeen years, the way I recall it.

Q. Now, does Peabody Coal Company have property near the site of the Paradise Steam Plant? A. Oh, yes, that is why we made — were able to make the contract.

Q. Where is that property located? A. The property is west of the plant. Some of the property is slightly southwest, but principally to the west immediately adjoining the plant site.

Q. Is that — you mean it immediately adjoins the
2722 property on which the Paradise Steam Plant is located? A. That is right.

Q. Now, with reference to the Paradise contract, and the other contracts that you entered into with the TVA, how did you come to submit a bid on behalf of Peabody? A. In an effort to sell coal, that's our business to sell coal. They are the coal user that announced their position to buy coal, and our business is selling coal. We were looking for business. We acquired acreages and property for the purposes of developing mines on them and selling the product, so it is a logical development for it.

Q. Does the TVA submit an invitation to you to enter a bid? A. Oh, yes. Not to us. They submit it publicly. They publish the fact that invitations are to be submitted, and all who want one can ask for it, and we always ask, and we are on the list to receive it now after having asked, along with coal companies generally.

And does the TVA in those invitations specify in general the quality or quantities of coal? A. It leaves great leaway in that. It usually tells the amount they intend to purchase, sometimes exactly, sometimes approximately, but the bidder has leaway in how much he wishes to offer.

Q. Now again with reference to the Paradise Mine,
2723 or Paradise Steam Plant, does your property near this Paradise Steam plant contain any particular

amount of coal? How much coal does it contain? A. It contains, we estimate, sixty-six million tons.

Q. And is that why you were interested in selling coal to the TVA in that quantity? A. Yes, sir, we wanted to sell the coal from this property, that is why we had acquired the property ten or twelve years ago. We thought it was an advantageous site, good coal mining conditions, so we were willing, and willing to sell the entire amount of it. That is the way we like to sell it.

Q. Had you attempted to sell it before? A. Many times to groups of utilities and individual utilities.

Q. Had you done any developing of that property with respect to mining it prior to — . A. No, sir. No.

Q. Now, with regard to the term contracts that you have entered into with the TVA, how you determined the price at which you would offer your coal? A. Just a matter of judgment. The way we determine the price ordinarily is how — we know it is a highly competitive market, the entire coal market is highly competitive, and we simply
2724 determine what is the lowest price at which we feel we profitably can operate this property and produce the coal and sell it.

Q. Now, in selling the coal to the TVA with reference to these various term contracts that you have had, obtained, have you ever entered a bid or secured a contract at a price which was suggested to you in any manner by the United Mine Workers? A. Oh, no, sir. No.

Q. Has this ever been a matter in which your company has conferred with the United Mine Workers? A. Oh, no. No.

Q. And have you gone into this question of price before submitting bids with other companies? A. No, sir.

Q. And have you submitted bids to the TVA on these term contracts with the intention of depressing the price of the TVA market? A. Repeat that Question. I want to be sure I understand you. That confuses me. Why in the world, if I understood you, would anybody in the market

they are hoping to operate in and do operate in want to depress the market. Did I under the question?

Q. Yes, sir, I asked you — A. Why, of course not. Preposterous.

2725 Q. And have you submitted any of these bids, Mr. Jewell, with the intention of driving out of business operators in East Tennessee? A. No, sir, no, sir, of course not. That is just as preposterous as the other thought. It couldn't have any bearing on any operator in East Tennessee as far as we would be conscious of. If so, it would be remote. It couldn't be a purpose.

Q. Now, Mr. Jewell, I'll ask you if you have had occasion in the 1950's, recent parts of the 1950's to sell coal to Tampa Electric Company on behalf of Peabody Coal Company? A. Yes, sir.

Q. Did you ultimately enter into a contract with Tampa Electric Company? A. Yes, sir, we did.

Q. When was it that that contract was entered into? A. Well, I will have to refresh my memory on that. It was done by steps and stages.

I think we reached an agreement on it in the latter part of '58, and I think we reduced it to written contract — yes, we did — in the early part of '59, February, I'd say, of '59.

Q. Now, what had been your efforts with the Tampa Electric Company to sell coal to that company doing

2726 business in — A. They have not been very active. Frankly, we went to sleep on the job there a little bit, and another coal company stepped in there and scooped us, and stepped in and got a contract. We knew them, and we called on them but we hadn't realized Florida was too good a prospect. We went down occasionally and called on the utilities. We knew Tampa Electric, but we had not gotten them into any serious negotiations with us, and another company did, the Potter Towing Company secured a contract.

Q. Excuse me, was that the company that was then owned by Nashville Coal Company? A. It was.

Q. It was the Nashville Coal Company then, owned by Judson Potter? A. Justin Potter.

• • • • • • • • • • •

Q. And what was the name of the transportation company that entered into the contract? A. As I recall, Potter Towing Company.

• • • • • • • • • • •

Q. What did you do after you found that that con-
2727 tract had been entered into? A. We congratulated Mr. Potter and continued to call on Mr. MacInnis and tell him the next time he wanted to buy coal, we hoped we would be more ready than we were this time to seriously negotiate with him.

We did not at that early stage have water-carrying facilities, and the Potter Towing Company did, and they beat us to the draw, but we kept in touch, because these utilities grow and build additional units and plants.

Outside of that, I can't say we did anything except keep in contact and hope for opportunity to do business at a later date.

Q. You spoke of Mr. MacInnes. Who is — A. He is president of the Tampa Electric Company. Excuse me, I thought that had been brought out.

Q. Did you later have further discussions and negotiations with the Tampa Electric Company, and if so, how did they come about and when? A. Well, you said did I later. That last question you asked me in the early fifty's or mid fifty's.

Q. That's right. A. I told you what we had done back for a period of time.

I am not sure of all of these dates. I think 1957, we heard
and it was generally heard by the gossip route and
2728 maybe in the papers that the company that had taken over the original Potter Towing Company contract with Tampa Electric had given notice to Tampa that it was not going to perform on the contract.

Q. Was that West Kentucky Coal Company? A. It was West Kentucky, which we understood had purchased Nashville Coal Company, and it subsidiary the Potter Towing Company.

Of course, that re-aroused our interest, and we got active again in our contacts with Tampa Electric Company. We went to see Mr. MacInnes, and tried again to sell him coal, and continued to try.

Q. And when you say you went to Tampa Electric and undertook to negotiate with Mr. MacInnes — A. I will have to qualify, I think it was in the early fall of 1957. I am almost positive that is when that was.

Q. Now what resulted after your — after these discussions that you had with Mr. MacInnes at that time? A. Well, after many contacts, many discussions, it resulted in what we called a sort of a test order for something like — we shipped a total of one hundred forty thousand tons, I believe on it, which we secured from the Tampa Electric Company.

We were not ready to negotiate seriously on a con-
2729 tract, and Tampa Electric wasn't either, but we wanted them to test our coal, and they were willing to test it, and we wanted to test out our experience of river shipments and transferring the shipments and shipping them across the Gulf before we committed ourselves to a substantial, long-term contract.

Q. And when — A. So that order was secured for that purpose, and granted for that purpose.

Q. Mr. Jewell, did you go to the Tampa Electric Company and negotiate with those people at the suggestion of the United Mine Workers? A. No, sir.

Q. Did you go there to negotiate with Tampa Electric Company at the suggestion of anyone with West Kentucky Coal Company? A. No, sir, not with the suggestion of them and not with the knowledge of any one of them so far as we have any way of knowing.

Q. Now, when was this one hundred and forty thousand tons shipped to Tampa? A. That was — took us about a year to get that order, so it must have been — started in late '58 and extended over into '59, probably into the spring of '59.

It was a makeshift arrangement we had, and we
2730 had to move pretty slowly. We weren't really equipped to handle it. We wanted to get some coal in their hands.

Q. And how did you get it to Tampa? A. We had at that time established a barge company which is a subsidiary of Peabody Coal Company named the Mid-American Transportation Company, which is a barge line company. We shipped it down the river on — by that method.

We transferred the coal from barges to Gulf Transit equipment at the Burnside transfer facility owned and operated by Olin Mathieson Corporation at Burnside, Louisiana.

It was shipped from that point in open vessels without loading or unloading facilities to Tampa by an arrangement we made with the Marine Transit Company of Tampa, Florida, who were engaged in transporting products across the Gulf, in one way or the other, and it was unloaded at the Tampa Dock with a crane and clamshell that we sent down from Western Kentucky, down this hundred some odd thousand tons of coal, because we were unable to get arrangements for the use of an unloading facility that was on the dock, which was owned, incidentally, by West Kentucky Coal Company.

We had attempted to get the use of it through some lease arrangement, and we were unable to secure that equipment from them.

2731 Q. Did you also — A. We had the order, we took the gamble. We thought we could surely get that equipment. They are a rather friendly company, and when we got it, we couldn't get the equipment, and we did some-

thing that was very unprofitable. We had to ship a crane down there, and unload it to ship our coal.

2732 Q. In other words, West Kentucky would not deal with you with reference to this equipment? A. They wouldn't make a deal that we could go for. I don't recall the negotiations, wholly unsuccessful. They may have at sometime said they would agree to so and so, but nothing we could ever consider at all.

Q. Did you ship any of the West Kentucky Coal Company coal on this contract to Tampa Electric Company? A. No, never have. Did not and never have.

Q. Now during the period that you were shipping the tonnage on this test order to Tampa Electric Company, you were also negotiating with Tampa Electric Company for a term contract? A. Oh, yes. That was the purpose of shipping a test order, to try to get it going and after we got some we got into more serious negotiations on that and continued them until we begin to get results on a contract, and finally did get results.

Q. When did you reach an understanding with Tampa Electric as to the term contract? A. Well, I would say late in 195- -- well, early in 1959.

Q. Now what was — A. We made a contract, signed, as I remember, in February of 1959.

2733 Q. What does that contract call for? A. It called for a schedule of tonnage. Very small the first year. Maybe 150,000 tons, I don't recall, maybe 200,000. And then the next year when another unit would be complete it steps up considerably, to, I believe, 600,000 tons. And we get in the third year the tonnage was supposed to be 800,000 tons, but it seems that they got a little accumulation of coal and we might not get to ship that much. But that is the range and it increases. I can't remember the exact steps. It goes up, after the 5th, 6th, or 7th year somewhere around a million and two hundred thousand tons and extends for a period of 20 years.

Q. Do you know whether this quantity of tonnage is all of the coal which Tampa Electric will use during that period of time? A. No, it isn't all of the tonnage. They are using other coal now that they receive by rail. I guess they still are. They were the last time I was there.

Q. Have they been using other coal during all this period that you have been selling coal? A. Yes, they have.

Q. You say that is rail coal? A. Yes.

Q. Do you know where it comes from? A. Why hearsay only. I have been told it comes from East Kentucky
2734 and East Tennessee.

Q. How are you shipping this coal on this term contract to Tampa? A. We are shipping this coal with water shipping facilities that are owned jointly by our own company, Peabody Coal Company, and Tampa Electric Company, which arrangements were worked out in the time — during the time immediately following the execution of the contract.

The contract was executed by a long time before we could ship because we had to get the water facilities. The contract was executed in February, 1959, but we did not get started shipping on it until December of 1959 because jointly the Tampa Electric Company and the Peabody had the necessity of setting up water shipping facilities. One a bare line, which is called the Mid-South Towing Company, and a Gulf steamer, which is a converted T-2 tanker called the "Martha Mack" which is a 15,000-ton ship.

Q. Are both of these companies, that is the barge company and the Gulf shipping company, jointly owned by Peabody and Tampa Electric Company? A. That is right. There is a transfer involved. You want the detailed facts?

Q. Where do you barge the coal to, what point? A. We barge it to, recently, last few months, to a point just south of New Orleans. Previously, for the first four or five
2735 months, maybe six, we transferred up-stream above New Orleans.

We were unable, for a long time, to make arrangements for facilities. Tried to but didn't. But we had to equip the ship with clamshell with which it can reach over into the barge and take the coal out of the barge and dump it into its own hold, and at the destination then it reached in the hold and take the coal out and unload it. That was the original method.

We later acquired or leased, made a lease arrangement with West Kentucky Coal Company for a transfer facility that company owns at Mrytle Grove, Louisiana. About 45 miles south of New Orleans. We now make the transfer from barge there at that point using that facility.

Q. Had you negotiated the use of the facilities of West Kentucky Coal Company prior to the time you had reached an understanding with Tampa Electric? A. Oh, no, for, as I say, we had to transfer for months in mid-stream with our own equipment because we did not or had not reached an agreement on it.

Q. Now I will ask you, Mr. Jewell, if after you reached an understanding with Tampa Electric Company on this term contract, whether you worked out an agreement with West Kentucky Coal Company to buy from West Kentucky Coal Company an amount of coal equal to half of the coal you were selling to Tampa? A. Yes, we did.

2736 Q. Has any West Kentucky Coal Company coal been shipped on your term contract to Tampa Electric? A. No, sir.

Q. And what have you been doing with the coal you have been buying from West Kentucky Coal? A. I know what we are doing with it now. I think it has been done with it right along, is we are shipping it on another contract which we have, which is a contract with the City of Memphis — Light, Gas and Water Division of the City of Memphis, Tennessee, to a municipal plant operated by that division.

Q. The West Kentucky Coal Company coal is being shipped to Memphis? A. That is right.

Q. Why did your company enter into this contract with the West Kentucky Coal Company? A. Well, there are many reasons for buying of coal. We produce and sell our own coal. We also, at times, for various reasons, buy some additional coal.

In this case this is a waterborne contract or shipping coal by water. In other words, the coal in this contract we have the privilege of shipping not just from our own mines but we specifically have the privilege of shipping coal from any mine we desire so long as it meets the quality speci-
2737 fications of the contract.

We did that purposely because we only have two river mines in western Kentucky. The River Queen mine and the Ken Mine. And we wanted a little broader base than that to be sure to be able to give service at all times.

You can have a breakdown in a coal mine or a coal dock. Now it is very logical in a contract of this responsibility and this size to have as many sources available as possible. That is one good reason for doing it.

We had a number of other, two or three, contracts near Cincinnati, New Albany, Indiana — many of them. When you have those contracts you are responsible. You want to be sure you can perform.

It wasn't out of any unusual force. It was good to have another source of supply.

I can tell you other reasons.

We at that time were hoping to get, and trying to get, the good wishes and cooperation and help of West Kentucky Coal Company on a problem which was a little delicate. We knew they had the contract and they had some reason for not shipping on it and we had moved in on it.

We were trying to get their blessings and cooperation to the extent we could make a deal with them for the use of that Myrtle Grove dock. They needed business badly, just as perhaps we all do, but we knew that they needed
2738 business. We were in position to place this amount of tonnage with them, and it was in the interest of

good relations between the companies for us to do it, and we discussed it and believing it was helpful and I finally reached an agreement with them on the Myrtle Grove dock.

I can think of those reasons offhand, and I think they are sufficient to justify it if any justification is needed when you are in the coal business buying coal.

Q. When was it that you worked out this agreement with West Kentucky? A. I tell you I don't know. It was sometime after the contract was made. Just how long I just don't recall.

Q. It would have been sometime after February of 1959? A. Oh Lord it was after, yes. I am confident it was; yes. I started to say a good deal after it, but I am not sure at all, but I am just as sure it was after. We couldn't have started before because we didn't know we had the contract.

2739 Q. Now, Mr. Jewell, what was your purpose in selling and negotiating this contract with Tampa Electric Company? What were you trying to accomplish? A. Promote our business, a normal way to sell coal, broaden our market, sell more tonnage, do more business.

Q. Were you trying to monopolize the coal business in Tampa or were you attempting to depress the price of coal in Tampa in any way? A. No, sir.

Q. Were you doing this at the suggestion of any other company or the United Mine Workers of America? A. No, sir.

Q. Were you attempting to—was it your intention in entering into this contract in negotiating for it to run mines in east Tennessee out of business? A. No, sir.

Q. Mr. Jewell, in selling your coal, and I take it that most of your coal is mined by the strip mining method as you have testified, do you sell your strip mined coal to various markets, and if so, what would they be? A. You mean geographical markets or use markets?

Q. Use markets. A. Oh, yes, we have domestic coal, heat-

ing coal, which is lump, egg, stoker coal, for heating, and then the usual screened steam coal.

2740 Q. What are the differences in these markets price-wise in general terms? A. Well, they are considerable. You get down to your lowest most difficult grades of steam coal to sell, which we call carbon, which is one-quarter inch by 28 mesh, carry very low price now. Something like $2.80 a ton. You get up to your egg coal, domestic use, you are in the range of $5.25 or $5.50 a ton. It varies. Your stoker coal, for domestic use, would sell for $4.85 a ton. Your normal screenings, inch and a half by 20 mesh screening, would probably be selling in the range of $3.25 to $3.50, $3.75, depending on quality of the coal.

Q. In other words, there is a considerable difference in the price that strip mined coal would bring—is that an accurate statement? A. You mean different sizes of strip mined coal?

Q. Yes. A. Strip mined coal or any other kind of coal. Choice of domestic sizes bring more money than steam size.

Q. What sort of markets do you have? Where do you sell your coal? Percentage-wise, what amount of your coal goes to the steam market as opposed to these other markets? A. Ours, a large per cent goes to the steam market—70-odd, probably 80 per cent of our coal goes to the steam

2741 market.

Q. Now is the steam market the lowest price coal? A. Yes, sir. It is also the biggest market. That is the reason we have to go that heavy in it. You couldn't market the quantity of coal we produce in the domestic market.

Q. Mr. Jewell, did you attend the meeting of TVA directors, 1958, at which a representative of the United Mine Workers was present? A. I attended a meeting of a group of coal people and board of directors of TVA and some of the staff of TVA from Chattanooga, at which a United Mine Workers representative was present.

Q. Was that in Knoxville or Chattanooga? A. It was in Knoxville, right here.

Q. Who had arranged for this meeting? A. My best memory is that Mr. Bayfield of the American Coal Sales Association in Washington, D. C. arranged for it.

Q. Is he the person who asked you to attend? A. Yes, sir.

Q. What was the purpose of the meeting? A. The purpose of the meeting was for an exchange of views between coal producers and sellers and the TVA regarding their coal buying policies, their coal procurement program,
2742 their cooperation with the coal industry and the coal industry's cooperation with it. That was the general approach.

Frankly, we had in mind and stated very frankly then, we had some very pointed suggestions we manted to make and requests we wanted to make for changes in some of their policies.

Q. Did you discuss with them any particular policies that you objected to? A. Yes, we did. We discussed the length of time they were waiting to announce awards after bids were made, left you not knowing whether you were obligated or not. It seemed to us it would take 60 or 90 days, which they were doing at that time, to let people know if they were successful or unsuccessful, which was unnecessary and unreasonable and worked a hardship on us. That was one of the things.

There had been one instance where they actually, while they had one set of bids pending and no action taken on them, put out another inquiry, which we thought was imminently unfair, and which they admitted was improper, unwise and unintentional and was a slip and promised that they wouldn't do it again. It was all after much discussion.

We discussed with them their attitude toward coal prices. We charged that they were using the full weight of their

influence and their persuasive influence to drive peo-
2743 ple down in prices. People call on them. "Get your pencil sharpened," they say. Won't get any business here unless they get down low. The bids are going to be competitive. We thought they were carrying that too far. They should take a constructive viewpoint and lend their influence toward influencing people to quote prices that would net a reasonable profit to the mine and still give TVA reasonable cost price for coal.

Just an exchange of views. Air out some differences that had existed. We thought it was better to talk to them than talk about them. Told them just that. Had a very friendly discussion with them.

Q. Were you making any demands of the TVA? A. Oh, no, we couldn't make any demands. We made suggestions and requested consideration of certain suggestions.

Q. Was the matter of the amount of coal that TVA purchased by way of term contract discussed? A. That was discussed. Not too forcefully. We suggested that they give consideration to buying a larger percentage of their coal on term contract and a smaller percentage on spot. We didn't get very much response from them on it. It was discussed.

Q. What was the position—who was there for the United Mine Workers, do you remember? A. Mr. Widman. I believe it is Michael Widman.

2744 Q. What was his position at this meeting? A. As I recall—I don't know whether he heard about the meeting and asked to come or whether Mr. Bayfield or Mr. Joe Moody of Washington asked him to come. It was a rather informal proposition. He was interested because he was interested in anything that bears upon coal, just as he is on freight rates or anything else for better understanding, at least better movement of coal.

Q. Did he have anything to say? A. Yes.

Q. Do you recall what he said? A. I recall he made a

nice little speech and said about what I said there. He was there for that purpose. He was interested, and he would like to see better coal prices prevail. If there was any way they could cooperate—of course, through that background. They said, "We don't set the prices. These boys here set the price. Submit the bids and we buy or don't buy." A general discussion of that sort. Mr. Widman more or less set in and did make a nice statement he was interested.

Q. Did he say why he was interested? A. Because his union had a great many members that were mine workers, they were interested in their welfare and interested in a healthy coal industry, therefore.

Q. Mr. Jewell, do you have anything to do with
2745 the labor negotiations or labor problems? A. No, no familiarity with it. I am not in touch with them.

Mr. Rayson: Cross examine.

* * * * * * * * * * *

CROSS EXAMINATION

2746 By Mr. Rowntree:

Q. Mr. Jewell, Peabody Coal Company has become the largest coal company with respect to tonnage sold in the country? A. Well, I don't know. I thought we were second. I thought Consolidation Coal Company was larger. Maybe I am wrong.

Q. Do you know if Peabody has yet overtaken Consolidation or not? A. I didn't think we did this last year. I thought we ran a second close. I hope we did overtake them. We try to.

Q. Your company has been rising rapidly? A. We think rather slowly, but it has been rising.

Q. Has been rising rapidly, has it not? A. Every man for himself whether it is rapid. The figures show.

Q. You are the most mechanized company in the United States? A. I don't know that that is true. We are mechanized.

Q. You use gigantic machinery in your coal operations?

A. Oh, yes.

2747 Q. You use water transportation? A. Yes.

Q. Your underground mine, the only one you have, is a big mine, is it not? A. Yes.

Q. What is its production? A. Approximately 4,000,000 tons annually.

Q. 4,000,000 tons a year for one underground mine? A. Yes, sir.

2748 Q. How does that rank in the country? A. It is either the largest or the second largest. I think it is the largest. The Moss Mine or Pittston might have produced a little more. They are close together this year.

Q. Your strip mines use the largest stripping shovels in the industry? A. We use as large as anybody else. I think there are others the same size—I know there's others the same size—but we use as large as anybody else.

Q. I believe you testified that you have many, many contracts across the country. A. We have many, yes.

Q. And will you tell us, are these contracts largely in the utilities area in the Middle West? A. Yes, sir, they are largely utility contracts. Yes, sir.

Q. Now, are these long-term contracts, most of them? A. Yes, sir, I would consider them long-term contracts.

Q. Do many of them involve millions of tons? A. Yes, sir. Now many of them do, many of them don't. We have all kinds of contracts, large and small, but we do have some large, long-term contracts.

2749 Q. You have many, many contracts, is that right?

A. Well, there are many. I don't know whether there are many, many or not. We have many.

Q. And you have been able to sell your steam coal at low prices because of your tremendous operations in the stripping fields, right? A. Well, that is a relative term "at low prices." We have been selling at lower prices than we would if we didn't have as efficient equipment as we have. There's low, lower and lowest, just as you say many, many,

many. I don't know what you mean by "low". We sell it lower than we could if we didn't operate efficiently and didn't use efficient equipment.

Q. And as you stated, the price of steam coal depends largely on its quality. A. No, I didn't say "largely on its quality." That is one of the factors.

Q. That is one of the factors? A. Yes, sir.

Q. Will you compare the quality of the coal in your stripping areas with the quality of the coal in East Tennessee? If you know. A. Oh, I don't know well enough to do that. I expect it is pretty generally known that inherently in the seam, the quality over here is the higher quality coal,
2750 but you can drag it out by inefficient methods and make the biggest mess on earth and cleaning it, and you have got a multitude of sins, and it is too involved a subject for me to try to give a categorical answer on.

Q. Do you wash your coal that you ship to the TVA? A. Yes, sir.

Q. Do you wash your strip coal that you sell to TVA? A. Oh, yes.

Q. Where is your processing plant? A. Well, right at the mine.

Q. Which mine do you have a processing plant? A. All of our mines. We don't have a mine that doesn't have a processing plant.

Q. Do you have one at the River Queen mine? A. Yes, sir.

Q. How many tons do you produce at the River Queen Mine? A. I think it is in the neighborhood of two million tons a year, a little less than that, I believe.

Q. Do you have barging facilities from the River Queen Mine? A. Yes, sir.

Q. And do you sell coal from that mine to the
2751 TVA? A. Not much. Just happens we don't. We could. There's no point in it one way or the other, just happens we are not. That is not one of the mines we are primarily shipping to the TVA.

Q. Did you not make a contract with the TVA on the term market in July, 1959, for five million, two hundred thousand tons? A. July of '59?

Q. September. A. Yeah. I believe we did, yes sir. We did. I am not sure about the date, but we made one along about that time for a million tons a year for five years, yes, sir, we did.

Q. I think that is one you overlooked a while ago in your direct testimony. A. Oh, I don't know. I didn't attempt to list all the contracts we have. I said we have some others.

Q. That is a rather small contract for Peabody Coal Company? A. No. No. No. I said we didn't have any other as large. I don't know what I said. If I said it, I am glad you correct me.

Q. Now, Mr. Jewell, this invitation for a bid from TVA on which you sold this sixty-five million tons for
2752 Paradise Plant, do you recall the language of the invitation under which you made the offer with respect to the sixty-five million tons? A. I couldn't recite it to you, sir. I could recall the sense of it, I believe.

Q. What was the sense of it? A. Just trusting to my memory. I believe it said the TVA intended to buy up to — maybe they said approximately, maybe they didn't use approximately — three million tons of coal annually, and would consider contracts of any term up to twenty years, I believe, and outlined that, and then outlined one or two descriptive paragraphs. I don't remember what was in them.

Refresh my memory if you want to with a leading question, and I will answer it.

And then in a lower paragraph it said, "In addition to above, TVA will consider other bids if operators wish to offer other tonnages for a later starting period," and outlined the starting periods.

Q. And was your sixty-five million ton bid under that language underneath there? A. Oh, I assume so. I can't

recall the details of that. We made a bid in response to that invitation. We hoped it would be considered responsive to the invitation, and it was.

2753 Q. Now, did you carry on negotiations with the TVA after that bid was submitted? A. Yes, sir, we did.

Q. And what was the nature of this negotiations? What was discussed? A. That is a long story. There was a lot of negotiations. We discussed the desirability of them awarding us a contract, and modifications that we would make, because in the bid we set forth in the event of certain circumstances we were prepared to make certain adjustments and modifications if we didn't have to build a loading dock, if we didn't have to wash the coal, if there was some way the cost of explosives could be made less than we were now paying. All of those things had to be negotiated.

Q. And as a result of your negotiations, the TVA decided to build the Paradise Steam Plant adjacent to your property, is that correct? A. I believe that would be a fair statement. They hadn't decided just where to build the plant. They had several sites under consideration, and I think that was a controlling factor, because it eliminated transportation costs.

Q. And that will be one of the largest plants in the TVA system? A. I think so, yes, sir.

2754 Q. Now when you came into the Tampa market, Mr. Jewell, you knew at that time that the railroad shipper that was shipping coal into Tampa was seeking to obtain a reduced rail rate at that time? A. I probably knew it. It seems that I would have. I don't recall whether I did or not. I knew he was shipping some coal. I knew he had gotten a violent reduction in the rate, tremendous reduction. There was a lot of conversation about whether it would be permanent or not. Many people didn't think it could possibly last, a reduction of maybe two dollars a ton.

It looked amazing, and whether they were trying to get

more or hold that one, there was still a lot of discussion about the rate. There is still a lot of discussion about it, and still a lot of uncertainty about it.

Q. And you knew subsequently he did obtain the contract for the supply of the requirements of the Gannon Steam Plant? A. No, I didn't know that. I didn't know it until this minute, and in fact, I am surprised to hear it. I didn't know it until this minute.

Q. You knew he had a contract? A. No, I knew he was shipping coal and was shipping coal to Tampa. Strictly never knew he had a contract.

2755 Q. The Tampa Electric Company never informed you that this shipper did have a contract?

The Court: Are you talking about Pittsburgh?

Mr. Rowntree: Talking about Love and Amos upon whose contract Phillips Brothers shipped.

The Court: All right.

The Witness: Are you sure they shipped on a contract and not just on sport orders?

Mr. Rowntree: It's in the record.

The Witness: Okay, I didn't know that.

By Mr. Rowntree:

Q. Now, West Kentucky Coal Company still wanted to use its loading facilities in Tampa and refused to lease them to you, is that right? A. It didn't have any loading facilities in Tampa.

Q. Unloading. A. No, it didn't want to use them, didn't have any business to use them on.

Q. But they didn't want to lease them out to you for any period of time? A. We got that impression, yes, sir. We weren't able to make an arrangement on them.

2755a Q. They were still inferested in using those facilities? A. I don't know that they are. I don't think so. They had given notice, so they told us, and so Tampa Electric told us they were not going to stop on the contract. And Tampa Electric at that time had formally cancelled the contract for non-performance, so there was

no indication they wanted to use them or ever expected to use them.

Q. But they were not using them at the time — A. No, nobody was using them at the time, and they were sitting there idle, rusting and it would have been better to put oil on them and used them.

Q. But they did not? A. But they did not think so.

Q. They did not want to lease them? A. No.

Q. But subsequently you did dlease from West Kentucky Coal Company its river transfer facilities below New Orleans? A. Very much later; yes, sir.

Q. And those facilities have been of great advantage to you in shipping coal to Tampa Electric? A. That is debatable. Some of our people think they are an advantage and some of them don't. It is about a stand-off with
2756 loading in mid-stream. It is still in the experimental stage and it is a big enough operation that it requires six months or a year operating to reach a conclusion and I can't say whether it has been a great advantage or not. We will know in about six more months.

Q. Then you did arrive at an agreement with West Kentucky for West Kentucky to ship half the tonnage to Tampa? A. No, we did not.

Q. Do you deny that there was an understanding that West Kentucky Coal Company would ship half the tonnage on the Tampa contract? A. Yes, sir. That was not the understanding. Certainly not my understanding.

Q. What was the understanding? A. The understanding was that we made a purchase and they made a sale for an amount of tonnage which we agreed would be equal to half the tonnage of the Tampa contract. That would be the yardstick, the measure, of how much coal we would take on this order.

Did not say where we would ship it, and we have never shipped any of it to Tampa.

Q. Isn't that just a technicality? A. You decide whether

it is a technicality or not. I have stated the facts. I don't think it is any technicality at all. We think it is very
2757 clear and explicit. We think the performance on it shows there is nothing technical about it.

If I wanted to tomorrow I would like to ship it to Minneapolis without any difficulty. It is our coal. We bought it. We did not agree to ship it anywhere.

Q. When this Memphis contract came up, when the invitations — were there invitations to bid on the Memphis contract? A. Yes, sir.

Q. When you received an invitation to bid on the Memphis contract, did you discuss that invitation with either Kirkpatrick Coal Company, West Kentucky Coal Company or Pittsburgh-Midway Coal Company before you submitted your bid? A. I don't recall we did that. We might possibly have because that was a lot of negotiations down there about selling it to them. If they could have they would have bought the coal without submitting it to bids. They were just in that mood, and they made it clear.

I don't like to talk about politics generally in court unless necessary. They wanted to favor certain people with the business, and so on.

The Court: You don't have any politics in Memphis, do you?

2758 A. (Continuing) I'm afraid they do slightly. But at any rate, I don't recall discussing it or not. We might have. It would be a little natural because down there — we run together down there and have a drink or two together and you get pretty talkative. We might have talked to any of them. The City Manager was going to buy some coal and we hope we could get it and you discuss what you do and what they do.

You can't remember every conversation which you have. Conversation after the bids were in and while negotiations were going on, and who was going to take it, and how much. The competition was so hot they split it. We had so many friends behind us all that they split it up.

Q. It is possible you did discuss this Memphis bid? A. In a casual way. Not in any formal way. Not in any way that had any effect.

Q. Anyway, you ended up splitting up that business? A. We did not split it up. Memphis split it up.

Q. And is it not true West Kentucky Coal Company is shipping on the Peabody order in Memphis? A. Yes. I just said that is where we were putting the coal. They had been doing it for quite a while.

Q. Isn't it true West Kentucky Coal Company and/or Peabody Coal Company is shipping on the Kirkpatrick Coal Company order? A. Kirkpatrick doesn't have
2759 an order. Kirkpatrick assisted us in getting the order and promised to give us some assistance in the administration of the contract in return for which we pay Kirkpatrick a small commission.

2760 Q. In other words, you did discuss it with Kirkpatrick Coal Company? A. Why sure, we discussed it to make that arrangement. We needed his help to get the business. We used it to pay for it in a legitimate way.

Q. Upon receiving any invitation for bid from the Tennessee Valley Authority term market, have you discussed any of those invitations with any other coal company or the representatives of any other coal company prior to submitting your bid? A. Not that I know of. I don't think I have personally. If anybody in my organization has, I don't know it, but I wouldn't say we have not. Like saying to your mother, "Have you ever discussed your baby with a neighbor who has a baby?" Probably some conversation will take place, anything of such great mutual interest. I don't recall any such conversation.

Q. Have you ever gone to Chicago or any other place to participate in any such discussion? A. No, sir.

* * * * * * * * * *

2761 Mr. Rowntree: Yes.

One further thing. We did request that Mr. Kramer, or counsel, have this witness bring records of the cost of

water transportation to Tampa and I wonder if the witness did bring those records.

The Witness: No. I didn't know that was requested. That would be a rather difficult thing.

Mr. Kramer: No, sir. Your Honor, I did get a request from Mr. Rowntree last Saturday, I guess it was, to do that, and in the rush I overlooked it.

The Witness: I don't believe you want those, Mr. Rowntree, if I can be informal a minute. That water transportation company is owned jointly by the shipper and the receiver and that company operates without profit. I don't think either one of us knows just what the cost is going to turn out to be.

By Mr. Rowntree:

Q. Do you know the cost per million BTU? A. I don't hesitate to give you a rough guess. I think it has been running in the neighorhood of 31, between 32 or 32 and a fraction cents per million. I don't think there is any secret. I don't believe Tampa Electric Company would object.

The Court: The jury may have a seat.

2762 A. I am not postive of that, but I am trying to give you an honest answer the best I can. We don't have any secret about it.

By Mr. Rowntree:

Q. You think it runs about 32 and a fraction? A. You are talking about the delivered coal?

Q. Yes. A. I think that is about the way we estimated it is running.

Q. About 32 and a fraction? A. You say, "Why can't you know?" We have got work to do on Myrtle Grove and we turn it back, it costs us 50,000, or 100,000 or 200,000. There are some costs held in abeyance, unknown and unascertainable for a period of time. We think we are getting close to 32½ cents a million.

Q. You have been shipping on it for a year now? A. Yes, but not by the same method by any means.

Q. Well, you have been watching it very closely? A. Yes, but we have been shifting pretty fast from one experiment to another. You ought to be in this game. It is interesting.

Q. Why are you experimenting? A. To try to find some way to get costs down, Mr. Rowntree.

Q. Isn't it true that you are watching your cost? A. Sure.

2763 Q. All right. A. Get fired tomorrow if I didn't.

Q. What is your lowest cost? A. I am telling you. I just got through telling you we are not going to know for a year or more what the actual cost is.

Q. Your lowest cost? A. The lowest estimate, my lowest guess you want?

Q. No. You have been watching your cost. A. I told you I think it is running in the neighborhood of 32½ cents a million delivered.

Q. All right. A. Cost of coal and transportation.

* * * * * * * * * *

* * * * * * * * * *

2764 T. REED SCOLLON

called as a witness by and on behalf of the cross-defendant.

* * * * * * * * * *

DIRECT EXAMINATION

By Mr. Combs:

Q. Will you please state your name and professional position and location of your headquarters. A. My name is T. Reed Scollon. I am chief of the Division of Bituminous Coal, Bureau of Mines, United States Department of the Interior, with headquarters in Washington, D. C.

* * * * * * * * * *

Q. Mr. Scollon, as Chief of the Division of Bituminous Coal in the Bureau of Mines, what are your responsibilities

and scope of your activities? A. As chief of the Division of Bituminous Coal I am responsible for the direction and supervision of the Bureau's technological and economic research programs on bituminous coal.
2765

In this capacity I have charge of a Washington staff of six coal research laboratories and an explosives research laboratory.

Q. In this capacity do you have the responsibility for the bituminous coal economics and statistical programs. I knew I would get stuck on that. A. Yes.

* * * * * * * * * *

Q. Mr. Scollon, what other experience have you had in connection with your profession? A. I have had approximately ten years experience in industry as a mining engineer and as director of research and statistics for a coal association.

I have also had approximately ten years experience in the federal government in addition to my present position. I was chief of the section of Coal Mine Prices of the Office of Price Stabilization of the federal government.

Q. Would you please name some of the professional and technical groups with which you are affiliated. A. I am a member of the American Institute of Mine, Metallurgical and Petroleum Engineers; Coal Mining Institute of America; Rocky Mountain Coal Mining Institute;
2766

The American Society for Testing Materials; The Mining Standards Board of the American Standard Association; The United States National Committee of the World Power Conference.

On three occasions I have been the United States delegate to the Coal Committee meeting of the Economic Commission for Europe, a United Nations organization in Geneva. And on two occasions I have been technical advisor to that delegation.

Q. Are you here to testify as an expert or as an official government witness? A. As an official government witness.

Q. As such witness do you have limitations that are proscribed by the regulations as to the type of testimony that you may give? A. Yes.

Q. And in what respect? A. I am limited to the presentation, explanation and discussion of statistics pertaining to bituminous coal and as it is affected by related fuels.

Q. Are you here under subpoena? A. Yes.

Q. Were you asked to make available Bureau of Mines statistics on coal? A. Yes.

2767 Q. Are these statistics available to any taxpayer? A. Yes.

Q. Were you asked to prepare specific studies based on Bureau of Mines statistics on coal? A. No.

Q. Were you asked to explain and discuss the Bureau of Mines statistics on coal? A. Yes.

Q. Were you asked to explain anything in particular? A. No.

Q. What then do you wish to explain? What are you prepared to explain? A. The Bureau of Mines statistics are quite comprehensive and complex. They cover a period of approximately 70 years possibly, in coal production and consumption.

I understand the year 1950 and 1958 are key years in this case. I have arbitrarily selected a decade prior to 1950 and a like period since 1950 to show trends both prior to and since that year.

Q. Do you have with you, Mr. Scollon, the mineral yearbooks of the Bureau of Mines that will contain the data that you will be expected to discuss on your charts? Are they here with you? A. Yes. All data were taken from

2768 the yearbooks—all computed from data in the yearbooks 1940 through 1958.

Mr. Combs: If your Honor please, we have these yearbooks presently here, and some of them are just a little bit difficult to obtain back to 1941. We have told counsel they are here available, and we have prepared charts that the

witness will testify from, and each of those charts and tables will show the exact page of the section where it is taken from in these books and will be available here.

We would prefer not to introduce them in evidence, if that is all right with counsel, because they are bulky and I don't think it would add anything to it. But I just wanted to say to counsel that they are available here and if counsel would like to have any particular one introduced we will be glad to do it.

Mr. Rowntree: That is perfectly all right. I understand the witness has prepared a number of exhibits here. We will rely on the witness' figures that he has put on these exhibits.

Mr. Combs: That is true. I have given him the exhibits that we expect to have here.

The Court: You have laid the proper groundwork for his testimony.

2769 Mr. Combs: Thank you, your Honor.

By Mr. Combs:

Q. Mr. Scollon, will you tell the Court and jury how much energy does the United States consume from fossil fuels and water power? A. According to Mineral Yearbook 1959, pages 8 and 9, volume 2 of fuels, the United States in 1958 consumed 41.5-quadrillion BTU of energy, including 1.7-quadrillion BTU of water power.

I might explain that a BTU is the amount of heat required to raise the temperature of water one degree Fahrenheit. This is a unit commonly used to express energy units.

It is difficult to equate electrical power and energy from other fuels without such a common denominator.

For simplification, the 41.5-quadrillion BTU is equivalent to 1.6-billion tons of bituminous coal. In other words, if all of this energy were consumed in the form of bituminous coal, there would be consumed about 1.6-billion rather than .4-billion tons of coal in that year, 1958.

Q. Mr. Scollon, in passing would you tell the Court and jury about how many BTUs would be contained in an average ton of coal? A. The average ton of coal in the
2770 United States contains 13,100 BTU per pound, so per ton would be 26,200,000 BTU. This is the conversion factor I use to equate the quadrillion—the 41.5-quadrillion BTUs to 1.6-billion tons of coal.

In other words, in every ton of coal there are 26,200,000 BTU.

Q. Is that the national average? A. Yes.

Q. Mr. Scollon, does that include sub-bituminous and lignite coal? A. Yes.

Q. That is the average of all coal? A. Yes.

Q. Do you have figures that show the average BTU per ton of coal in Tennessee? A. Yes.

Q. Would you give that, please.

Mr. Rowntree: Is this a consumed figure or a production figure?

The Witness: This is the average BTU of coal produced.

Mr. Rowntree: All right, sir.

The Witness: And delivered—and/or delivered to the customer.

The average shown in the Bureau of Mines Infor-
2771 mation Circular 7538 entitled "Average Heating Value of American Coals by Rank and by State" shows the average for Tennessee high volatile bituminous coal is 13,460 BTU per pound.

2772 By Mr. Combs:

Q. What did you say the national average is so we will have the two together? A. The national average for high volatile coal, I mentioned high volatile for Tennessee—the average U. S. value for high volatile coal is 12,900 BTU.

Q. Would you mind explaining to the jury and to the Court what is high volatile coal?

The Court: Now, Mr. Combs, while he is on that subject, let's let him translate 13,460 BTU per ton in Tennessee.

By Mr. Combs:

Q. Would you do that, please. A. 13,460—that would be 26,920,000 BTU's per ton.

Q. As compared to 26.2 did you say? A. Million.

Q. Of the national average? A. Yes.

Q. Of all? A. Of all coal. I did not give you a comparable figure for high volatile U. S.

Q. I see. Could you do that? A. Yes. 25,800,000 BTU per ton of high volatile coal in the U. S., the average.

2773 Q. Now, Mr. Scollon, would you explain just what you mean by high volatile coal? What does that mean? A. This is coal which contains a volatile content of 32 per cent and more.

Q. I see. A. There are generally three breakdowns, low volatile, medium volatile and high volatile bituminous coal. All coal below 23 per cent volatile is considered low volatile. 23 to 31, inclusive, is medium volatile, and 32 per cent and above is high volatile coal.

Q. Mr. Scollon, I think we would be interested, what do you mean by volatile in relation to this? Is that the BTU? A. Volatile is the gaseous material that comes off of coal upon burning. There is a standard laboratory test to determine volatile matter. Stated another way, the moisture in coal, the ash in coal, the fixed carbon in coal and the volatile matter in coal add up to 100 per cent. So that when we mention a 34 per cent volatile coal, for example, that is a coal which when burned under certain conditions will lose approximately 34 per cent of its weight by the evolution of volatile matter.

Q. Would you, Mr. Scollon, describe the growth in the United States of energy consumption say from 1940
2774 on up through to 1958? A. Would you repeat the question, please?

Q. My question was, I just wanted to know about the per

cent of the increase of fuels on an average annually from 1940 say through 1958. Has there been an increase in the consumption of energy during that time, and, if so, how much? A. Yes. In 1940 a total energy consumption was 23.9 quadrillion BTU's, compared to the 41.5 quadrillion BTU's for 1958. This is an increase of approximately 75 per cent during this period.

Q. Now what are the major sources for this energy that is consumed that you are describing, what are the major sources? A. Could we have Chart 1 and I think this would show better.

Mr. Combs: Yes, we have some charts here, your Honor.

The Court, Yes, sir.

Mr. Kramer: I wonder if before that is marked as an exhibit, your Honor, if we might mark the graph that is over there that we used yesterday—give it a number so it could be identified in the record?

The Court: Yes.

Mr. Kramer: We will ask the reporter to give a number for the graph already on the blackboard that was referred to in the testimony of Mr. Jewell.

2775 (Exhibit No. 145 was marked for identification and filed.))

Mr. Kramer: And while you are there, mark this other chart with the next number.

(Exhibit No. 146 was marked for identification and filed.)

Mr. Combs: We have another one, a table, which will accompany the chart, and would like to make it a collective exhibit all the way through and coordinate it.

Mr. Kramer: Mark it 146 and 146-A.

The Court: Yes.

Mr. Kramer: The graph here, whatever we call it, will be 146 and this table will be 146-A. The Court: All right, and then the next one will be 147 and the table 147-A.

Mr. Combs: We would like to offer these tables and charts.

The Court: They are received as evidence.

(Exhibit No. 146-A was marked for identification and filed.)

* * * * * * * * * * *

2776 Mr. Combs: Your Honor, we have a table that counsel has copies, and we have twelve sets of tables. The pages are numbered one through nine, and they will correspond to the charts. There we have table "A", "B" and "C", and we have them here in sets, and if we could introduce them at the same time and give them to the jury, I think it would save time.

The Court: You may do so.

(Exhibits 147a, 148a, 149a, 150a, 151a, 152a, 153a, and 154a, were marked for identification and entered into evidence.)

* * * * * * * * * * *

2777 By Mr. Combs:

Q. Mr. Scollon, we are referring to Exhibits 146 and 146a, tables and charts entitled "United States Consumption of Energy Fuels and Water Power, Per cent of BTU's from 1940 to 1959."

What is the source of the figures that you use in the table contained in the chart? A. This is the 1959 U. S.
2778 Bureau of Mines "Mineral Yearbook," Volume II, entitled "Fuels", pages 8 and 9.

2779 Mr. Rowntree: If your Honor please, may I suggest that we eliminate the question with respect to source in order to save time, because I think each chart has its source.

Mr. Combs: Yes.

By Mr. Combs:

Q. Now Mr. Scollon, with the Court's permission, I would like for you to explain the charts and the table, the changes since 1940 in these energy sources.

* * * * * * * * * * *

Q. Would you go ahead, Mr. Scollon. A. As I mentioned earlier there was an increase in the total amount of energy from 1940 through 1958 of about 76 per cent. This repre-

sented an annual rate of growth of energy consumption in the United States of 4 per cent.

2780 For comparative purposes I have prepared this chart to show the portion of the total market of each of the major energy sources in each of the years 1940 through 1959. I used 1959 because we had data through that year, but I will cut off at 1958 in my discussions.

You will notice that in 1940 bituminous coal had 47 per cent of the total market for energy; that reached a peak of 51 per cent in 1943, and has shown almost a continual drop-off since that time. Such that in 1958 it represented, coal represented only 23 per cent of the total energy consumed in this country.

Now anthracite has been falling off gradually. I would like to apologize for a typographical error under the column "Anthracite" for 1943. That should be 4.8 instead of 48.8.

Anthracite comprised 5 per cent of the total and has dropped to one per cent in 1958.

Now both bituminous and anthracite coal have been somewhat squeezed by the inroads of petroleum and natural gas: Petroleum in 1940 comprised 31 per cent of the total energy, and it now comprises 42 per cent — in 1958 comprised 42 per cent.

Natural gas probably has made the greatest change
2781 in this two-decade period, representing 12 per cent of the total energy consumed in 1940 and now representing 30 per cent.

On a combined basis petroleum and natural gas, in 1940, represented 44 per cent of the total energy market — almost the same as coal, just a little under — but in 1958 it represented 72 per cent of total production.

Now water power has remained relatively constant as a percent of the total. If you will remember, however, there has been a gradual increase of about 4 per cent per year in energy consumption, which means that the energy consumed

from water power has been rising at about the same rate as the total energy picture.

Another way of looking at this, if in 1958 coal still had 47 per cent of the market that it had in 1950, the industry would be producing three-quarters of a billion tons of coal —almost double the production today.

Q. Mr. Scollon, could I ask a question? A. Yes, sir.

Q. In relation to the petroleum, does all this petroleum enter in competition with coal? A. No, sir. Only about one-third of the petroleum enters into direct competition with coal as a fuel, a power fuel. Two-thirds of it is for mobile units, such as automobile and airplanes, and so forth.

2782 Q. Go ahead. A. I think that finishes. I think I am finished, unless there are some further questions.

Q. All right, thank you.

Mr. Scollon, could you tell the Court and jury what brought about the changes in this energy consumption during this period of time? A. Well, basically, the intensified competition between and among the fuels, the technological changes in production, in preparation, in transportation, and in consumption of fuels have had a significant effect on the picture during this 20-year period.

For example, the use of gasoline, the requirements of gasoline for motor car use develop additional products such as diesel fuel, kerosene, fuel oil, residual fuel, which creates further competition for coal.

The development of long distance pipelines made natural gas available on a country-wide basis. The use of petroleum products and natural gas, as the chart indicates, is primarily the basis for the decrease in bituminous coal consumption.

Q. Mr. Scollon, has there been improvements in the efficiency of consumption of these fuels during this period of

time? A. Yes, there has. In almost all cases the
2783 technological changes also affect the consumption in another way, that is, in the improvement in burning or producing.

An example is in the amount of coal required to generate a kilowatt hour of electricity. In 1940 there were required about one and one-third pounds of coal per kilowatt hour of electricity. In 1958 this had dropped to nine-tenths of a pound of coal. Just in this period of time there had been a significant decrease in the amount of coal required to generate a kilowatt hour of electricity.

Q. Does this increased efficiency tend to increase the amount of fuels available and therefore increase the competition between the fuels? A. Oh, yes.

Q. Now you spoke of residual oil a while ago. Would you explain what residual oil is. A. In refining crude petroleum to get gasoline, diesel oil and the other products, the last product to come off is residual oil. It is what is left over. It represents a small portion of the United States refinery experience today.

Again technological changes have decreased the amount of residual fuel oil, but on the other hand there have been substantial amounts of residual fuel oil imported and it is a product which can be, and is, sold at a very low price. Usually just to undersell coal.

2784 Q. Can that be used as steam coal? I mean, for steam purposes? A. Yes, it is.

Q. What are coals principal markets? A. Coal's principal markets are for the generation of electric power; for coke, the manufacture of coke; for general industrial use; for retail use, and railroad locomotive fuel.

Q. Have you prepared a chart and table to show the markets in which coal has lost its position in the energy markets? A. Yes, I have.

Mr. Combs: That is Table 2, your Honor, and that will be 147, and 147-A.

Mr. Kramer: 147-A has been marked but not 147.

(Exhibit No. 147 was marked for identification and filed.)

Mr. Combs: If the Court and jury will refer to Table 2 that they have.

By Mr. Combs:

Q. Mr. Scollon, will you explain this chart and table, please? A. Here again I have prepared a chart on the hundred per cent basis. This is the per cent of consumption in each of these categories. And I might mention to begin with, in 1940 the total consumption of coal, repre-
2785 sented as a hundred per cent on this end of the chart, was actually about 420-million tons; whereas, in 1958 the 100 per cent is actually under 367-million tons, or only about 85 percent of the consumption back in 1940.

Now in the industrial category the amount—30 per cent of all coal is used for general industrial use, for heating, steam, and so forth, in 1940. This has dropped to 27 per cent in 1958.

Coke, both by-product coke and coke, coal consumed in this category represented 19 per cent in 1940. It was 21 per cent in 1958. It had a slight increase in the early 1950's.

The greatest change which has taken place is coal in the electrical utility category, rising from 11 per cent of the total in 1940 to 42 per cent of the total in 1958.

On retail deliveries there has been a substantial decrease, from 20 per cent — I am rounding these, by the way, if you are watching a chart — from 20 per cent in 1940 to — I am sorry — yes, to 8 per cent here in 1958. This is a decrease of almost 50-million tons annually from this period to this period.

The greatest loss, as most of us know, has developed in the railroad fuel area.

2786 Q. What caused that loss, Mr. Scollon? A. The inroads of diesel fuel. In 1940 the railroad's locomotive fuel market represented 20 per cent of the total and it is down to one per cent in 1958. This tonnage, in actual tons,

dropped from 85-million tons in 1950 to less than 4-million tons in 1958.

2787 Q. Mr. Scollon, will you resume your seat. Are you through with the chart? A. Yes.

Q. Mr. Scollon, what type of fuel, I mean coal, what type of coal do the railroads use, steam coal? A. All types. They can use all types of coal.

Q. But what do they generally use as your chart shows? A. I don't understand the question. As coal becomes available, say, from other markets —

Q. Excuse me. Counsel suggested that I get to the point. What I am trying to do, Mr. Scollon, is to find out the grades of coal, premium coal, or steam coal, or what kind of coal that each one of these particular consumers use. I first asked you what grade and what type of coal that the railroads use. A. As a rule, steam coal.

Q. Now what type of coal do the utilities use? A. Steam coal also.

Q. And the coke products? A. This is a special high grade coal, specially for coking purposes.

Q. Now under the industrials, what type of coal do they use? A. That is generally a steam coal.

2788 Q. What about the steel industry, is that included in the industries? A. Yes, it is.

Q. With reference to the value per ton of coal, how do you grade that? Is steam coal cheaper than the metallurgical coal? How does the bureau classify the types of coal? A. We have no breakdown as to class of coal, that is steam coal, directly. We do show a value per ton of coal sold on the open market and captive coal. Now on a nation wide basis, much of that captive coal is coking coal and there is a decided difference in the value per ton of that coal.

Q. Would you tell the jury while you are looking for that, what do you mean by captive coal? A. Captive coal is coal that is produced and consumed generally by a company

which manufactures goods. In other words, the coal does not enter into the open market. It is not sold on the open market. A large steel company produces captive coal — it can also buy coal — the coal it produces for its own use. Railroads do the same and other types of large industry will produce its own coal for its own use.

Mr. Rowntree: If your Honor please, in order to determine the competency of this price figure he is
2789 about to give, may I ask the witness two or three questions?

The Court: Yes, sir.

Mr. Rowntree: You are saying, Mr. Scollon, that these figures you have with respect to coking coal and what other category?

The Witness: Steam.

Mr. Combs: Coking, steam and metallurgical.

Mr. Rowntree: Coking and metallurgical are the two categories you are about to —

The Witness: No, sir.

Mr. Rowntree: Which categories?

The Witness: I was going to distinguish between the value of coal sold on the open market and the value of captive coal.

Mr. Rowntree: I see. And the captive coal is not sold on the open market?

The Witness: That is correct.

Mr. Rowntree: And the captive coal is quite often mined by the same company that uses the coal?

The Witness: That is correct.

Mr. Rowntree: And the captive coal may be mined by a subsidiary of the user of the coal?

The Witness: Yes.

Mr. Rowntree: So the circumstances with respect
2790 to this price figure you are about to give are not the same circumstances that relate to sales on the open market?

The Witness: That is correct.

By Mr. Combs:

Q. Would you continue, please, and refer to those tables. A. In the 1958 yearbook the average value per ton for all coal sold in the open market in the United States was $4.58, and the average value for coal not sold in the open market was $6.41.

Mr. Rowntree: May I ask one more question?

The Court: Yes, sir.

Mr. Rowntree: That value is not a buying and selling price?

The Witness: It is in effect the f.o.b. mine price for coal sold in the open market, but not for the captive coal.

Mr. Rowntree: That is right.

By Mr. Combs:

Q. Would you continue, please? A. That is all I had. I just merely wanted to make the comparison.

Q. Now in the national average value of coal, did you say that that included bituminous and lignite? A.

2791 A. Yes, it does.

Q. Now how much of the total production does lignite have, what percentage?

Q. Now how much of the total production does lignite have, what percentage? A. The actual tonnage I have before me was 2.4 million tons in 1958, so that would be 6/10ths of one per cent.

Q. Is that coal sold generally over the United States—A. No, it is not.

Q. Or confined to a limited market? A. No, it is not.

Q. What about the sub-bituminous, what percentage would that have of total production? A. I don't have that figure before me, but it is a very small percentage also.

Q. What is sub-bituminous as distinguished from lignite? A. Sub-bituminous is a step nearer bituminous coal. In other words, it has a little more carbon content. It is gen-

erally a higher grade coal. It is between lignite and bituminous in rank.

Q. Does it have a very limited market? A. Pardon?

Q. Does it have a limited market, sub-bituminous coal?

A. Yes, relatively limited, yes.

2792 You mentioned exports in your discussion of consumption. Have you prepared a table showing a picture with respect to bituminous coal exports? A. Yes, I have.

Q. And that would be Table A? A. Table A. It shows U. S. exports of bituminous coal in each of the years of the period we are discussing.

Mr. Combs: We have three additional tables, your Honor, that we would like to pass out at this time, A, B and C.

Mr. Kramer: They will be 155-A, 156-A and 157-A.

(Exhibits No. 155-A, 156-A and 157-A were marked for identification and filed.)

By Mr. Combs:

Q. Mr. Scollon, would you explain to the Court and jury the picture that this table shows with relation to bituminous coal exports? A. Yes. Another category in which bituminous coals enter into competition is in the export market. This was not included in the chart I just referred to, but the export coal market has had a significant effect on coal markets over the years.

2793 If you will refer to the last column, the total column, you will note that in 1940 approximately 16 million tons of coal was exported to the world. This reached a level of 25 million approximately in 1950 and a peak of 76 million tons—

. . . . . .

A. The peak in exports was about 76 million tons.

By Mr. Combs:

Q. In what year? A. In 1957. In 1958 this dropped to 50 million tons. If you will look at the column under Europe,

you will note that as would be expected during the war years, the exports were extremely low, and beginning in 1945 there was quite an increase, by 37 million tons in 1947, and this was because of Europe's recovery. This then dropped off to less than a million tons in 1950. By that time the European mines were back in shape. However, although they had recovered substantially to produce their own coals, they did not have enough to take care of the economic upturn that then occurred in Europe, so that in 1951 the exports of the United States coals to Europe was up to 28 million tons, and then again this began to decrease, and decreased to 1953.

2794 Then a further increase. There have been these economic resurgences in western Europe, where they could not take care of all their energy requirements from indigenous coals.

The only other significant item is under Canada. Whereas the exports had been running in the late 40's and early 50's at about 20 million ton level, they are down in 1958 to about 12 million tons. This is a result of Canada using its own coals, its indigenous coals, and the placing of subventions on U. S. coals.

Q. Mr. Scollon, have you finished? A. Yes.

Q. What do fluctuations in exports on these other markets have on the competition of coal? What effect does that have? A. Well, as the export demand drops, this places more coal on the open market and in competition with other coals. This is the same, the same situation as when coals are displaced by other fuels. It just places more coal on the open market.

Q. Does that increase the competition between the coal companies, the coal operators? A. It does.

Q. In other words, it is too much coal? It increases the amount of coal for the market? A. Yes.

2795 Q. Mr. Scollon, you have shown the growth and the energy demand of the United States in the last

two decades and you have also shown that bituminous coal did not share in this growth in these charts. You have prepared a table that will show the effect on the United States coal industry of these changes? A. Yes, I have.

Q. What table is that? A. Table B, salient statistics on bituminous coal in the United States, 1940-1958.

Mr. Kramer: What is that exhibit number? That is 156-A.

* * * * * * * * * * *

2796 By Mr. Combs:

Q. Mr. Scollon, would you continue? A. Yes, I would just like to cover a few highlights on this table. Production in the year 1940 in the second column.

* * * * * * * * * * *

Q. All right, sir. A. And the column under production you will note that in the United States production of coal in 1940 was about 461,000,000 tons. This reached a peak in 1947, an all-time peak of 631,000,000, and has dropped off to the present production of 410,000,000 tons.

Average value per ton is increased from $1.91 in 1940, to five dollars—I'm sorry, to $4.86 in 1948. The high point was $5.08 in 1957, but otherwise, you will note the relative constancy of the price over the past ten-year period.

Number of mines increased from 6,300 mines in 1940 to 9,400 mines in 1950, and has dropped to 8,300 mines in 1958.

2797 The average number of men working daily, there were 439,000 men employed in 1940, reaching a peak of 462,000 in 1942, and in 1958, there were 197,000 men employed.

Average tons per man per day has increased from 5.19 tons in 1940 to 11.33 tons in 1958.

The average number of days worked were 202 days worked in 1940; the peak of the period is shown in 1944 of 278 days; in 1958, 184 days were worked.

Now most of the remaining material is on subsequent charts, so if I may skip that, I would suggest that.

Q. All right, I think that will shorten it. Now, Mr. Scollon, did you prepare a table showing these statistics in Tennessee? A. Yes, Table C, Salient Statistics on Bituminous Coal in Tennessee, 1940-1950.

Mr. Combs: That will be 157-A, Your Honor.

It is Table C.

By Mr. Combs:

Q. Would you please explain this table, Mr. Scollon? A. In the production column in 1940, Tennessee produced 6,000,000 tons of coal. The peak production was 1956 with 8.8 million tons, and in 1958 there was produced about 6.8 million tons.

2798 The average value per ton increased from $2.00 in 1940 to $3.83 in 1958. The high point was in 1948 when $5.74 was the average value per ton.

The number of mines increased from 124 in 1940 to 500 in 1958. In 1950 there were 133 mines.

The average tons per man per day in Tennessee was 3.38 in 1940, and 8.22 in 1958.

Q. What was it in 1950? A. In 1950, the average number—or the average tons per man day was 4.67.

The average number of days worked, 208 in 1940, 168 in 1950, and 141 in 1958.

And again, I would suggest I eliminate the last few columns.

Q. The other statistics will be on subsequent tables and charts? A. Yes.

Q. Mr. Scollon, are these conditions reflected in coal producing area or coal producing states? A. I didn't understand.

Q. Are these conditions reflected in each coal producing area and each coal producing state? A. What I have shown are the trends in the United States and Tennessee.

Q. Right. A. The other states vary in different

2799 degrees.

Mr. Rowntree: May I inquire if that question just relates to these last two charts?

Mr. Combs: Yes.

The Witness: To Tables B and C, yes.

• • • • • • • • • • •

By Mr. Combs:

Q. Mr. Scollon, do you have a chart that shows the trend of production of coal in Tennessee compared with the trend of production in the United States? A. Yes, I have.

Q. Do you have tables that reflect it also? A. Table Three reflects the information on the chart.

Mr. Kramer: I think the way we have introduced that, it should be numbered 158, then we will have some with an "A", but we will have it consecutive, Your Honor.

(Exhibit No. 158 was marked for identification and filed.)

By Mr. Combs:

2800 Q. Now, Mr. Scollon, referring to the chart, Number 158, and Table Number Two, 147-A, would you please explain that chart?

• • • • • • • • • • •

A. Since 1950—as a base here in this case, I have selected this as an index of one hundred in production in the United States, and in Tennessee. In other words, whatever the production was here, it was a hundred per cent for the United States and for Tennessee.

In the United States, you will notice that in the year 1940, the total production was only 89 per cent of what it was in 1950, and only two years was it below the hundred per cent line, black line here.

Q. Speaking of these lines, Mr. Scollon, so it will be clear, the United States production is shown by the blue line? A. The blue line shows United States production, yes, sir.

Q. And the red line shows Tennessee? A. And the red line shows Tennessee.

Q. All right, sir. A. So with the exception of these
2801 two here, the United States production in each of the other years was above what it was in 1950. Subsequent to 1950, there was only one year, the year 1951,

in which the production in the United States was higher than it was in 1950. At that time it was 103 per cent, but in all other years, although there was an upsurge from 1954 to '56, there was a further decline, and it hasn't yet reached the 100 per cent line.

In the case of Tennessee, in only one year also prior to 1950 was the production below the 1950 level, and at all other points, it was higher than the 1950 level.

Subsequent to 1950, in contrast to the United States picture, production in Tennessee has been above the 1950 level. It reached a peak of about 175 here in 1956, and it has dropped off considerably since that time, but it is still 17 per cent above the 1950 production.

(Witness resumes stand.)

Q. Now, Mr. Scollon, do you have charts to show the production, the number of mines operating and other information by the size of coal mines? A. Yes, I have. By size, the Bureau of Mines has a standard breaking point of production per year which we can use as size of mine, but the Bureau breaks the size—the production according to six classes: the mines that produce over 500,000 tons annually; the mines that produce between 200,000 and
2802 500,000 tons referred to as Class 2; and the—

Q. I believe, Mr. Scollon, it would be better to get this chart marked.

* * * * * * * * * * * *

(Exhibit No. 159 was marked for identification and filed.)

* * * * * * * * * * * *

Q. All right, sir. A. Each year the Bureau classifies mines according to one of six classes, according to the size of the annual output.

Class 1, which in this chart is the red, are the mines that produced 500,000 tons or more annually;

Class 2, the blue, represents mines that produce between 200,000 and 500,000 tons annually;

The orange, Class 3, produced between 100,000 and 200,000 thousand;

2803 The yellow, Class 4, produced between 50,000 and 100,000 tons annually.

The green, Class 5, produces between 10,000 and 50,000;

And Class 6, less than 10,000 tons annually.

I think I should mention at this point that not included in any of our statistics are mines that produce less than a thousand tons a year.

This chart shows the per cent of the total production by each of these classes of mines.

In 1940, the largest class, the plass producing 500,000 tons or more, represented 46 per cent of the total production. In 1950, this had dropped to about 36 per cent, and in 1958 was 45.7 per cent, exactly the same percentage of the total that it represented back in 1940.

In Class 2, the next larger size, it was 27 per cent in 1940, 27 per cent—that is the difference in the vertical distance—27 per cent in 1955, and 21 per cent in 1958.

Class 3, 1940, was 13 per cent, 14 per cent in 1950, and ten per cent in 1958.

In Class 4, it was 6 per cent in 1940, ten per cent in 1950, and 11 per cent in 1958.

2804 I think I gave a wrong figure. I am going to repeat that to make sure.

Under Class 4, 1940 was 5.8, 1950 was 8.6, and 1958 was 6.9.

Under Class 5, 5.8 in 1940, 10 in 1950, and 11 in 1958.

Under Class 6, 2.7 per cent in 1950, 4.2 per cent in 1950, and 4.7 per cent in 1958.

If an arbitrary break is made at 100,000 tons—if you combine these three, the total of these three in 1948, represents about 86 per cent of the total.

Q. Which three are you talking about? A. Of the largest three classes. Classes 1, 2 and 3.

Q. All right, so it will be in the record. A. Represented

86 per cent of the total in 1940, 77 per cent—that is the total of these three—77 per cent in 1950, and also 77 per cent in 1958.

Alternatively, the three smaller classes were 23 per cent in 1950, and 23 per cent in 1958 of the total production.

Q. Mr. Scollon, is it true that under this classification that a mine may be under one classification one year and under a different classification the next year? A. Yes. A mine can produce, for example, 510,000 tons in this year and be in the red class, and the next year 490,000
2805 tons and be in the blue class. So they are not identical mines in each year.

Q. Does this fact result sometimes in the trend—cause a trend we are talking about in moving of one mine to another classification? A. Yes, it would.

. . . . . .

Q. Have you prepared a chart, Mr. Scollon, to show a breakdown of the size of mines in the State of Tennessee? A. Yes, I have.

Q. Do you have a table that shows that? A. Yes, Table 5.

Q. Which would be Exhibit No.—

Mr. Kramer: Table 5 is Exhibit 150-A.

Q. (Continuing)—150-A, and referring to Exhibit 150-A would you please explain this chart, Mr. Scollon.

(Exhibit No. 160 was marked for identification and filed.)

A. This is the same type breakdown. We show
2806 for the United States all the same classes, and again this is the percent of coal production by class, by size class.

You will note that in this case there are only three years in which the mines during this period and which mine was in, produced 500,000 tons or more annually.

In Class 2 in 1940 about 49 per cent of the total production came from mines producing between 200,000 and 500,000 tons.

In 1950 this had dropped to about 20 per cent, and in 1958 was about 24 per cent.

Class 3 represented about 25 per cent of the total production in Tennessee in 1940; about 38 per cent in 1950, and only less than 4 per cent in 1958.

Class 4 mines produced about 15 per cent in 1940, about 25 per cent in 1950—24 per cent, I am sorry, in 1950—and 20 per cent in 1958.

Class 5 mines—these are the mines that produced between 10,000 and 50,000 tons—

Mr. Combs: I might say, I believe that is the class that the plaintiff is in, your Honor.

The Court: Is it? All right.

Mr. Combs: I think that is true.

Mr. Rowntree: The Class 5?

Mr. Combs: Yes.

2807 Mr. Rowntree: Correct.

The Court: What is the number in that class?

A. (Continuing) The total tons in Class 5 is between 10,000 and 50,000 tons annually.

The Court: Yes, sir.

A. (Continuing) In Class 5, in 1940 the mines produced 8 per cent of the total; in 1950 they produced 14 per cent of the total, and in 1958 produced about 31 per cent of the total.

In Class 6, the mines producing less than 10,000 tons a year, in 1940 less than 4 per cent was produced in this class, and about 5 per cent in 1950, and about 22 per cent in 1958.

Again arbitrarily adding the first three groups here, we have only two—groups 2 and 3—in 1940 they produced about 74 per cent of the total production; in 1950 they produced about 58 per cent of the production, and in 1958 they produced 28 per cent of the total.

On the other hand, the mines, combining all mines less than 100,000 tons, in 1940 it was 26½ per cent of the total production by this group; in 1950, 42 per cent of the total,

and in 1958 the three smaller groups produced 72 per cent of the total.

Q. Mr. Scollon, will you explain to the Court and jury why 1954 is vacant? A. In the year 1954 the Bureau
2808 of Mines did a joint survey with the Bureau of the Census, Department of Commerce, and because of their disclosure rules, that is, they did not want to disclose the nature of a few mines by a report of something that might be identified, we were permitted to publish anything but mine size in this year. We have the total but no breakdown by sizes.

Q. Have you finished? A. Yes.

Q. Do you have a chart to show the trend in the number of mines in each of these size groups since 1940? A. Yes, I have.

Q. Is that Table No. 6? A. Yes.

Q. That would be Exhibit 151-A. A. Yes.

(Exhibit No. 161 was marked for identification and filed.)

Mr. Kramer: This chart of classes you are now filing is No. 161.

By Mr. Combs:

Q. I am referring to Table No. 6 and to the figures. Will you please explain the table and chart, Mr. Scollon.
2809 A. Both the table and the chart show the number of bituminous coal mines by size of annual output in the United States in the years 1940 through '59. These represent the same size classes we talked about on the last two charts, but in those other cases we were talking about the percentage of total production. In this case we are talking about number of mines actually in operation.

The solid black line at the top represents the coal mines in operation. We might discuss this one first. You will note that there were a total of 6,324 mines in 1940. This reached a peak in 1950 of 9,492 mines, and in 1958 was 8,264 mines.

The Classes 1, 2, 3 and 4, all fell in this lower class and overlapped so that as you will note these are measured in the hundreds of mines and the number of mines in the large classes has been relatively constant during these years.

Class No. 5, 10,000-50,000, in 1950 showed 1,157 mines. In 1950, again the peak, 2,367 mines, and in 1958, 2,169 mines.

The great changes in the slope in the total curve is affected mostly by the changes in the number of mines in Class 5 and Class 6. In Class 6 the number of mines in 1940 was 3,728. A peak also in 1950 of 5,252. In 1958 the number of mines in operation was 4,927.

2810 Q. Mr. Scollon, did you prepare a chart and table to show the number of mines in the various sizes and operation in the State of Tennessee? A. Yes, I have, Table 7.

Mr. Combs: That would be Table 7, your Honor.

Mr. Kramer: That is 152-A.

(Exhibit No. 162 was marked for identification and filed.)

* * * * * * * * * *

By Mr. Combs:

Q. Mr. Scollon, would you explain Table No. 7 and Chart No. 7, Table 152-A and the Chart 162, please. A. On this chart we show a comparable trend for Tennessee, or rather comparable information that we had shown on the preceding chart for the United States. The same explanation for the year '54 applies here as applied on the production chart.

As was true in the case of the United States, the first four classes, the largest four classes, 1, 2, 3 and four, represent a very small number of mines, and they are for all practical purposes relatively constant on this chart.

The green line, Class No. 5, 10,000-50,000, showed 21 mines in operation in Tennessee in 1940. This class, there
2811 were 30 mines in 1950 and there were 97 mines in 1958.

Class 6 mines, 71 in 1940, 68 mines in 1950, and 376 mines in operation in 1958.

All mines in Tennessee were 124 mines in operation in 1940, 133 in operation in 1950, and 500 mines in operation in 1958.

You will note again, as was true in the United States, the smaller two classes of mines have more effect on the total line than the other four.

Q. Resume your seat, please. Mr. Scollon, what has been done by the coal industry to enable it to hold as high a share of the energy market as it has in its competition with oil and natural gas? A. Among other things, it has mechanized to the extent possible. That is to the extent that natural and geological and other conditions would permit.

Q. Do you have a table and a chart that would reflect that? A. Yes, I have.

Q. And that is Table 8? A. Yes.

Q. And Chart No. 8? A. Yes.

(Exhibit No. 163 was marked for identification and filed.)

By Mr Combs:

2812 Q. Mr. Scollon, would you take your place at the chart. Now you are referring to Exhibit 163? A. Yes.

Q. Go ahead please. A. Here we show the breakdown of mining by types of mining, by underground coal mechanically loaded, by strip or surface mining, by auger mining, and by hand loading. These are the prominent methods of loading coal today.

Auger mining, I might explain, is the use of an auger into a horizontal coal seam to bore out the coal. It is relatively new, as you note here. It just came in—first reported in 1952.

In 1940, 32 per cent of all coal in the United States was loaded mechanically. 9 per cent was loaded by strip, and 59 per cent was hand loaded.

In 1950, 53 per cent was loaded mechanically underground, 24 per cent by strip and 23 per cent hand loaded.

In 1958, 59 per cent of all coal was loaded mechanically underground, 28 per cent strip, 2 per cent auger, and 11 per cent was hand loaded.

You notice the rather general trend in the increase in mechanical loaded tonnage up to about 1955. Also the total amount that is loaded by hand, loaded by strip and
2313 auger method, a general increase until about this period, and it has leveled off somewhat in the last three years shown.

Q. Do you have a chart and a table that will show the same information with reference to the State of Tennessee? A. Yes.

Q. Is that Chart No. 9? A. Yes.

Q. And Table No. 9? A. Yes.

Mr. Kramer: Table 9 is 154-A.

(Exhibit No. 164 was marked for identification and filed.)

By Mr. Combs:

Q. Now, Mr. Scollon, referring to Chart No. 9, which is Exhibit 164, and referring to Table No. 9, which is Exhibit 154-A, would you please explain the chart and table? A. Again we have made the same breakdown that we have made for the United States. Underground coal mechanically loaded in Tennessee was 12 per cent of the total in 1940. It was a negligible amount, not enough to put on the chart in that year of strip coal. Underground production hand loaded was 88 per cent. In 1950 mechanically loaded coal represented 38 per cent of the total, but had dropped from a peak of 47 per cent in 1948, and strip coal
2314 represented 12 per cent in 1950, and underground hand loaded was 50 per cent of the coal in 1950.

In 1948, 29 per cent of the total was mechanically loaded underground. 29 per cent was strip and 7 per cent was auger. Leaving 35 per cent of the total loaded underground by hand.

The only similarity in the recent year, in the year 1958, with the United States is that the combined strip and auger mining in Tennessee represented 36 per cent of the total and the combined strip and auger in the United States represented about 30 per cent of the total.

Q. Would you take your seat, please.

Mr. Scollon, I note that in the State of Tennessee the per cent of coal mined in the strip and auger represents about the same portions of the total as these methods of mining show for the United States. Why on the other hand has the per cent of coal loaded mechanically underground in Tennessee not kept pace with the underground mechanization in the United States? A. There are many things that affect the ability to load coal mechanically. Among others are the physical condition of the coal seams, thickness and other factors have a great effect.

In this respect, I would like to refer to page 46 of the 1958 Minerals Yearbook. This shows that Tennes-
2815 see, that 77 per cent of the coal mined in Tennessee in 1955 was less than four feet in thickness, whereas the average for the United States, 34 per cent of all seams mined was less than four feet. Of the ten leading coal producing states, Tennessee had the highest percentage of coal mines in seams of less than four feet thick.

Q. Mr. Scollon, do you have under your jurisdiction research programs for the coal industry? A. Yes, I have.

Q. Would you describe briefly for the Court and the jury what type of research you are making and why you are making it? A. The Bureau of Mines is engaged in coal research, in mining preparation, conversions and utilization. It has at present several major projects designed to assist the coal industry. These are the development of a coal burning gas turbine for use in electric utility plants and hydraulic mining of coal.

The research effort in the United States has been relatively small compared with research in other countries. During the past five years the United States Congress has held many hearings which resulted in the enactment of legislation last year to create a new office of coal research in the Department of Interior, which would make

available more money for coal research, which money
2816 could be contracted to both government and non-government sources.

There is a great deal of interest nationwide in expanding on coal research. In addition to the Bureau of Mines program, an expanded program is being developed by the industry. A new coal research laboratory is being constructed this year in Pittsburgh.

By way of comparison, in 1955, a survey was made to show that about 17 million dollars annually was spent for coal research in the United States. This compares with about 250 million dollars spent for petroleum research and over 300 million for chemical research. The reason for the relatively low expenditure for coal has been given in the hearings as the fact that the profits in the coal industry
have been too low to warrant a program of any size.
2817 And therefore it was concluded that the United States Government would have to make money available and thus the creation of the new Office of Coal Research in the Department of the Interior. The type of research they will be geared to do and to sponsor should be short-range, large-scale research.

Q. Why is that? A. Because the money available generally to the Bureau of Mines and other groups to date has been relatively small, and large-scale, pilot-plant type research is very costly. The money has not been available to do it.

Q. Is this research designed to increase the uses and the markets for coal in order to increase employment and to protect the national security? A. Yes, it is. I mentioned only two relatively large projects the Bureau is engaged in. We have literally hundreds of projects to develop liquid fuels from coal, gaseous fuels, chemicals from coal, and in addition to new uses, to develop new mining methods to lower mining costs.

The possibility of supplementing our natural gas supply in the not too distant future iis — well, there is a great

possibility that we might have to convert coal to high BTU gas in the not too distant future. We know how to do it technically now, but economically, it is still out of the picture.

2818 Q. In comparison to reserves of fuels, how does coal rank along with the other fossil fuels you have been discussing? A. It is difficult to explain reserves without a — with a proper — in this short time, but let me say this. At the present rate of consumption, there are proved reserves of coal for about seventeen hundred years.

Now, oil and gas reserves are not measured the same as coal. Coal reserves are a rather definite amount. They have been drilled ahead, and there is still questions, there is room for error, but they are pretty definitely established.

On the other hand, with oil and gas reserves, the producers of these fluid fuels drill ahead only enough to keep them in business, and this is the figure that is generally reported. As I recall, there are proved oil reserves to last at the present rate of consumption about thirteen years, and there are proved natural gas reserves to last at the present rate of consumption about twenty-one years.

This is misleading, because this is a floating average. Each year the company develops so much more, but we have very little data on total reserves of oil and gas.

Q. Did I understand you to say — I didn't exactly understand your answer — that the reserves though of coal
2819 at the present rate of production and consumption is around seventeen hundred years? A. Yes.

Q. That is in the United States? A. In the United States, yes.

Mr. Combs: You may ask him.

CROSS EXAMINATION

By Mr. Rowntree:

Q. Mr. Scollon, I would like to take up first this Table I on the sheets, Exhibit 146-A, and this shows does it not a

competition in the generation of energy between these different fuels and that in the country as a whole the coal has suffered in this competitive race? A. That is correct.

Q. On the other hand, in Table — or rather they skip back and forth.

Let me ask this question. Do you have any information with respect to how this competitive race between fuels has resulted in Tennessee consumption? A. No, I do not have that on a state basis.

Q. And is it not true that coal has increased its position in Tennessee, rather than that position being declined? A. I can't answer that as a per cent of consumption. The only indication I have is in the production figure for the
2820 state of Tennessee.

Q. Well, with respect to consumption, however, would you have any figures? A. No, I haven't.

Q. Is it not true that the Tennessee Valley Authority steam plant system uses coal, or do you know? A. I understand it uses coal.

Q. Yes, sir. And it is equipped to burn coal? A. I understand it is, yes.

Q. Is it equipped to burn gas or oil? A. I do not know.

Q. And therefore, if — are you acquainted with the figures of increased consumption for steam utility use in the state of Tennessee? A. I am not.

Q. Accordingly, is it not true that this Table One, with respect to the country as a whole would not prove true necessarily with the state of Tennessee? A. It would not necessarily hold true for any State.

Q. Yes, sir. And it may be entirely true, might it not, that this race between fuels would have little or no bearing upon market conditions in some areas such as Tennessee as compared to other areas? A. As I mentioned earlier, when we were discussing exports, the decrease in the ex-
2821 port market makes coal available farther inland, and this has a pyramiding effect in some cases, so that

the situation could be different in each state, but about it could be — each state could be — each state could be affected more by such changes in competition. It is a state-by-state problem.

Q. And in order to have an effect in Tennessee, it would be because coal was brought into Tennessee from elsewhere? A. It could be, yes.

Q. And — now Table Two, let's take up Table Two. A. All right.

Q. I believe that is Exhibit 147-A.

. . . . . .

Q. There we see that the third column of user, Electric Utilities, has increased in its position with respect to the use of coal. A. Yes.

Q. In the United States. A. Yes.

Q. Quite extensively. A. Yes.

2822 Q. Now, that is steam coal, is it not? A. Yes.

Q. And also the industrial use is largely steam coal? A. Yes.

Q. And those two together make up close to three-quarters of the use of coal in the United States in 1959 — 1958? A. That is correct.

Q. Now has that increased use of steam coal affected the average price of coal in the United States? A. The Bureau of Mines statistics would not reflect this. I would like to add that there is no price by class of coal as steam coal, and although coking coal used for coking purposes usually commands a higher price, that in many cases where there is an over-production of coking coal, it moves into the steam market also at a lower price.

Q. Yes, sir. But this increased use of steam coal has not meant that the price of coal has gone down to any appreciable extent as shown on Table B here? A. On Table B — that is correct, in the United States in Table B.

Q. In the United States? A. Right.

Q. Table Three, let's consider Table Three.

2823 Table Three does show Tennessee's production increasing to 1956, that is in this period of 1950 to 1959? A. Yes.

Q. That production did increase to 1956, and then rapidly fell, is that not true? A. Yes.

Q. Do you know why the production increased from 1950 to 1956? A. I do not.

Q. Would you be of the opinion that the increased use of steam coal by the TVA would have a bearing upon that? A. I don't believe I am prepared to answer that to give an opinion, sir.

Q. All right, sir. And you would have no knowledge of the continued use of steam coal in comparison to the 1957, '56, in the later years, 1957 through 1959? A. In Tennessee, no.

Q. Let's turn to Table Four.

Mr. Scollon, these figures in the first column, Class 1 Mine, do they not show a decline in the position of these big mines in the period of 1945 to 1949? A. Yes, they do.

2824 Q. And does that not show that some sort of crisis presented itself to these big mines in the period of 1949 to 1950? A. Not necessarily.

Q. Will you explain. A. Well, there are many factors that can affect production, and as I mentioned a moment ago these mines can move from one group into another or go out of business altogether, and the post-war recovery period was just over, the market was dropping, and it is possible that the general market conditions, the general competition, just reduced production from this group.

Q. In other words, the smaller mines were increasing in number and in percentage of production in that period of 1948 and '49? A. In 1958 and '49 the number, or total number of mines in the United States had increased to an early peak of 9,000 mines in 1958 and there were 8,600 mines in 1949.

Mr. Kramer: The witness used the figure '1958'.

Mr. Rowntree: Yes.

The Witness: I beg your pardon. I did not hear the question.

Mr. Kramer: I thought we were talking about 1948 and 1949 and you used the figure 1958.

2825 Mr. Rowntree: I was talking about 1948 and 1949.

The Witness: Yes. I was giving the figure for 1958. If I said "1958" I was in error.

Mr. Kramer: That is what I thought.

The Witness: In 1948 there were 9,000 mines and in 1949 there were 8,500 — 8,600 mines.

By Mr. Rowntree:

Q. And this Table 4 I am looking at, does that not show that the participation, percentagewise, of the big mines was 41.5 in 1947 of the total production, it dropped to 38 per cent in 1948, and it dropped again to 29.3 per cent in 1949? A. That is correct.

Q. And, of course, that difference had to be made up in smaller classes of mines? A. Yes, sir.

Q. In other words, these big mines were losing business to the smaller mines in that period of 1948 and 1949? A. That is possible.

Q. And is it not true that this same table, Mr. Scollon, shows that immediately after that period, commencing in 1950, these big mines not only held on to what they had but started to increase their participation in the produc-

2826 tion of coal? A. That is correct.

Q. Does not that same chart show that 1950 was a year of change with respect to these big mines? A. I think it was 1949 when the low point was reached, 29.3.

Q. And 1950 was the year when the increase started? A. Yes.

Q. I would like to drop over to Table — let's see now — Table 7, which is Exhibit 152-A. I think, Mr. Scollon, we have had an exhibit on the board comparable to this but

limited only to two years, the years 1955 and 1959, in previous testimony.

This does show that Tennessee does not have any big mines — I mean, Class 1 mines? A. That is correct.

Q. It shows that Class 2 has been holding on in the period 1950 to 1959, does it not? A. That is correct.

Q. I suppose that you have no knowledge as to what those five mines are? A. I have not.

Q. Does not this table show that Classes 3 and 4 have suffered with respect to retaining their position in
2827 the production in the period 1950 to 1959? A. That is on another chart — on the production, your question went to production?

Q. I am talking about number of mines, really. A. It shows for Class 3 mines there were 15 in 1950 and two in 1958. In Class 4 mines there were 16 in 1950 and 20 in 1958.

Q. Do you not think, Mr. Scollon, that the absence of big mines in Tennessee and the low number in 1959 of these classes, 2, 3 and 4, would largely be attributable to the working conditions in Tennessee, that, size of seams, terrain, and so forth? A. As I mentioned, the thickness of the coal seam has a great deal to do with the number of mechanized mines, and to that extent there could be an effect.

Q. Now, Mr. Scollon, look at the year, particularly 1953 there on that Table 7. Does not that show that Classes 2, 3 and 4 — well, Classes 3 and 4 particularly — had a big drop in that year? A. From the year before, yes.

Q. That is right. And in that same year do you not see that that Class 6, the small mines increased by almost 200? A. Yes, sir.

Q. Would you think that there is some connection
2828 between the great decrease in Class 3 and 4 and the great increase in Class 6? A. No, it would be very negligible. Look at the total column, the increase — I mean, if you pick up the mines that were lost in Classes 3 and 4,

it could not begin to make up for the increase in the total here in the Class 6 mines or in the total.

Q. But Classes 3 and 4 would generally employ quite a number of men in comparison with Class 6? A. Per mine, yes.

Q. Yes. Now would it not be reasonable to say from these figures that when these Class 3 and 4 mines closed in 1953 that the men who worked in those mines then went over to Class 6 mines? A. It could. It would depend on many factors, geographical location, and so forth.

Q. Let's compare Tables 8 and 9, and I believe that you have already pointed out here that the underground mine in Tennessee has had a hard time with respect to mechanization? A. Well, the —

Q. Comparing the 1959 figure of 39 per cent on Table 9 in Tennessee with the 1959 figure of 10 per cent from Table 8 for the United States with respect to hand loading.

2829 A. Well, what the table says is that 39 per cent was hand loading underground in Tennessee in 1959 and 10 per cent was hand loading underground in the United States in 1959.

Q. That is the best evidence what the table shows, correct. And the mechanical loading figures show just the reverse, that is, that the United States figure is higher than the Tennessee quite a bit. A. That is correct. 59 per cent mechanically loaded in 1959 in the United States and 32 per cent mechanically underground in 1959 in Tennessee.

Q. Right.

Returning to Table C, which we will have to compare with Table B, I would like to file this little chart which I have taken from the figures on those two tables.

. . . . . .

(Exhibit No. 165 was marked for identification and filed.)

. . . . . .

2830 By Mr. Rowntree:

Q. There we see, do we not, that in 1949 the average price of coal in the United States was $4.88? A. Yes.

Q. And in Tennessee in that year the average price was $5.29; that is correct? A. I have $5.25 for 1949.

Mr. Rowntree: Let's change that figure.

2831 Q. So Tennessee starts off this period we are covering here, 1949 to 1958, considerably ahead of the United States average price? A. That is correct.

Q. And do not these two charts show that the Tennessee figure or average price dropped to $4.60 in 1953 and then down to $3.96 —

The Court: How much in '53?

By Mr. Rowntree:

Q. $4.60 in 1953 as compared with $4.92 for the country as a whole in that year? A. This is correct.

Q. And then the next year, the figure dropped in Tennessee to $3.96, is that right? A. Yes, sir.

Q. And in the United States it dropped to $4.52? R. Yes.

Mr. Combs: The year 1954.

By Mr. Rowntree:

Q. That is the year 1954. That was a pretty hard year on the coal industry generally, I take it? A. Apparently so.

Q. The figure in Tennessee has been gradually going down after it went up — well, strike that.

In 1955 the Tennessee figure went up to $4.08 as
2832 compared to $4.50 in the country as a whole and, in 1956 the Tennessee figure was $4.02 as compared to $4.82 in the country as a whole in 1956? A. That is correct.

Q. In other words, the national figure went up rather sharply and the Tennessee figure declined slightly? A. That is correct.

Q. Do you know whether or not the Tennessee production, or consumption of coal went up sharply in that period of time or are you acquainted with that? A. I do not know. I know the production went up, which usually parallels the consumption.

Q. And the national figure went up again in 1957 and the Tennessee figure went down again in 1957? A. Yes.

Q. And the Tennessee figure declined again in 1958, corresponding to a decline in the national figure?

The Court: Are you talking about production or prices?

Mr. Rowntree: These are prices, your Honor.

The Court: Well, in order to keep the record clear, shouldn't you go over those prices in '57 and '58 like you have done in '55 and '56? The witness can't see the board and neither can the Court. Maybe some of these younger people can see the board.

2833 Mr. Rowntree: I am in your way, too.

1957, the price of Tennessee coal went down $3.92.

The Court: All right.

Mr. Rowntree: And the price of coal in the country as a whole went up to $5.08.

The Court: All right.

Mr. Rowntree: In 1958, the Tennessee price went down to $3.83, and the price of the country as a whole dropped to $4.86.

By Mr. Rowntree:

Q. Mr. Scollon, do you know why the Tennessee figure is lower in these years, 1954 through 1958, than in the preceding five year period, whereas the national prices were not appreciably lower in the later period? A. I do not.

Q. Now if a coal company, Phillips Brothers Coal Company, following the spot market of TVA, had an average price for its steam coal of $3.92 in 1956 and an average price of $3.20 in 1957 and an average price of $3.13 in 1958, would you not say that this spot market of the TVA, which was followed by Phillips Brothers Coal Company, a market involving the consumption of approximately 5 million tons a year, was the cause for that decline in the Tennessee average price? A. A price representing 5 million tons

2834 would have a significant effect on the average, yes.

* * * * * * * * * * * *

PATRICK B. C. SMITH

called as a witness by and on behalf of the cross-defendant,

* * * * * * * * * * * *

2835 DIRECT EXAMINATION

By Mr. Rayson:

Q. Will you state your name, please? A. Smith. The initials are P.B.C.

Q. Mr. Smith, where do you live? A. In Knoxville.

Q. And in what business are you engaged? A. In the coal selling. I am president of Inter-Mountain Coals, Incorporated.

. . . . . .

2836 Q. Is Inter-Mountain Coals a coal sales agency?

A. Yes, altogether.

Q. It is not an operating company? A. No, it is not an operating company whatsoever.

Q. Are you the sales agent in this area for Consolidation Coal Company? A. For their properties that they have in this area, yes. Their Tennessee properties.

Q. I might ask at this point what properties Consolidation Coal Company has in this area? A. It is property out on the Tennessee Railroad and mostly in Anderson County. It was formerly known as the Moore Coal Company property here, and it was sold to Pocahontas Fuel Company in December 1953, and when Pocahontas Fuel merged into Consolidation Coal Company, why that is how it got there.

Q. When did that merger occur, do you recall? A. I couldn't tell you exactly. It is a matter of public record though.

Q. Mr. Smith, how long have you been in the coal business? A. Well, all my life. My father was in the coal business when I was born, and been associated with
2837 it, and I became actively engaged in it two years after I left college, and started to work for the old Southern Coal Company in Birmingham in 1932.

Q. And have you been in coal sales work since then? A. I say two years. About three or four years after I got out of college. That was in 1928. I take it back. Yes.

Q. Would you briefly review your work in the coal sales

business since you joined Southern Coal Company in 1932? A. Well, I joined Southern in their Birmingham office as an order clerk in 1932, and along about 1934, why I became a salesman travelling North and South Carolina for them. And in 1935 we opened an office here in Knoxville and I travelled out of that office with headquarters — at least I lived in Charlotte for about a year and then in 1936, why I was brought back in here sort of as an office manager. There was some change in personnel within the company, and having been an order clerk once they put me back as an order clerk again, I guess.

And then from then on I was located here in Knoxville from June, 1936, first as office manager and then as district manager, and along through the years why I got to
2838 be a vice-president, and then about '46 I was moved to Memphis where the general offices were, and in 1937 moved my family over there and became — I mean '47, I beg your pardon, 1946, and in 1947 why I was made president of the Southern Coal Company and remained as such until, oh, about the latter part of 1951 and we moved our general offices from Memphis up to Chicago in 1949, and I moved back here in 1951 as — early '51 as a vice-president in charge of the so-called eastern division of Southern Coal Company which was headquartered here in Knoxville.

And then in June of 1951, why the Southern Coal Company was more concerned with the middle-western fields and I took over the eastern division and we formed Inter-Mountain Coals, Incorporated, with headquarters here in Knoxville and started the business on July 1, 1951.

Q. Is Inter-Mountain Coals an independent sales agency? A. Absolutely. All of our stock is owned by active executives of the company.

Q. And in your experience that you have outlined for us have you sold coal to the TVA on the term market and on the spot market? A. Yes, sir. Ever since, oh, whenever they first — well, the old Wilson Dam steam plant in Alabama, before they dreamed of all these others. I guess ever since

they have been buying coal I have sold them, yes.

2839 Q. Have you sold coal to the various other markets available to producers of coal in East Tennessee? A. Oh, yes; yes.

Q. Mr. Smith, on the far bulletin board by the jury is a map of the TVA system, and I would like to ask you a few questions about the matters which appear on this map.

* * * * * * * * * *

Q. Mr. Smith, we have been talking about a mine in Campbell County for several weeks, and I suppose that everyone here knows where Campbell County is, but I take it it is about due north of Knoxvillle up here near the Kentucky line; is that right? A. I would say that. I wear bifocal glasses and I can see that thing pretty well from

2840 here, but that is it.

Q. I will mark a "C" by Campbell County so we will all be familiar with that location.

Mr. Kramer: Mr. Rayson, what is the number of the exhibit you are dealing with so the record will show.

Mr. Rayson: The map is Exhibit No. 145.

By Mr. Rayson:

Q. Mr. Smith, what are the eastern division plants of the TVA? A. Oh, Kingston steam plant, John Sevier steam plant, the Watts Bar, which is more or less stand-by, and that is what we commonly refer to sometimes — sometimes they bring the Widow's Creek plant in. It is sort of a stand-by.

When we talk about the eastern division, why usually the John Sevier and Kingston really, although I believe when they do buy spot coal sometimes why they do include Widow's Creek in certain invitations.

2841 Q. Now are the Watts Bar, and Kingston, and John Sevier plants the steam plants of the TVA to which the coal from the area of Campbell County, which is sold to the TVA, is sold? A. Kingston, John Sevier and Watts Bar, that is correct. Of course, Watts Bar has been idle, off the line, since I believe '57.

Q. Do you know if Watts Bar is one of the older steam plants of the TVA? A. Well, it was the first plant that they built themselves back in the 40's. It is there. Of the ones that they built themselves, it is the oldest. Of course, they have still got the old Wilson Dam steam plant.

Q. The Wilson Dam steam plant? A. Yes, and the Ocoee.

Q. That is this steam plant here in northern Alabama? A. They are all plants that were in existence before the TVA was and then they came in and they just took them over from other things.

Q. Now do you know, Mr. Smith, whether coals in the area of Campbell County have ever been sold to these steam plants in the western division of the TVA system? A. Not to my knowledge, no.

Q. Do you know why that would be? A. Well,
2842 they are just not competitive over there from the standpoint of transportation and all that.

Q. In other words, would you say that the rail rates from Campbell County to Gallatin and Johnsonville and Shawnee would not be competitive with the rail rates of the mines in western Kentucky to those plants? A. That is right. I mean there has never been —

. . . . . .

Q. Are there any coal mines in the western part of Tennessee? A. No, sir, not in the western part of Tennessee.

Q. What are the western-most mines in Tennessee? A. I presume these mines down in southern Tennessee would be possibly the western-most or out on the Tennessee Central Railroad around Monterey on what we call The Plateau out there.

Q. The mines you are referring to near Chattanooga I believe are in Sequatchie County? A. That is right.

Q. About an inch or two to the west of Chattanooga as shown on this map? A. That is right, and then due north, up there around Monterey, almost due west from the King-

ston steam plant, why there is a coal field out there
2843 and some mines there.

* * * * * * * * * *

Q. And there is no coal west of that in Tennessee? A. Not to my knowledge.

Q. So the mines here in western Kentucky would be the closest mines to these plants in this area, in the area of Johnsonville and Gallatin? A. I would say the closest, yes.

Q. Now you spoke of the Watts Bar steam plant closing. Do you know if the TVA has closed any of its other plants? A. Oh, you mean of these newer plants that they built themselves?

Q. Of any of its plants. A. Oh Lord, they acquired a plant in Nashville, you know, and I am sure it is closed. They had one in Paducah. I am sure it is closed. Wilson Dam, I am sure it is closed. They had one down here at Ocoee, and I am sure it is closed. Had one up at Watauga, and I am sure it is closed. But those are all plants, small plants that they acquired and the TVA got cleared through the Supreme Court.

Q. Mr. Smith, in order that it will appear on this map, I will ask you if I am indicating the general area of the
2844 west Kentucky coal fields, the western Kentucky coal fields (indicating)? A. Let me see. That is the Shawnee plant. Yes, that is about it.

Q. Right in here (indicating)? A. In that general area, yes. It is right there near the Kentucky dam, which is just before — I think it is 20 miles before the Tennessee empties into the Ohio, is a place known as Grand River, where there is a facility for transferring rail coal to barge, and that is approximately 60 miles roughly from the heart of the west Kentucky coal field.

Mr. Rayson: Your Honor, I have written "West Kentucky Field" on the map.

The Court: Yes, sir.

By Mr. Rayson:

Q. Mr. Smith, are there more than — is West Kentucky Coal Company the only company operating in that field? A. No, no, there are several there. Would you like me to name some of them?

Q. You might name some of them. A. Bell & Zoller Coal Company, Peabody Coal Company, United Electric Coal Company — let's see — Kirkpatrick Coal Company, Pittsburgh Midway and several others. Those are the ones that come to mind.

Q. Were any of those mines in west Kentucky able
2845 to sell to the John Sevier, Kingston and Watts Bar plant when it was open? A. I beg your pardon?

Q. Were any of those mines in west Kentucky able to sell coal to the eastern division steam plants of the TVA? A. Watts Bar, before the others were built, and during the war years, when there was quite a demand for coal, some west Kentucky coal was sold under contract, that is coal from the western Kentucky field, to the Watts Bar steam plant and barged there. It was sold on a competitive basis. At that time the market was extremely good, so to speak, from the standpoint of realization here and most of our so-called eastern coals in this area apparently had more attractive places elsewhere to where they could put the coal, because it was a very high market. That was one time that western Kentucky coal moved to Watts Bar. That was before, long before the Kingston steam plant was even dreamed of.

Since the Kingston plant has been there, why back in 19— early 1956, there was some western Kentucky barged coal, I believe, — in fact, I am sure there was some barged to the Kingston steam plant, more or less coal that was moving to other plants. It was diverted to Kingston, just at the same time there was some coal from southern Tennessee that was diverted into Kingston.

Now that would be the fact there had been quite a
2846 drought, as I recall, and the latter part of '55 the hydro on the TVA system was not producing the

power they wished. The weather wasn't too good, and a lot of this so-called, I call it, outdoor mining around here wasn't working too well and the TVA had a few, at least, long term contract suppliers that had failed to deliver, and Kingston plant got down to where — well, I believe it came out in the papers, down to about a week's supply of coal down there. It was an emergency condition existing, and there was some western Kentucky coal brought in during that period, but it was hardly a competitive situation.

Q. Before we go into that situation any further, let me ask you if you will compare the cost of transporting coal by barge to the cost of transporting coal by rail? A. Well, the TVA in evaluating a bid has a rule of thumb which seems to be, stand up in actual practice. They will evaluate transportation charges by barge at two mills per ton mile, plus 25 cents per ton. I think they have some barge contracts that may even be lower rates than that, but that is their standard for evaluating a bid, unless you have a specific barge contract.

Rail, why I would say that a rail rate runs on the average better than a cent per ton mile. For example, the Southern Railroad rate to Kingston is $1.10 and the mileage from our mine to Kingston is — do you mind if I refer to a
2847 figure to make sure?

Q. Not at all. A. I have got some notes here. Our approximate mileage to — from the Moore mine to Kingston is about 90 miles, the rate is $1.10.

2848 There may be some lower than that. Why I understand — in fact I know — that the L&N Railroad has published some recent rates that probably run less than a cent a ton mile.

Q. In any event, there is a very substantial advantage to the shipper who ships coal by barge coal? A. Oh, very much so, yes.

Q. In preference to rail coal? A. Oh, yes. Yes.

Q. Now, I want to go back to the 1956 situation involving

the Kingston Steam Plant, and ask you if you can explain or give your understanding of how the Kingston Steam Plant was caught short of coal during that year. A. Well, now, I don't work for the TVA, but I mean I have my personal opinion, I think it is correct. They made no attempt to hide it so far as I know.

As I said a minute ago, why, during the late '55, there, as I recall, and early part of '56, why drought conditions were such that the hydro didn't produce the power that it normally would.

TVA had some long-term volume coal contracts for the Kingston Steam Plant on which, for one reason or another, the supplier was, or suppliers were rather, substantially behind in deliveries, and the general weather conditions there in late '55 and early '56 interfered with the
2849 operation particularly of at that time strip mines which were outdoors, and they had a lot of difficulty.

Q. How does the weather interfere with the operation of strip mines? A. Well, in this area, strip mining is practically altogether contour, which means it is up on the side of a mountain, and the coal seam drifts in at whatever elevation it is, and they have got to first get up there.

For example, if we were stripping at our — to be specific — at our Moreco, why the elevation of the seam there is about twenty-three or four hundred, I believe, and we would have to get up the mountain there and start where the coal crops. The drifts, the seam drifts out to the side of the mountain, and get a shovel up there and start stripping what we call the overburden, and just picking it up in open pits so to speak.

Q. And then one — A. And there it is, and then you have got to get it down to the railhead or wherever you are going, and then it is quite a problem of road transportation, particularly in rainy weather.

Q. Were there any other factors then that created or added to the TVA's situation in Kingston? A. Well, yes.

Yes, there were several. For example, in July of '55, why we were successful in negotiating with a private util-
2850 ity company, and the railroads, for a substantial freight reduction at another — at this private utility plant, and we made a contract to furnish around three hundred thousand tons a year with this utility.

Of course, our coal is right in what you might call the Kingston Steam plant basin. We weren't running the mine, but we — but when we made that contract, we reopened it, and there was three hundred thousand tons of coal a year that originally, I guess, the TVA would have expected to have been available to them that was moved to this other utility, and ours was not the only contract. There were others made, and that particular utility bought a fair amount of coal, so to speak from the Kingston Steam Plant's bread basket.

And then, on top of that, the export market, which became rather attractive about that time, and I guess there were just a lot of people that thought they could do better in other markets, and it got the TVA to — well, their sources were rather rigidly restricted, because of other markets available to those sources.

Q. Now, what happened as a result of this situation? A. Well, they, I believe they had a bid opening there, a term bid opening along about February of '56, I believe. I'm not quite sure, but somewhere along in there, and the coal offered to them was not sufficient, I guess, for their
2851 needs, or they thought not, and they bought rather heavily on the spot market.

As I mentioned before, they diverted some western Kentucky coal that was already under contract to the plant to help out. They diverted some southern Tennessee coal that was already under term contract to the plant to help out.

They bought all of the spot coal that was offered to them at — oh, up to their valuation of say 23½ cents a million.

They encouraged — for example, they came to us and —

to encourage new development, and we opened a new operation more or less on an experimental stage or basis —

Q. What operation did you open? A. Well, what was known as the old Trimore property. It had been closed since — well, we closed it in June, '54.

Q. Did you negotiate a contract with the TVA at this time? A. Well, they negotiated one with me. Mr. Claytor came to Knoxville and asked — they were trying to encourage great development and all of that, and they negotiated one with us. They negotiated, I'd say, at least a half dozen, maybe a dozen.

It was — the one they gave us was based on fifty
2852 thousand tons or six months, whichever we got to first, and I think the others that they negotiated were about the same basis, and it did encourage considerable new development, I am sure, in the general area.

2853 Q. At what level did the Kingston inventory pool get to in 1956? A. It stayed below 30 days there for quite some time. I think there was a newspaper report that it got down to less than a week's supply. Whether it actually did that or not, I can't say.

Q. What is the normal inventory that TVA carries for its plants? A. When they built their storage yard it was designed to hold a million and two hundred thousand tons. Their annual burn, the maximum I would say, probably be about four million eight hundred thousand — maybe that could egg up to five million.

The usual rule of thumb, nationally, for utilities, is anywhere from 60 to 120 days, or even as much as 180 days. It all depends on where the utility happens to be located. And the TVA's first idea, as I recall, was maintain a 90-day supply.

Now that may vary, down to 60 instead of 90. I just wouldn't know.

Q. Now Mr. Smith, going to another subject, have you prepared a chart showing the annual consumption of coal

in tons by the TVA for the TVA fiscal years ending 1956 through 1959? A. Yes.

2854 (Exhibit No. 166 was marked for identification.)

* * * * * * * * * * *

Q. From what source did you obtain the information shown on this chart, Mr. Smith? A. Oh, from a book that the National Coal Association gets out annually that is based on Federal Power Commission records. I mean, the actual source is Federal Power Commission records which are a matter of public record.

All utilities report their burn to the Federal Power Commission. I believe the TVA issues an annual fiscal year report and the same figures, I am sure, are in those.

* * * * * * * * * * *

2855 Q. Now would you explain what this chart shows, Mr. Smith? A. Well, it shows the burn of each plant, each steam plant of the Tennessee Valley Authority system on the fiscal year basis ending with June 30 of those respective years.

The burn, you can call that consumption — I mean it is the actual coal that went through the plant and was converted to electricity or ash or all the rest of it.

Q. In other words, this was the coal that the TVA used at these various plants in generating electricity; is that right? A. That is right, the individual plants.

Q. Not what they bought but what they used. A. What they actually burned.

Q. Incidentally, I believe the TVA fiscal year ends on June 30? A. That is right.

Q. So the 1956 year would cover the period from June 30, 1955 through June 30, 1956; is that correct? A. That is right.

Q. And so on for the other years. A. That is cor-

2856 rect.

Q. I believe that this exhibit shows the consumption of coal regardless of whether it is term coal or spot

coal? A. Oh, yes. It is just the burn. It doesn't matter how it got there. It is coal that was burned in the plant.

Mr. Rayson: Your Honor, if I may, I would like to read some of these figures to the jury and state our position with respect to them.

The Court: You may.

Mr. Rayson: I refer first to the figures pertaining to the Kingston plant in the third column from the righthand side of the chart.

You will note that in fiscal 1956, 4,290,000 tons of coal was burned. And 1957, 4,699,000 tons of coal was burned. 1958, 4,326,000; 1959, 4,334,000.

Then the Johnsonville and Colbert plants, you will note that the amount of coal burned, the total amount of coal burned in 1956, fiscal 1956 exceeded the amounts of coal burned in 1957 at each plant, and that the 1957 figures exceed the amount of coal burned in 1958.

In other words there was a declining picture at those two plants.

2857 You will note that at Shawnee the amount of coal consumed in 1956 was 4,481,000 tons; 1957, 4,793,000 tons; 1958, 4,849,000 tons.

By Mr. Rayson:

Q. Mr. Smith, I will ask you in connection with Shawnee if an enlargement was made to that steam plant at any time during that period? A. Shawnee steam plant; the last and 10th unit — it was a 10-unit plant built between — well, the first one came on the line in April 1953, and the last unit came on the line in October 1956.

Now the intervening, or the number 2, 3, 4, 5, 6, 7, 8, 9 came on at pretty regular intervals during that period.

Q. Let me ask you this, Mr. Smith, in the fiscal year 1957, in the early part of the fiscal year 1957, was increased equipment put into effect at Shawnee? A. Oh, yes.

Q. And that equipment if used would require a consumption of additional coal? A. Well, each unit wts, I believe, 135,000 KW, and a rule of thumb is about two or three —

about three tons of annual consumption per KW, so I would say the three tons, just one unit alone, would account for at least 300,000 tons in that fiscal year.

2858 Mr. Rayson: Of course, your Honor, we have introduced this exhibit in connection with the theory that by reason of the integrated operations of the TVA less coal would be consumed in the east if more coal was consumed in the west, and vice versa.

And we would point out, of course, that the only evidence on that is the statement this was a theoretical possibility on the part of Elmer Hill of the TVA.

Your Honor, we want to introduce this Exhibit 166 if we have not already done so.

The Court: All right.

(Exhibit No. 166 was filed.)

By Mr. Rayson:

Q. Mr. Smith, would you explain to us why coal companies would want to engage at certain times on the spot market, what factors might contribute to a coal company's desire to enter upon the TVA spot market? A. Well, there are great many different factors that might influence you to do it. For example, you may have in mind opening a new property. You drill it as best you can to try to find out as much as you can about it but you are not positive of the exact quality of the property you are going to be able to deliver. The only way to find out about your mining conditions actually is to get in there and mine.

2859 The spot market of the TVA offers an opportunity to really get in there and experiment temporarily and convince yourself whether you have a good property or not, whether it is an acceptable product. You can find out in a relatively short time. If you have not, why all you have done is spent the money to run the thing for a few months and you have learned that it is a lemon, and if it proves up satisfactory why then you got a basis for your long-range planning of your property and all that.

In other words, the spot market is not anything you would use for a permanent outlet for your coal. It is a temporary proposition.

Another thing, several mines screen out various sizes and perhaps they have a ready market for, say, 85 per cent of the various sizes production-wise that they produce.

Q. What are these screened out coals called? A. Well, it all depends. Some mines screen out what we call block and egg and nut, stoker nut, and carbon, which is a fine dust, from a quarter-inch down, or an eighth-inch down. It is the by-product of making double-screened stoker coal.

And some mines crush everything down and make just a stoker coal and carbon, but in order to make stoker
2860 coal, why they have got to make carbon because your stoker coal and domestic stoker, and even other stoker, is what we call double screened. It has a top size and has a bottom size, so the minus of that bottom size is the by-product of the operation of making stoker coal which is commonly called carbon.

As I say, if your mine is running along and maybe 85 or 90 per cent, maybe 95 per cent, of your coal is sold and this sort of by-product of the coal operation is hanging over your head, why the spot market offers the TVA, or any other spot market, offers an excellent opportunity to balance out your run, because most mines have no place to store that stuff or no reason to at the mines.

Q. Can you store coal indefinitely? A. Yes, you can store it indefinitely. But then you can't store it in railroad cars because pretty soon you have exceeded your car rate, or no bill rule as they call it, and you don't get any more cars.

A coal mine, in any given month, that has 85 per cent of its production sold on a satisfactory basis and has 15 per cent say, or 5 per cent, or 10 per cent, hanging over unsold, is happy to dump that on a spot market in order to balance out the operation and continue running.

Another thing, sometimes you have your coal sold under

contract or otherwise, anyway, satisfactorily sold
2861 something happens at the plant of your customer. Maybe a breakdown or something that he can't take the coal. As of today why you got it sold and maybe you think for a year ahead of time, certainly for a long period, and tomorrow he calls up and says such and such unit broke down, or something like that, and stop his shipments.
2862 And usually it is a temporary thing. It sometimes pays to take those shipments that you thought you already had sold, but you suddenly find out they are not sold and dump them on the spot market to maintain the continuity of your operation. Particularly, if it is an interruption, that your customer is of a temporary nature, which you usually find out. There are times when you have trouble on the railroad and there may be some embargoes in certain directions where your coal happens to move. Maybe it is sold in that direction and there is a flood or something and you can't ship it in that direction, even though it is sold. Rather than shut down, temporarily you might divert that coal to some spot market, either TVA or Duke Power, or wherever you can.

Q. Now, Mr. Smith, I take it that where it is possible to secure a term contract, that it is more preferable for a coal company to operate under a term contract than it is under a spot contract? A. Oh, I just — you asked my personal opinion and it is the practice of our company, by that I mean Inter-Mountain. We couldn't live — I don't see how anybody could live on a spot market for any length of time. The nature of a spot market is temporary. You can do anything on a temporary basis, but you can sure go broke in a hurry if you stretch it out very far.

2863 Q. What are the advantages of a term contract to the coal operator? A. Well, under a term contract, you know where you are going. You know how much coal you have sold. You know when it is going to move. You can plan ahead. You can invest money in facilities to improve your operation and get greater productivity. Well,

if you know where you are going for a long period ahead of time, why you can plan accordingly. You can work out your property.

Q. With respect to the TVA market, what has been the comparison in price, on a normal basis — on an average basis, what has been the comparison in the price that the TVA has paid for term coal as compared to spot coal? A. Oh, on their evaluation theory, oh, I would say it runs maybe a cent and a half or two cents a million less.

Q. Less for which? A. Less for spot than for term coal. Now there have been times when that has varied more than that. There have been times back in '56, they paid the same thing for spot coal that they are willing to pay for term rate. That is typical emergency, and they were buying a good bit of that spot coal on account of suppliers who had fallen down on deliveries of term contracts.

Q. Would you explain why in the normal periods of
2864 time the term market commands a greater price than the spot market for coal? Well, the term market is that keeps you in business. You sort of figure what you can do with your property, what it is going to cost you to mine coal and what you are going to have to get for that coal to regain your investment and return a reasonable profit and, naturally, when you sign your name to that term contract, you are obligating yourself for a definite tonnage for a definite period of years and you pretty well want to know that you are getting a price that will return you your investment, plus a reasonable profit.

Q. In other words you have a greater responsibility, the coal operators, a greater responsibility on the term bid, is that right? A. Oh, yes, absolutely. I mean you are committing yourself for a period of years, you as an operator, or a period of months, usually a period of years.

Q. What is the commitment on a term contract — I mean a spot contract? A. A spot contract, under the TVA is 30 days. I mean you can take all sorts of chances on a 30 day basis, but you can't on a 30 year or even a one year basis.

Q. Now there has been introduced as an exhibit in this case Exhibit No. 104, listing a number of term con-
2865 tracts with the TVA, and I would like to hand the witness this exhibit, if I can find it.

Your Honor, this exhibit covers a number of different companies, not just the Consolidation or Inter-Mountain.

I would ask the witness if he would explain in general the contracts shown on this exhibit with which he was concerned. A. I beg your pardon. You are asking me —

Q. For example, does the contract shown under date of December 7, 1956, some eight or ten lines from the top of the page, for Inter-Mountain Coals, was that your contract? A. Yes. It appears there are two contracts, each for 5,000 tons per week. That was really one contract. We named two mines under which we obligated ourselves and obligated ourselves to a minimum of 5,000 tons weekly, but not more. We reserved the privilege of shipping from either mine, and the reason for putting it in that way was the quality of the two coals was different, and we had a different guaranteed analysis, but it was only a 5,000 ton a week contract.

Q. Whose mines were these? A. At that time they were, I believe, the mines of the Pocahontas Fuel Company. I believe that was before Pocahontas went into Con-
2866 solidation Coal Company.

Q. This exhibit shows the date of this contract or these contracts, their term in months, the amount per week to be supplied on the contract, the cost per million BTU's, and it also shows the average spot cost on the TVA market at that time. I will ask you how you came to bid on these contracts and how you arrived at the price at which you submitted this bid? A. Well, let's see. This was '56. We had opened up the Trimore mine in the spring of '56 on this experimental contract for 50,000 for six months. We had completed that. We had the mine in operation. We wanted to continue in operation at this particular time — that was in '56 — let's see now.

Yes. We were shipping about 25,000 tons a month, roughly, under a term contract to Georgia Power. And we wanted to keep this Trimore thing going and increase our production, so we put in this price, I mean this bid, and how we came about reaching the price, we figured that we needed the business and the producer figured the lowest possible price that he could afford to bid and still run a profitable operation. It developed in this particular instance that we were successful in an award — just as in many others that we had developed we were unsuccessful in using the same sort of figure.

2867 Q. Now I notice here on line 40 of this exhibit, under date of September 17, 1959, another sale for Inter-Mountain Coals is shown to the Kingston plant for a five year period for 5,000 tons a week at a price of roughly 22½ cents per million BTU's. Now from whose property was this coal to be shipped? A. That is from the Moreco mine of Consolidation Coal Company.

Q. Consolidation Coal Company had acquired this property in the meantime? A. Back there when I referred to the Trimore mine, it is the same thing. We call it Moreco.

Q. Well, these contracts that you show for December 1956, do you recall whether or not Consolidation Coal Company owned the property at that time? A. It is my recollection that Pocahontas Fuel owned it at that time.

Q. Was Pocahontas a subsidiary of Consodidation then? A. I don't believe so. I ought to know something about that.

Q. In any event, Consolidation owned the property in September of 1959? Consolidation. A. Yes, sure.

2868 Q. Now would you explain how you came to bid on that particular contract? A. Well, there were a lot of reasons on this. In the meantime— let's see — starting in, I believe January 1, '59, we had negotiated a ten year contract with another utility, with more or less stepped up tonnages through the years, which was satisfactory so far as we were concerned for the immediate de-

velopment of this particular property. We happened to be served by a short line railroad, known as the Tennessee Railroad, and during 1959 why there was considerable concern as to the continuation of that railroad's operation. In fact, they petitioned for abandonment permission.

Q. This is the railroad that serves these mines of Consolidation? A. Yes, sir, that is the only way we can get it out of there.

Q. In Anderson County. A. It is a short line railroad that runs — the terminus is just a mile or two beyond us, I believe at what they call Fork Mountain, Tennessee. And it runs up, oh, roughly 40 miles up to Oneida, Tennessee, where it connects with the CNO&TP or the Southern, but it is our only way of getting coal out of there. The trouble that the railroad was having was lack of revenue tonnage. We were well satisfied with the tonnage we were producing at our mine and had sold under a long term contract. But it wasn't enough, and at that time we were about the
2869 only property out there that was showing continuity of operation. In other words, the Tennessee Railroad knew they could get so many tons a day from us five days a week. These mines run all the time. Weather has no effect on them or anything else. But the Tennessee needed additional tonnage over and above what we were shipping under our existing contract to this private utility. So we went to that utility and attempted to determine from them if they were in position to increase their rate of shipment.

Q. What utility is that you are talking about? A. Georgia Power Company.

2870 Q. All right, go ahead. A. And they were not in position to increase the rate of shipment. They were equally concerned with the continuity of continued life of this railroad, because they were naturally interested in this basin of coal that we had to support this ten-year contract that we made with them. So we tried to find some other

way to increase the revenue freight available to the Tennessee Railroad.

So, the only way at the time seemed to be to bid on the TVA which we did, and we had been bidding off and on to the TVA, but with the thought in mind of trying to get some business, which really was additional business for this railroad.

Why, we put in that bid, and I believe we bid four dollars and five cents for the coal for a five--year basis, five thousand tons a week, and then — you want me to go on as to how we got the award and all of that?

Q. I don't think that is necessary. Let me ask you this, though. Was the continued operation of that railroad of rather vital importance to your property? A. Oh, of all importance. It was a question of — see, that is a right valuable basin of coal we have out there, and here we were obligated to Georgia Power on a ten-year basis, and figuring with them for other things and other people, and we just couldn't afford to lose the railroad.

2871 Q. Well, now — A. It was all important, and I think the TVA was concerned about it too, because it is a basin of long-term coal out there available to the TVA.

Q. In other words, it serves many mines other than yours? A. Oh, yes, there's several other mines out there.

Q. And, Mr. Smith, — A. And there's a lot of coal under the ground.

Q. What? A. And there's a lot of coal under the ground.

Q. Yes. A. That will be needed some day.

Q. Now, Mr. Smith, in connection with this contract that you negotiated, 1959, and all the other contracts that you made with the TVA, regardless of market and regardless of the person you were representing in such transaction, did you have any intention of bidding coal so as to damage or run out of business small operators in East Tennessee? A. No, sir, there was no reason for that at all. I think you

will find that the awards we have been awarded, and the awards that we have not been — I mean the bids upon which we have not received an award were awful high to show any indication of trying to run anybody out, because
2872 — I mean our bids are always based on what the operating department figured it cost them to mine a ton of coal and to recover their investment, plus a reasonable profit, and then —

Q. You did — A. We are happy to have competition. We just wish they would bid a little higher.

Q. Did you enter into any agreement with other companies? A. No, sir.

Q. To bid at a particular price? A. No.

Q. To TVA? A. No.

Q. Were you doing anything pursuant to any request or suggestion by the United Mine Workers? A. No, Lord, no.

Q. Did you have the final authority on the bids that were submitted to the TVA on behalf of Consolidation Coal? A. In effect. I mean, it had to have their final approval, but in every instance, why they have just gone right along with whatever I recommended.

Q. All right, Mr. Smith, I want to turn to another subject. Now — A. And incidentally, in all of these
2873 contracts, we appear as the prime contractor, Consolidation Coal Company. Prior to that Pocahontas Fuel Company is named as the producer supplying the coal. But we are the prime contractor. The bonds that have to be made that the TVA requires, performance bonds, and all of that are made in the name of Intermountain Coal.

Q. What sort of bond did you have to put up on that five-year contract, what amount of bond? A. Oh, Lord, what is it? Twenty — fifty cents a ton, I believe it is, on the first year's contract tonnage, and you have to — the bond is good for a year, and six months before the year expires, you have to renew it so it is always one year ahead.

Q. Do you recall what — A. In fact, I am renewing one this week.

Q. Do you recall what the full amount of the penalty of that bond would be? A. I believe it is fifty cents a ton. I'd rather look at the contract.

Q. Would that be roughly $130,000? Would that be about right? A. Yeah, I guess that's about right.

Q. Do you put up a private surety bond in a case like that? A. No, just do it through John Bailey. I've
2874 forgotten the name of the bonding company now.

Q. Do you know what it cost you to put up a bond of that size? A. Oh I think in the neighborhood of six, seven hundred dollars, something like that. I would have to look at my books to tell you exactly, but that is about my recollection.

Q. Are there any bonds required with respect to spot contracts? A. No.

Q. Now, Mr. Smith, I want to turn to another subject, and I would ask you if you would look at the chart which has been introduced before as Exhibit Number 147 —

* * * * * * * * * * *

Q. Mr. Smith, this chart has been introduced to show the various markets available for coal during the years 1940 through 1958.

* * * * * * * * * * *

2875 Q. If you will stand over here, please, sir. Now, looking at the period 1950, say, through 1958, I will ask you if the average national market which this chart undertakes to show, corresponds to the market existing during those years in the state of Tennessee?

* * * * * * * * * * *

Q. Are you able to say that the market which this photograph shows corresponds to the market which existed in the state of Tennessee?

In other words, did Tennessee in 1958 have roughly twenty-five per cent of its coal market for industrial coal, and so on, through coke, utility, retail, railroad? Could
2876 you explain whether the market in the state of Tennessee during that period corresponded to the aver-

age national market? A. No, I wouldn't think it corresponded to the average national market, because, for example, here is metallurgical coal, coke producers, goes into making coke, and I'd say Tennessee production during that period that went into coke making was practically nil. There was some small amount, but certainly not of the importance that it is on this national scale.

Q. What about the market in Tennessee for industrial coal during this period? A. I'd say it was possibly typical.

Q. All right, sir. And what about the market in Tennessee for utility coal, for steam coal? A. Well, I'd say that the utility graph there would spread out quite a bit on account — particularly in the later years on account of the big TVA burning.

Q. And would the market shown on this chart for retail be typical of that in Tennessee? A. Well, of the coal mined in Tennessee, a fairly representative portion of it has always moved to what we call domestic use.

Q. Is there any railroad market left in Tennessee? A. Are you talking about now or in 1950?

2877 Q. Well, take — A. As a matter of fact, on the charts that the Bureau of Mines now sends out, why just this month I believe they left off railroad fuel consumption as of no importance whatsoever.

* * * * * * * * * * *

Q. I want to ask you some questions, Mr. Smith, about the prices of coal on an average. First of all, I will ask you what coal, or what market rather, normally brings the lowest price for coal? A. Oh, the utility market.

Q. Now is that — is this generally true? A. Yes, pretty much so. They can burn most anything, some of them.

Q. Now are there differences in utilities? Do all utilities burn the same grade of coal? A. No. No, they have different specifications. For example, utilities located near mines and what not, such as the TVA, or with low transportation charges and with very modern and up-to-date

burning equipment, can burn most anything, and without added transportation charges, why it doesn't matter too much about the ash.

2878 Whereas, a utility, for example, in New England, where the freight transportation, or rather transportation charges, New England Utilities, most of the coal that they burn goes to Hampton Roads by rail and up the coast by boat, and my recollection is the rate to Hampton Roads goes, oh, at least three dollars and fifty or sixty cents a ton, and then you have got your transfer charge and boat transportation on top of that, so there is a lot of transportation involved.

For example, take New England Utility, when the coal gets there, and they would require a much higher, considerably higher quality coal. It's just the economics of the thing, and some —

Q. Is it accurate to say that while utility coals in general command the lowest price that there are different levels of prices according to the differences — A. Yes.

Q. — In utilities. A. Oh, yes, there are several utilities, for example, that won't burn coal over ten per cent ash.

Q. How much ash will TVA burn? A. Up to I believe it is sixteen per cent, and of course can burn above that and have by special adjustments and what not in price to compensate.

Q. Well, does the TVA then consume the most
2879 impure coals in comparison with other utilities? A. Well, yes. Yes.

Q. Are there any other utilities that compare with the TVA in this respect? A. Not as a system, no. I mean there may be some individual generating plant in one particular utility that is right at a mine mouth, and where the coal is just scooped up and thrown in the plant that might burn about the same as TVA, but by and large, as a system, why they have the widest specifications of any of them that I know.

2880 Q. What, on the average, would you say is the difference in the price —and I am speaking of f.o.b. mine price incidentally — what would the difference in a mine price for coal suitable for domestic purposes be as compared to coal sold to utilities?

In other words, the block and the egg that is separated from the other coal. How much more would that bring than utility coal? A. Well, you have got various qualities of domestic coal for example, but the best domestic coal from this producing district, District 8, why block sells up around eight or nine dollars a ton f.o.b. mine. And some of it sells down maybe as low as six, depending on the market. It is a seasonable market, and all that, and depending on the quality.

And your egg would sell from fifty cents to a dollar under the block, and your domestic stoker coal would be — depending on the quality of it. If it is purely domestic and all, that is what we call a premium domestic stoker coal, it would sell at the mine for around between six and seven dollars. Some of it a little higher than that.

Your acceptable commercial stoker coal is down in the five-dollar bracket, or something like that.

Q. In any event, there is about a two or three-dollar difference per ton f.o.b. mine in those grades of coal as
2881 compared to the utility coal? A. Yes.

Q. What about then a comparison of coal suitable for coke purposes, coke production, as compared to coal suitable for utility use? A. Well, that is a premium use. There isn't so much coal available. That is what we call of a metallurgical acceptance or grade.

Q. Will you explain what metallurgical coal is. A. Well, it is coal that goes into the ovens to be converted to coke for use in the manufacture of steel.

Q. What qualities must that coal have? A. Well, the number one importance is very, very low sulphur. I don't

know of any order that will permit you to ship above .5 or .6 sulphur. And the next thing is low ash. They usually require a maximum of certainly not over 5 or 5½ per cent ash.

And then something about the phos in the ash. My education is always on this classic and when you get into the chemical stuff it gets too much for me — but there is something to the phosphorus in the ash that is important. And the ash itself is important. Because this coal, of course it is coked and in coking it the volatile gases are all driven off and about all you have left is carbon and ash. So you start out with a 5 per cent ash coal and convert it to coke
2882 and you come up with probably a 10 or 11 per cent ash coke.

Another thing too, the coking quality of the coal. The way it does coke, the structure of the coke it makes, and all that.

We have what is known as a British swinging index that is a measure of that. And, for example, many of the coals around here are low coke button, and there are three or four, even if they are low sulphur, low ash, low phos, and low everything else, that they are low coke button, they still don't go into metallurgical market because they just don't make satisfactory coke either from the standpoint of structure or something like that.

Usually you would want about a coke button of around 8 per cent, a satisfactory coke making coal.

And another thing in making coke, frequently, and almost as a rule I would say, various types of coals are blended or frequently blended.

In other words, what we call a low volatile coal may be blended with a high volatile coal. Our coals down here are all high volatile and in southern West Virginia it is what we call — there is some what we call low volatile coal, and frequently they will blend it in the coke oven with a low volatile coal or medium or high volatile to come up with a

good coke that gives you good structure and all that.
2883 Lots of coals that perhaps satisfy each specification of sulphur, specification for coke button, the specification for some reason or other just don't blend where they have to go more on blend. And it all adds up to where you narrow down the available source of supply and naturally a metallurgical type coal demands a premium price.

Q. What price do you mean by "premium price" in comparison to utility coal? A. Oh, two or three dollars a ton higher, anyway.

Q. Is much of this metallurgical coal produced by commercial coal operators as opposed to captive coal operators? A. Yes. I think — yes, quite a bit of it is, but about — I believe the captive production of metallurgical coals— that is a matter of national record — must be around 20- or 25-million tons a year. The rest is commercial.

Q. What about the non-captive market of metallurgical coal, how much would it amount to? A. What about the difference there is between that 20- or 25-million and the national market for metallurgical coal?

Q. Do you know what the national market is for metallurgical coal? A. Normally, it ought to be around
2884 80- or 90-million tons a year. I can tell you what it has been for the first three months of this year.

Q. All right. A. Consumption — I got a figure here yesterday, I think. January 1 through the end of March, why there was 14,862,000 burned in the oven coke plants. For the same period of last year it was better than 25-million.

Normally, in a good year — it depends on steel production of course — a good year it can amount to as much as a hundred million tons, and this year it might run 60 or 60, I don't know.

Q. I want to go to the coals that are classified on this exhibit as industrial coals. How do those coals compare to utility coals? A. Well, normally, of course, there is a lot of coal that goes in the general industrial coal that also

goes to utilities, but there is a lot of coal that goes to utilities that would not go into the general industrial market.

The general industrial market includes small industrial plants, factories and all sorts of things like that. It includes some of the chemical industry that has certain specifications. It includes the cement industry, and all, and, of course, industrial customers depend on—or their in-
2885 dividual size plant determines the class coal they can use.

If you got a small plant the coal specification, the quality is much more rigid than a large plant.

Q. And what about a comparison of price f.o.b. mine of coals which would move to the industrial market as compared to coals which would move to the utility market? A. In the industrial market there is quite a tonnage of double screened coal. The same thing as stoker, an inch and a quarter by a quarter, that moves to the industrial market, which, of course, would go at a considerable higher price than would carbon or something like that.

There is a lot of industrial plants that can't use carbon. Usually it is the larger plant that can use carbon, which is our fine dust. A lot of industrial plants depend on their size for real coal burning.

For example, a plant that burns a couple of cars a week, their coal costs are not nearly as important to them in their final product or the final operation of the company as one that burns maybe ten cars a week, and so their plant and equipment, the burn equipment, might not be quite as broad in that it can burn almost anything the way a utility or the way even a big industrial plant can do.

So I would say that there are all sorts of good reasons why the general industrial market would be some-
2886 what above the utility market.

Q. Now Mr. Smith, would you know whether on an average strip mined coal would bring as much f.o.b. the mine as underground coal? A. I would say that strip mined coal would bring less than underground.

Q. Would you explain why that is. A. Well, there are several reasons for that. In some areas strip mining is just done for perhaps a particular utility situation that can use that type of coal, and were it not for a utility outlet for that type of coal that particular strip mine, or some of the strip mines, probably would not be open and so that is the only market it has.

And then, too, why particularly in this general area, very little, if any, effort is made to improve the quality of what strip coal is mined.

Q. What do you mean by improve the quality? How do you go about doing that? A. When you take the stuff out of the mine, or out of the strip pit or mine, you just take what you got and include the grass, tree roots, mud and rocks and slate and coal and several other things. To improve your final product, why you can screen that coal out and pass it over a picking table and pick by hand and get the leaves out, or you can have mechanical washers and do it all mechanically, and the net result is a net product
2887 that you bring forth, particularly where it is mechanically washed, which is a much higher grade product and not just the low grade mine run that you ship right from the pit.

* * * * * * * * * * *

2888 Mr. Rayson: Mr. Smith, I believe that we were talking just before recess about the difference on the average in the price of coal produced by strip mining as opposed to coal produced by other methods.

Now, your Honor, I would like at this point to call the attention of the Court and jury to Exhibit No. 116 filed in connection with the testimony of the witness John Amos. That witness referred to this booklet at page 9 and stated that for 1957 the national average price of coal was $5.08 a ton and that for 1958 the national average price of coal was $4.86 a ton.

On page 89 of this booklet, which is a Bureau of Mines

publication, there is a breakdown showing the national average prices, state by state, and total, for the different kinds of mining.

Now this again shows that the national average for all types of mining is $5.08 for the year 1957 and $4.86 for the year 1958. But with respect to strip mining, for 1957, instead of showing a national average of $5.08, the Bureau of Mines Publication shows a national average of $3.89.

2889 For 1958, instead of showing a national average of $4.86, it shows a national average for strip mining of $3.80.

* * * * * * * * * * *

May I introduce this particular page as the next exhibit.

(Exhibit No. 167 was marked for identification and filed.)

Mr. Rayson: That is page 89 of Exhibit 116, entitled "Coal—Bituminous and Lignite", on which are shown the figures for two years, 1957 and 1958.

In order for our position to be clear, we would state that we contend that the national average price may be considered only if it appears that the market price in Tennessee has a relevance to the national market. In other words, that it compares to the national market. We would say that the national average price may not be considered un-

2890 less the Tennessee market compares to the national market. However, if the national average price has any relevance, it is our position that the national average price for strip mined coal, which is the type of coal which Phillips Coal Company produced, is not the national average for all coal must be considered.

By Mr. Rayson:

Q. Mr. Smith, did you attend a meeting of the TVA directors with a number of men, including a representative of the United Mine Workers at some time in 1958? A. Yes.

Q. Would you state what transpired at this meeting, what the purpose of it was and so forth? A. Oh, it was mostly sort of a roundtable get together to exchange our respective gripes and to try to see if we couldn't get some constructive

reaction resulting from it. Most of it had to do with methods, procedures and stuff like that. A lot of people in the coal industry in a way had been beefing about TVA coal procurement policies and some of the people on the TVA had been beefing, I guess, about some of the coal producers' policies and whatnot. It was considered advantageous on the part of both interests, as I understand it, to sort of get together and let our hair down and talk across the table.

Q. Who was the representative present from the
2891 United Mine Workers, do you know? A. Mr. Widman.

Q. What was he saying there, if anything? A. He had very little to say. Appeared to be more as an observer. As I recall, the latter part of the meeting, the very last of the meeting, he made a rather general statement that there had been an awful lot of complaints at his membership level about TVA coal procurement policies and all that and he was there to sit across the table from the board of directors and the various people charged with the coal procurement for the TVA to hear their side of it as much as anything else, and also as a duly authorized representative to uphold the interest of his membership. His whole statement — and he just made the one statement, as I recall, more or less in generalities. They wanted to — his organization wanted to do anything that was within their power to assist the situation. It was mostly as an observer to determine what was going on and what the attitude of the TVA was.

Mr. Rayson: Cross examine.

CROSS EXAMINATION

By Mr. Rowntree:

Q. Mr. Smith, do you know whether or not Consolidation Coal Company acquired Pocahontas Fuel Company in 1953?

A. Consolidation Coal Company did not acquire them
2892 in 1953, as I recall it. In fact, I know they didn't.

Q. Pocahontas was acquired by Consolidation Coal Company some time before this merger? A. Oh, the whole thing was a merger. The Consolidation Coal Company

agreed to exchange its stock for Pocahontas Fuel Company. That thing happened along somewhere in the late '50's.

Q. I am talking about the control of Pocahontas. A. Pocahontas Fuel Company was an independent company, right up until the date of the merger.

Q. When was the merger? A. It was along in the late 50's. I couldn't tell you exactly. I ought to be able to, but I can't tell you. It is a matter of public record.

* * * * * * * * * *

A. But in 1953, Pocahontas Fuel Company was an independent company and Consolidation Coal Company had no interest in it whatsoever.

By Mr. Rowntree:

Q. In 1953, December, the mine in Anderson County was acquired by Pocahontas Fuel Company? A. I believe the deal went through December 15th or December 14, 1953.

Q. It was in that period of time that TVA was
2893 commencing its great expansions of TVA power plants? A. Oh, yes. Yes.

Q. Talking about the spot coal prices — I mean the strip coal prices, it is true that strip coal is sold on the basis of quality, the same as underground coal, in utility markets? A. Well, yes, all utilities, that is any of them that I know anything about, buy on the basis of cost per million BTU's. Some of them have a little different formula from the others, but in the end it is the same thing. It is the heat unit that is in the coal.

Q. I believe you indicated that strip coal quite often is bitten off out of the ground and gulped up by the machines, containing a lot of mud, debris and so on? A. That is true.

Q. And that would naturally lower its value with all of that debris in it? A. I would think so, unless something was done to get it out or improve it between there and where it was going to be used.

Q. Where is the great amount of strip coal mining done? Could you give us some idea? A. Oh, tonnage wise and all that, I would say through the middle west, Indiana, Illinois,

western Kentucky. There is some done in Alabama. There is quite a bit done in Pennsylvania now and Ohio, and
2894 west of the Mississippi River, Kansas — I believe Kansas, but I am not sure, Oklahoma, I know, and Arkansas, and Missouri, and Iowa. The big majority of it is in what we call the central western basin, the big production.

Q. Would you say as much as two-thirds of it is done in that basin? A. Just my offhand guess would be yes. I would think so.

The Court: Two-thirds of the nation?

Mr. Rowntree: Strip coal comes from the middle western basin, the coal field.

The Court: Two thirds of it?

The Witness: Of the total strip, that would be.

Mr. Rowntree: Two-thirds of the strip bituminous coal comes from this middle western basin, field of coal.

By Mr. Rowntree:

Q. In other words, I believe there are something like 116 million tons stripped? A. What is it now? 25 or 26 per cent, the total production I believe is the last figure.

Q. How much? A. I think it is around 25 or 26 per cent, isn't it?

2895 Q. Something like that. A. I can't remember these things. There are so many of them. That is my idea.

Q. About 25 per cent. A. It is all a matter of record. The Bureau of Mines gets those figures out every year.

The Court: Well, is there any figure, gentlemen, anywhere showing how the strip coal in Tennessee compares proportionately to the strip coal all over the nation? Are there any figures bearing on whether or not this average price as stated by the Bureau of Mines —

Mr. Rowntree: We could probably find one, but we say that price is depressed.

The Court: Sir?

Mr. Rowntree: We can probably find one, but we say

that price is depressed. That is the price we say is depressed.

The Court: Yes. But before it was depressed, as you say it was depressed, what the Court and jury are interested in is whether or not this average figure as established by the Bureau of Mines is applicable to Tennessee. Now that is the question.

Mr. Rayson: Your Honor, we brought out the national average price of strip mined coal in as much as Mr.
2896 Rowntree had brought out the national average price for all coals. We felt if you are going to use a national average, you ought to use a national average for the same kind of coal that Mr. Phillips was producing. On that same chart — as I said, the names of the states were obliterated in the Verifax process, but it shows the state by state breakdown of the average strip mine prices in each state It shows what it was in Tennessee for those two years.

Mr. Rowntree: We say we have to go to an earlier figure. I haven't gotten hold of an earlier figure.

Mr. Rayson: In answer to that, your Honor, we say that he used the same national average prices for those same years, except he wasn't referring to strip mined coal, he was referring to all kinds of coal, which, as the witness says and this book shows, was a much higher price on the average than strip mined coal.

Mr. Rowntree: Of course, we are saying that the national price was not depressed. The Tennessee price was depressed, and we have to now make an analysis of this national strip price with the national average price for all coal.

2897 The Court: As I understand it, you are claiming there as damages the difference between what you claim is the depressed price that your clients received in 1957 and 1958, and the average price of coal throughout the nation.

Mr. Rowntree: That's right.

The Court: That is to say you, hypothetically speaking,

you are claiming that the depressed price that your client received during those years was three dollars in round figures, and you are claiminig that the national average was $4.50 during those years, and the difference between three dollars and four dollars or $4.50 is your damage?

Mr. Rowntree: That's right.

The Court: Now, do I understand your theory?

Mr. Rowntree: That's correct.

The Court: Now what the Court and jury is trying to find out is what bearing, if any, does the national average price have in relation to the price of Tennessee during these two years, 1957 and '58.

Now, if you can throw light on that subject, then, of course, that should be done. I think you are hitting at it, but I think you may have to get a slide rule to figure it out the way you are hitting at it, and I don't know of any mathematician who can do that and use the slide rule.

2898 I know one that can't who is in the Courtroom.

Mr. Rayson: If Your Honor please, may we inquire of counsel if they are still insisting that the national average of all coals rather than the national average of strip mine coals has relevance in this case?

Mr. Rowntree: Yes, indeed, we certainly do. We see no other figure that can be used. We think that all other figures have imponderables that cannot be used to compare with the price that we got. That is our position.

Mr. Rayson: Your Honor, we objected to the use of the national average figure when it was introduced.

The Court: I know you did.

Mr. Rayson: And if Your Honor will recall, John Amos testified he didn't know what the national average figure was made up, and certainly if there are imponderables in the national average price for all coals, which would include strip, underground, and auger coal, there are more Certainly in order to make a comparison in the average

price in Tennessee and the average price in the nation, you have got to have something to compare.

2899 The Court: The market in Tennessee must be comparable to the national market.

Mr. Rayson: Exactly, and the type of mining in Tennessee must be comparable to the type of mining you are talking about on the national average market.

The Court: That's right.

Mr. Rowntree: And the quality of the coal must be comparable.

The Court: That's right.

Mr. Rayson: And the transportation and all these other factors.

The Court: That's right.

Mr. Rayson: They must be comparable.

The Court: That's right, those are relevant factors.

Mr. Rayson: I think the thing we are talking about here, and the thing that the cross plaintiffs' own exhibits show is that the national average price for strip mine coal was way below the national average price for all coal, and there are reasons for that as this witness has explained.

Mr. Rowntree: And we were starting to analyze that testimony, Your Honor.

The Court: All right, you may continue. Go

2900 ahead.

By Mr. Rowntree:

Q. And about two-thirds of the strip coal mined in the country does come from this midwestern basin of the coal fields? A. That would be my opinion now.

Q. And would you say that the East Tennessee coal is of better or lesser or poorer quality than the coal from the middle western basin? A. Are you talking about it in the ground or delivered to the customer?

Q. I am talking about underground. A. Well, underground, the Tennessee seams are what we call a stronger coal than the coals in the middle western basin. I mean it

all goes back to your pure fuel value, and that is ash and moisture free, and your Tennessee coals, most of them —

2901 By Mr. Rowntree:

Q. Mr. Smith, will you look at Exhibit 114, page five, and see on there what the BTU or quality of the coal, say, in Illinois is shown on there? A. Just any of these places up and down here?

Q. Well, take Illinois. A. Sir?

Q. Illinois coal would come largely from this midwestern basin? A. Well, your first section mostly shows Illinois origin coals.

Q. Yes, sir. A. And 10,299, 10,850 —

Q. I think there is a combined average. A. Oh, 10,971 is the average, and of course there is some in Kentucky and some Indiana coal mixed in that.

2902 Q. That is all from this midwestern basin? A. That's right, it is all from the middle western — well, now, let me see.

Q. That is ten thousand — A. Yeah, that's all from the middle western field.

Q. And what is it? A. 10,971, I believe it is.

Q. And that is coal from different part of that basin? A. Well, it seems to be mostly from Illinois, some from Indiana, and some from Kentucky, but more or less minor things.

Q. That would be western Kentucky? A. Western Kentucky, yes.

Q. And would you say that 10,971 BTU quality analysis would be representative of the coal of that middle western basin? A. No, sir.

Q. What would be a representative figure? A. Well, may I mention seams and such.

Q. Well — can you find — A. Because one seam —

Q. Can you find in that book there a representative figure as a combined total that would fit more easily your

opinion as to the proper analysis? A. Oh, I'd say
2903 — now you are referring to the whole of the strip area in Ohio, Indiana, Illinois, and western Kentucky.

Q. I want to compare that area generally, generally, with your experience. A. My experience there would be on a BTU basis from about eleven thousand up to, oh, twelve five.

Q. Can you find any coal in that book there in the middle western basin that is twelve five? A. I know there's plenty. The Washington Number Eleven in Kentucky will do that; Number Six Washington, Illinois, will do that.

Q. Is that — A. The Pittsburgh Number Eight in Ohio, which is a large strip tonnage, washed, will do that.

Q. Are these — A. I have bid in the past on those kind of guarantee for washed and stripped coal.

Q. Will you look in the book there, Mr. Smith, and see — you have already mentioned the qualitative analysis in illinois. A. Yes.

Q. 10,971. A. Yes.

The Court: Is that per pound?

2904 Mr. Rowntree: That's right.

The Witness: That is the average of the consumption of all Illinois utilities, I believe, isn't it?

By Mr. Rowntree:

Q. Yes, sir, and that would be representative, would it not, of the Illinois coal? A. Not altogether, I wouldn't think so. There's an awful lot of dust that is the result of the by product of the operation, particularly of the southern Illinois, of the Illinois stripping mines.

Q. Let me suggest — A. That will run down, I guess it won't run eight thousand BTU's or nine thousand BTU's, that is just dust.

Q. Yes, sir. A. And it is sizeable.

Q. And that is after screening? A. Sir?

Q. Is that after screenings? A. Well it is just — it is whatever is left over.

Q. Yes, sir. And that is called carbon? A. No, some of it is even worse than carbon. It is just fine dust. It is recovered. It's gone in the washing plant and been
2905 recovered. They try to squeeze every BTU they can out of this thing, and the reason why it is that low, in many instances on an as-received basis that includes the moisture, you know, that comes, and some of it runs fifteen to eighteen per cent moisture.

Q. And that is sold on the market, too? A. Oh, yes, TVA bought some of it.

Q. And that enters into this national average price? A. I would say it does.

Q. Yes, sir. And will you check one more state, check say Indiana, see what the BTU runs there? A. 11,247.

Q. 11,247? A. Yes.

Q. And that is another representative state of coals from the middle western basin? A. Pretty much so, I'd say, yeah.

* * * * * * * * * *

2906 Q. Mr. Smith, it doesn't make any difference to a consumer whether the coal comes from a stripping machine or from a continuous miner underground, so long as the quality of the coal is the same? A. Well, there's something besides quality as far as the consumer is concerned, it's reliability and responsibility of supply that enters in there too.

Q. The size of the company? A. I mean when the consumer buys his coal, why in addition to getting the quality that he expects to get, he also wants to get the service and the continuity of shipments and regularity of shipments, and also consistency of quality.

That all enters into the price at which he is willing to pay for coal.

Q. And this business and continuity and so on, has that resulted in many of the great utility markets being put under long-term contracts? A. I'd say that there are quite

a few long-term utility contracts for very good reasons. It costs — when you build an electric generating plant, it will cost from one hundred thirty to a hundred fifty dollars per KW, and you build a million KW plant, that is a hundred and fifty million dollars investment, which you don't have the money — I mean I am putting myself as a utility — and there's only one way you can get that
2907 money, and that is to float bonds or sell stock or something, or just short-term loans, but for a thing like that, it has to be a long-term loan which means you have to go to the investment bankers, and the rule of thumb on a thing like that, among the utilities, I'd say they are financed by bonded debt at least sixty per cent, and in many instances, as much as eighty or ninety per cent of the cost of that plant.

2908 Now those bonds, the utility just sells them to the investment banker. The utility does not sell them to the public. The investment banker in turn sells to the public, and the investment banker is naturally interested in those bonds he bought for sale. And while he can see this plant there that cost $150,000,000, the plant is of no use whatever unless there is a responsible, reliable source of supply behind that plant to produce the product that the plant is going to sell from which the utility will be able to make the interest and amortization payments on the bonds.

Q. And that is the reason — A. That is just good sound business.

Q. And that is the reason why many of the utility markets have been making these big long term contracts for their supply of coal? A. Well, that is one of the reasons, and the other thing, you know, every utility in itself is a controlled monopoly. They are the only ones that have protected areas and they have obligations to deliver power at such and such rates, and all that, and they have to know pretty well, or should know pretty well long range what the fuel cost is going to be and where the fuel is coming from.

. . . . . .

2910 Q. Would you have an opinion, Mr. Smith, as to whether or not, regardless of any labor contract, the policy or requirement of one of these large coal companies that you have these large term contracts with utilities, that would prevent that company from buying small company coal; do you have an opinion whether or not that would seriously hurt the small coal companies of the country? A. I just would not know about that, Mr. Rowntree. My experience in the companies I represent for the most part by and large, mine and ship their own coal, and that is it.

Now in our contracts we specify where the coal is coming from and who is producing it, and that is the contract.

Now as far as going outside and pulling someone else in it, I just don't know. I don't know too much about
2911 that.

Q. You are familiar with the fact, are you not, Mr. Smith? A. There is such thing being done. I don't know whether on the part of a large company or small company, or maybe Mr. Phillips did it for all I know. I have seen some of these TVA contracts where there are as many as ten or fifteen, in some instances as many as thirty, so-called subcontractors.

Q. Let's be specific about this now. Isn't it true, will you state whether or not it is true Consolidation Coal Company buys a lot of coal from other operating companies? A. I am not in a position to say that on the part of Consolidation Coal Company, because my connection with Consolidation Coal Company i exclusive sales agent for their properties down here, and to my certain knowledge they have only upon one occasion bought any outside coal down here. And that was when there was no bills on the railroad and they bought up about 15 or 20, maybe 30, cars of coal to fix up the car supply.

Q. That is in regard to a local contract? A. What?

Q. Was that with regard to a local contract? A. No.

There was one of the mines on the Tennessee Rail-
2912 road that was blocked out and the Tennessee Rail-
road car supply is rated by the Southern Railroad as one car supply.

In other words, at our mine we never had a no bill after we went back to work in '55. But there are other mines on the Tennessee Railroad that had what might be termed as no bills. Thta is coal loaded in the cars for which if it is sold they can't ship it or it isn't sold, they can't ship it, and when those no bills mount up to 25 per cent of the total Tennessee Railroad rating why the Southern Railroad, under I.C.C. rules, will not give the Tennessee Railroad any more empty cars.

So upon one occasion, why the Consolidation Coal Company took on, I believe 15 or 20 cars of coal that somebody else on the line had loaded to remove no bills. And incidentally, the quality of coal was such that we were very disappointed but we did maintain our car supply, and that is the only occasion — and even before Consolidation, Pocahontas Fuel Company, ran the mine.

Q. Mr. Smith, it is true, is it not, that Consolidation Coal Company has subsidiaries and affiliated companies that operate large loading facilities on the Great Lakes, transfer stations, coal selling agencies, that buy coal in considerable quantity, or did before 1959 at least, from other companies? A. Oh yes, yes.

2913 Q. Now — A. You are talking about Northwestern-Hanna and —

Q. That's right. A. — things like that. Surely.

Q. Now we have talked about these — A. You realize, of course, I am not an employee of Consolidation Coal Company.

Q. Sometimes it is hard to determine. A. I am their exclusive sales agent.

Q. Sometimes it is hard to differentiate, isn't it, Mr. Smith? A. I guess that is true.

Q. I notice a while ago you talked about when "we did do stripping at our mine out here at Trimore". You do very closely — A. You see, I negotiated the sale of those properties to Pocahontas Fuel Company and they have sort of left the sales responsibility to me. You did get the "we" in there, no doubt about it.

* * * * * * * * * * *

2915 By Mr. Rowntree:

Q. This contract that was made by Inter-Mountain Coal Sales, Mr. Smith, in 1956, December I believe — perhaps our exhibit was in error in mentioning two contracts, but we cannot distinguish it from the TVA award sheet. Will you look at that and say whether or not that does show two contracts for five thousand tons each?

* * * * * * * * * * *

A. (Continuing) There should be a sub-note by it some way. Wait a minute, let's see.

Here it is right here, right down at the bottom,
2916 the bottom note on the page. A total of 5,000 tons per week is to be delivered from Trimore and/or Moore.

Q. And/or Moore? A. One of them. The shipping point is the same, but one of them was from the Moore mine, which was the in existence. The other from the Trimore mine, and different analyses were bid on the two different mines, and we reserve the right to ship from either mine as we saw fit.

We did obligate ourselves to 5,000 tons per week and it was specifically stated that was the only obligation.

Q. Do you recall which mine that coal was shipped from? A. From both. It was started out with the idea of being shipped from Trimore, and, as a matter of fact we were delayed in getting that contract for two or three weeks because some of the people down at the TVA were wondering what our obligation was there and would we fulfill it because we named two sources.

The Court: Trimore is an Anderson County mine?

The Witness: These two mines were across the road from each other. They are in Anderson County.

. . . . . .

2917 A. (Continuing) And that we finally convinced them that despite the naming of the two sources it was a responsible contract, and we had a bitter experience in having to prove it in several weeks.

The motor at Trimore got off the incline and was down for two or three months and we had to ship everything from the Moore mine for weeks.

The Court: From the Moore mine?

A. (Continuing) We got back in operation, why most of it went from the Trimore mine then.

Q. And your price at one mine there in December, 1956 was $3.90, and at the other mine was $4.10. That the price at the mine. A. F.o.b. mine. I believe that is correct.

Q. And your price at the mine in your contract of 1959 was $4.05, is that correct? A. F.o.b. mine. I be-
2918 lieve that is correct, yes.

Q. Your price did not go down in this interval of 1956 to 1959? A. No.

Q. Talking about coal mines of Tennessee, Consolidation has only these two mines out there in Anderson County? A. That is right.

Q. And could you tell us what years those two mines were operating in this period since 1953? A. We acquired them in December, 1953, and we shut them down in, I believe it was June 30, 1954, and they were idle until July, 1955 when I negotiated a two year contract with Georgia Power.

We started back, oh, about July 7th, I think, of 1955, and just started Moore. We did not start Trimore and left it idle. And we ran Moore. The contract was for two years, 300,000 tons annually, as I recall, and we ran Moore through 19— — wait a minute. Let me get some figures. When I

get back on these dates I will be saying 1943 and 1955, and I want to be sure.

2919 Well, let's see. We reopened — Moore just ran from then on. In fact, never missed a work day until they worked out in April, I believe, of '59.

We reopened Trimore in April of '56 with that experimental thing that I was telling you about with TVA with a mechanical miner, and just a six months or 50,000 tons trial run to see how it worked out.

Q. How did it work? A. It didn't.

Q. What was the trouble? A. Well, we just had conditions there just not satisfactory for that particular miner and it so happened that we have been pretty successful with Joy loaders and buggies anyway. Crews more accustomed to that type of mining.

Q. How thick a seam do you have? A. In the Moore mine, think it averaged — of course, it has worked out now — it averaged pretty close to 60 inches, I think, 55 or 60 inches. In Trimore, we are averaging in the neighborhood of 44 inches, I would say. When I say we, I don't mean that I am, Consolidation Coal Company. That is the way it is. Then we made that contract with TVA in December of '56, so we kept Trimore running through '57. That was a 13 month contract. It was December 1st, '56 through the calendar year 1957.

Q. Let me ask, was Trimore operating in '59? A.

2920 We started it—well, let me see when we started it. It produced 2,400 tons yesterday. Trimore started back in operation in May of 1959. In fact, all the coal we have produced has been from the Trimore operation since then. Moore worked out last April.

Q. How much coal did Consolidation produce out there in '59, do you know? A. In 1959?

Q. Yes, sir. A. Wait a minute. Let's see. 225,136.40 tons.

Q. How much? A. 225,136.40. Now that may vary a few tons. That is what we sold.

Q. That is one of the Class 2 mines in Tennessee? A. What is that?

Q. Is that a Class 2 mine? A. When you get into this Class 1 and Class 2, I don't know too much about that, because I am altogether with sales.

Q. I believe the records of the Bureau of Mines show that Tennessee has five Class 2 mines. Would you say that this is one of them? A. If it has to do with tonnage, I would certainly think so.

Mr. Rowntree: I believe that is 200,000 to 500,000

2921 Mr. Combs: Yes, that is right.

By Mr. Rowntree:

Q. Do you know what the other Class 2 mines of Tennessee are? A. When, now?

Q. Say in 1959. A. In '59, I would say Bessemer Coal, Iron & Land Mine at Windrock.

Q. Is that mine in operation now? A. Yes, so far as I know it is, yes. And Pittston-Clinchfield Meadowcreek mine out at Monterey.

Q. What is the name of that mine? A. Meadowcreek I believe they refer to it.

Q. That is Pittston? A. Pittston and Clinchfield Coal Companies. Let's see, that is three of them. I don't know whether Kentucky Ridge, I don't whether that is listed in Tennessee or Kentucky. I believe it is listed in Kentucky. It is a member of our oSuthern Appalachian Coal Operators Association. I sometimes confuse it. I believe Tennessee Products had a mine. What did they call it? Reelco or something like that. It is possibly still there.

Q. Is that still in operation or do you know? A. I don't know. I imagine it is. I don't get into that field too

2922 much.

Mr. Kramer: It is operating.

By Mr. Rowntree:

Q. What about Tennessee Consolidated? A. Whether Tennessee Consolidated had a mine in '59 I don't recall or

not. They had a mine — I would think if it was running, it would have produced about that.

Q. Now we have talked about these steam plants over here and where the coal comes from or can come from. Is it not true that the Clinchfield of Pittston Company is located at Monterey, Monterey, Tennessee? A. Yes.

Q. About where would that be? A. It is almost due east from the Kingston plant. It is not very far out there: Crossville, or some place out there in that general area.

Q. It is say half-way between Crossville and Cookeville? A. I would have to look at the map.

Mr. Rayson: We will agree to that.

The Court: Monterey is 100 miles from Nashville. That is what the marker shows on the road.

By Mr. Rowntree:

Q. That would put it about half-way between Nashville and Knoxville, wouldn't it? A. About that.

2923 Q. That Pittston mine at Monterey has been a big shipper to the John Sevier plant, has it not? A. No indeed. It has been a major shipper to the Kingston plant. It doesn't even have a rate to John Sevier. You are thinking of — well, you are thinking of a Virginia operation that goes to John Sevier.

Mr. Kramer: Speak a little louder.

A. Meadowcreek couldn't possibly go to John Sevier. Doesn't have a rate up there.

By Mr. Rowntree:

Q. Well, the Pittston Company does sell a lot of coal to John Sevier? A. Yes, from some of their Virginia properties.

2924 Q. Isn't it true that they have taken over two-thirds of the coal selling to the John Sevier plant? A. No, I wouldn't think so. Stonega Coal Company, General Coal Company has a contract there now.

Q. Do you recall — A. That shouldn't represent — they have got a right fairly substantial contract there.

Q. Do you recall that Pittston Company made two contracts with TVA in 1959, each for 10,000 tons a week for the John Sevier plant? A. I recall one for 10,000 tons a week. I don't recall the second one. I know they made a second one at a later date. I didn't believe it was, or I don't believe it was for another 10,000. I think it was for 5 or 6. I may have been mistaken. All I did was just look at it and try to keep track of what the competition was doing.

Q. We refer here to Exhibit 82, 10,000 tons per week contract, Pittston-Clinchfield. A. Is that for 18 months or 12 months?

Q. That is 18 months. A. That was the first one. I see you have it here in this exhibit. I am sure they made another one. I don't recall the tonnage.

Q. A 10,000 ton contract per week would be 520,000 tons a year? A. Yes.

2925 Q. If there are two of them, that would be a million tons or a little over? A. Yes, surely.

. . . . . .

Q. The first one was dated March 6, 1959, 10,000 tons per week. A. That is right.

Q. The next one is dated May 28, 1959, for 10,000 tons per week. A. Yes.

Q. So that makes a total of 1,040,000 tons a year? A. About that, yes.

Q. And the plant consumed around one million and a half tons per year? A. Yes, roughly.

Q. So Pittston was supplying two-thirds of the plant requirements of the John Sevier plant? A. As of that particular time, yes.

Q. Now is it not true that the rail rates are a

2926 flexible thing, particularly with a government market? A. Well, rail rates, they are open to negotiation. You have got the volume of traffic — for example, my job of selling is as much trying to negotiate rate

reductions as it is selling coal. They are not as flexible as I would like to have them.

Q. Those things change quite often? A. Oh, yes, they change.

Q. Isn't it true that west Kentucky coal now has a freight rate to the furthest TVA steam plant down at Watts Bar that makes the west Kentucky coal competitive with the Tennessee coal?

Mr. Rayson: If your Honor please, we object to that. We don't think it has any relevancy whatsoever. The West Kentucky Coal Company does not set the rail rates. They are set by the Interstate Commerce Commission.

The Court: Overruled.

A. What was that?

By Mr. Rowntree:

Q. Isn't it true that west Kentucky now has a competitive rail rate to the farthest TVA steam plant at Widows Creek?

A. I believe they have. I think they have got a rate 2927 down there.

Q. Isn't it true, Mr. Smith — A. Just how competitive with what now?

Q. Competitive with the Tennessee coal. A. Competitive with the southern Tennessee coal, yes.

Q. Well, if it is competitive with the southern Tennessee coal, well, it is certainly competitive — A. As far as our Tennessee mines up here are concerned, we have never shipped a pound of coal to Widows Creek and I don't think ever will.

Q. I am talking about west Kentucky and the Tennessee coal. A. But you are talking about where west Kentucky is competitive with Tennessee coal, and I am telling you that with certain Tennessee coals, it is not, they just don't move down there. If you are talking about southern Tennessee, I agree.

Q. Southern Tennessee was supplying Widows Creek, is that right? A. And still is.

Q. Isn't it true that on the last bid award of TVA that the west Kentucky supplier came out with more than half of the award? A. You mean for the overall system?

2928 Q. For Widows Creek. A. For Widow's Creek?

Q. Yes, sir. A. I wouldn't know. That may be so. It is all a matter of record. Now whether it was awarded to Widows Creek, I don't know.

Q. Well, this coal can really hit most anywhere,

2929 can't it? A. Not most anywhere, no. It can go —

Q. It can go to the fartherest plant, can't it, from West Kentucky? A. It can go to Widow's Creek on a certain basis. I mean that rate is what — what is that rate, a dollar forty-five, isn't it, that they named down there, and I think your minimum rail rate from the southern Tennessee mines is around sixty, sixty-five cents, something about like that. From western Kentucky mines $1.40, and from the southern Tennessee mines, $.60.

* * * * * * * * * *

Q. I believe I was talking about the furtherest plant. I think one plant, John Sevier over here, is further.

2930 A. Well, Kingston and John Sevier. Kingston is further, too.

Q. Well, we could take a divider on it. I am not sure, those three may be in a circle. If a circle was drawn around the west Kentucky field, those three plants — Widow's Creek, Watts Bar and Kingston — might hit on the circle, wouldn't they, pretty close? A. If you just draw a circle, I don't know, frankly, but we always considered Kingston and John Sevier as much farther than Widow's Creek.

* * * * * * * * * *

Q. What contract are you talking about now? A. This John Sevier-Pittston-Clinchfield that you brought

2931 up.

Q. Now what about the contract? A. There was a period in there when the TVA at John Sevier did not take Southern Railroad coal because of an argument over some of the details in the Section 22 quotations.

Q. Well, arguments come up in business all the time, don't they? A. That's right.

Mr. Rowntree: All right.

Mr. Kramer: When you say "Southern Railroad coal", you mean delivered by Southern?

The Witness: All of it is delivered by Southern, I mean Southern Railroad origin.

. . . . . .

2932 By Mr. Rowntree:

Q. The Consolidation Coal Company was selling its coal to TVA on these contracts we have been talking about for around four dollars a ton? A. I beg your pardon?

Q. Around four dollars a ton? A. Well, this current contract is at $4.05 a ton, which Consolidation —

Q. And it is — A. It is Consolidation's Coal, yes.

Q. And those earlier contracts, term contracts were $3.90 and $4.10? A. Well —

Q. In that vicinity? A. I believe so, either that or
2933 it might have been $3.90 and $4.20, and of course, that was Pocahontas Fuel Company as a company at that time.

Q. Would you say, Mr. Smith, that the price of TVA coal was depressed in comparison with utility steam coal in other parts of the country? A. As of the present time?

Q. In the period of 1956 through 1958. A. Yes, and no. Now I guess for the country as a whole, why perhaps so, and yet other privately owned utilities were — some in the Carolinas were paying about the same price as TVA.

Q. Would you compare it with the midwestern market? A. With the midwestern utility market?

Q. Yes, sir. A. Well, my opinion would be it was somewhat depressed as compared to that market, yes.

Q. It was what? A. Somewhat depressed as compared with that market.

Q. Yes, sir. A. It's pretty hard to tell. It's all based on

cost per mile delivered, and the FOB mine price is a little different on that.

2934 Q. The price of four dollars, or approximately four dollars, I believe you state a while ago, on direct examination, that you entered your bid at the lowest price that you could and make a profit? A. Well, that was our reasoning on the thing.

Q. Yes, sir. Is it not true that Consolidation Coal Company makes its profit from — I mean substantial profits in other mines in other parts of the country? A. Oh, yes, I am sure this is a very minor part of it.

Q. And it has some large mines — in what states does it have mines? A. Oh, as I recall, it has some in Ohio and Pennsylvania and — I don't believe it has any in east Kentucky any more, but I know it has them in Ohio and Pennsylvania, West Virginia.

Q. So it is relatively unimportant how much of a profit you make on the local operation here for Consolidation? A. Well, not the way they talk to me. It may be, but —

Q. But you did enter your price at the lowest amount you could and still live, with a profit? A. Well, on good business principles, give a reasonable return on the property

2935 and all of that. You know they don't hire sales agencies to lose money.

Q. What? A. They don't hire sales agencies to lose money, and so I am one hundred per cent a sales agency, so if my producer doesn't profit, I am out of business in a very short time.

Q. But you did enter a bid at the lowest price that you could and live, at a profit? A. Yes, at a reasonable profit.

Q. You stated there were certain reasons for a demand on the spot coal market at Kingston in 1956. Will you state when the units at Kingston, the generating units were completed? A. May I refer to my notes on that?

Q. Yes, sir. A. So I can give you the — the ninth one, I believe went on in December of '55. Now there may have

been a little delay, they had a little trouble with number two and number three, I think.

Q. Was that one of the big ones? A. Yes, the last five were the big ones. The first four were the small ones.

Q. When was the one before that? A. The first one went on in February of '54, and they followed each other with a degree of regularity right up to December '55. I
2936 couldn't give you the exact dates.

Q. So it was in December, 1955, the month just before 1956 that this market had fully developed? A. So far as the burning — the plant was completed, as I understand it December '55.

The Court: That was which one?

The Witness: Kingston.

Mr. Rowntree: Kingston Steam Plant.

By Mr. Rowntree:

Q. I believe that you stated, Mr. Smith, that it is impossible to live solely off of the spot coal market? A. Well, that is my opinion, yes, sir.

Q. Now the spot coal market is a sizeable market, is it not? A. In the case of the TVA, and I presume that is what you are talking about.

Q. Yes, sir. A. It is rather a large tonnage, but in relationship to their overall purchases, why I'd say it would run maybe twenty, twenty-five per cent of their total purchases.

Q. And that is substantial — A. It may not run that high. Sometimes it is below that.

Q. That is quite substantial tonnage? A. In tonnages out of a total burn of twenty million tons, why, what is
2937 it? Five, isn't it?

Q. Five. Five million. A. Yes.

Q. And a coal producer producing twenty-five thousand to thirty-five thousand tons a year would have an ample market to ship coal into? A. Oh, yes, I mean you can — they can go down there and bid every Thursday.

Q. So when you say you can't live off of the spot market alone, you are really talking about the price on the spot coal market? A. Yeah, I mean spot in itself means a temporary thing and involves a lot of distress coal and matters of convenience and things like that.

Q. And is it not true that the spot coal market offers an opportunity to experiment with new mines? A. Oh, yes. Yes.

Q. And it enables a company opening up a mine to experiment and then make its long-term plans later on? A. Oh, yes. Yes, indeed. That is one of the reasons for the spot coal market, as I understand.

Q. And it would be an ideal market for a small company starting up business to experiment on it? A. It certainly would. It would give them an idea of its quality and some idea of what its operating conditions are.

2938 Q. And is it not true that a small coal company would risk considerable hazards in entering into a long-term contract with limited financial resources, a term contract that would make demands month after month for a period of several months or even years? A. Well, of course that would depend on the quality of coal he has, how much coal he has under lease, and all of that.

Q. And whether he has financial resources to back up any periods of shutdown and what not? A. Oh, yes. Yes.

Q. And therefore is not the spot coal market a very vital market for small coal companies in the Tennessee Valley? A. I think they have used it as such. It would appear to be that way.

Q. And is it not true that a good way to hurt small companies or run them out of business in the Tennessee Valley would be to beat the spot market price down? A. Well, not necessarily. The spot market is designed as a matter of convenience to take distress coal off of the market, and whenever you have got a situation like that, the price is sort of secondary.

Q. Well, of course, any market — A. I mean it is
2939 a convenience to the operator, it is a convenience to the TVA, because they are able to get coal that temporarily can't go somewhere else on a better realization, and if they get in a pinch like they did in '56, why they can just go out and buy coal on the spot market even if it costs them quite a bit.

Q. Of course, any market likes to buy cheap coal, distress coal? A. Oh, yes. Yes, sure.

Q. But a spot market would be ideally designed to accommodate the opening up of a new mine or for a small mine to operate upon? A. For a temporary period to find out what he had, yes.

Q. Give it time to grow? A. I don't know about that. It all depends on how much time you are talking about again.

Q. Again it depends on price? A. Well, I mean you can't expect too much in the way of price from a spot market.

Q. Why is that? A. From the nature of the thing itself. It is a spot market, involves distress coal, convenience coal, to get rid of it in a hurry and and all of that, and I mean normally a man that is selling something on the spot
2940 market doing it in a hurry to get rid of a temporary inconvenience or temporary problem.

Q. And also it is subject to people dumping coal on that market at low prices. A. Well, I mean any time that you have distress coal — we call it dump coal — that you sell on the spot market.

Q. The coal from the west Kentucky field has long been committed to the public utility markets of the middlewest, is that right, before TVA generating systems? A.
2941 No, not so much so. You see, the west Kenaucky — western Kentucky coal field was mort or less an orphan field for years and years. Wherever they went with the coal they had no home market, and wherever they went they had to leap over another coal field to get to the consumer which meant that they had transportation charges

to their disadvantage. And up until, along in the early '40's, I believe, why most of western Kentucky coal mines produced what we call raw coal, which was of much lower quality than they could produce after they put in these modern washing plants, and all that.

Starting in the early 40's, why they improved their product, their ultimate product. It has actually been by the installation of mechanical washers, and everything like that. And from about the early '40s on, why it got more and more important in the utility market particularly through the middle west. Prior to that there were a lot of utilities wouldn't use it because I used to have to sell some of it.

Q. And the coal from west Kentucky was being sold extensively in the midd estern market? A. Yes, yes.

Q. And that coal — A. Up and down the Mississippi Valley most of it.

2942 Q. And that market has held up well, has it not, Mr. Smith, the middle western utility market? A. Yes, I would think so. I haven't been active in that particular market the last few years, but as far as I know it has.

* * * * * * * * * *

Q. Is it not true that the western Kentucky coal, rather than being thrown in the middle western market to
2943 depress that market, has been thrown into the TVA market and has contributed to the depression of that market? A. As far as contributing to the depression of that market, I can't say, but as a practical measure of the distress spot coal they have had, West Kentucky, I would say a greater part has gone into the TVA market than the other market.

Because, frankly, the TVA spot market buys coal every Thursday of every week and makes awards every Friday. The middle western general market, why some of them buy maybe once a month, some of them don't buy at all. And there has been, I would say, distress spot coal from the western Kentucky coal fields sold to, shall we say northern

utilities or middle west utilities just as it has been to the TVA, but my guess would be that a greater volume has been sold to the TVA because it is a much more convenient place —I mean, particularly for the fellow who is in the sales business.

Q. Now, Mr. Smith, please look now at Exhibit 113, page 90, and will you look under the east south central section there and state what states are included in the east south central region. A. Do you mind if I refer to the index? Would they have somebody read it to me?

2944 Q. I think that page and the preceding page will show the states. A. The east south central would be Kentucky, Tennessee, Alabama, Mississippi. That is it, isn't it?

Q. That is Kentucky — A. Kentucky, Tennessee, Alabama —

Q. And Mississippi. A. And Mississippi.

Q. Now how much coal did Mississippi consume on utility steam coal in 1958?

Mr. Kramer: What page of that exhibit?

Mr. Rowntree: That is page 90.

A. Page 90. None, isn't it? Let's see.

Q. Look at '57. I think — A. '57? I don't see any here. I don't know.

Q. Is there — A. I am not sure just how they have got this particular thing. Is this the fuel units, thousands coal? Well, 4,000.

Q. Four thousand tons. So it is relatively insignificant with respect to the region as a whole? A. Oh, yes, very much so.

Q. And will you look at the east south central and see — that is the accumulated average for east south central — and see what the average cost per ton was in 1958?

2945 A. 1958 for coal, $4.61, it looks like.

Q. $4.61. A. That is correct.

Q. That is really the area covered by the TVA system,

is that not right? A. Let's see. Kentucky and Tennessee and Alabama. I would think so, yes.

Q. That is $4.61 cost for 1958? A. 1958.

Q. And there are some coal producing regions in that area, Kentucky, Tennessee and Alabama; right? A. Oh, yes, yes. All except Mississippi.

Q. And will you turn the pages this way and look for the east north central area. A. Yes. I was seeing where it said east north central continued, that is the way it started.

Q. Will you look there and state what states are contained in that region. A. Ohio, Indiana, Illinois, Michigan, Wisconsin — that is it.

* * * * * * * * * * * *

2946 Q. There are large coal producing states involved in that region, too? A. Well, Ohio, Indiana and Illinois. Michigan at one time produced some coal but doesn't any longer. Three of them are coal producers.

Q. Ohio, Indiana and Illinois? A. That is right.

Q. Produce considerable more coal than Tennessee does, for instance? A. Ohio and Illinois, I think. Now, about Indiana, I have forgotten. I think they are right — they are all matters of public record there. I don't want to appear dumber than I am.

Yes, Indiana produces — yes, they produce more than Tennessee. I just want to make sure of that.

Q. We refer to the total tons produced in 1958 from Exhibit 116: Indiana, 1958, 16,149,000, as compared to Tennessee, 7,052,000. Illinois, 45,932,000. Ohio, 37,869,000.

Now will you look at the east north central average cost for the period 1958. A. $6 it says here.

Q. And that is compared with $4.61 in the TVA region?

* * * * * * * * * * * *

2947 Q. Is that right? A. Yes.

Q. $6 compared to $4.61 in the TVA region? A. Yes. Those, of course, are delivered costs in both instances, I believe, are they not?

* * * * * * * * * * * *

Q. They have quite a bit of water transportation in the middle west, do they not? A. They have quite a bit, but even in that case the charges are much lower than they are down here.

Q. Well — A. I mean your barge rates are lower down here than they are up there. You can handle much larger tows down here on the river, handle these jumbo barges and all that. So the transportation charges for the east north central, all of which have gone into these figures, are
2948 considerably higher than for whatever the other one was that refers to this thing down here.

Q. Well, they have the Great Lakes system, too, don't they, to transport on? A. Yes, but the Great Lakes, there is no coal mine on the Great Lakes. It costs a good bit of money to get the coal to the Great Lakes before you put them on the boats up there. It is a right substantial rate. I guess the rate from — you are talking about the western Kentucky coal field to Chicago for trans-shipment by boat is probably two or three times what our rate from our mine to Kingston is. That is before it gets on the boat. Then you have a vessel rate on top of that, if you are taking it up through the Great Lakes.

Q. Well, we have variations in transportation in our region and they have variations in their region, but both regions are coal producing regions? A. Yes.

Q. And is it not true, Mr. Smith, that rail rates in the south have been disadvantageous to the southern producers as compared to the northern producers? A. No, I wouldn't say that.

Mr. Rowntree: That is all.

REDIRECT EXAMINATION

By Mr. Rayson:

Q. Mr. Smith, do you recall what the rail rate from
2949 the west Kentucky fields to Widows Creek was prior to its reduction in 1959? A. No, I wouldn't. I presume there was one down there.

Q. Would a reduction of about a dollar on the ton sound approximately correct to you? A. You mean this new $1.45 rate, does that represent a reduction of a dollar a ton?

Q. That is right. A. I would say at least that, yes.

Q. Would the present rate of $1.45 from the west Kentucky field to Widows Creek — in other words, looking at Exhibit 145 from a place marked "West Kentucky Fields" and Widow's Creek, do the southern Tennessee mines still have a freight advantage? A. Oh, yes. I think the minimum rate there is 60 cents, so they have about 85 cents, and they also have a quality advantage.

Q. So even discounting the quality advantage of the southern Tennessee mines, the fields in west Kentucky, the mines in west Kentucky are something in the order of an 80 cents disadvantage over the mines in southern Tennessee? A. That is right.

Q. Now you spoke of the Clinchfield mines in Virginia serving John Sevier. Do you know where those
2950 Clinchfield mines in Virginia are located? A. Yes, they are located at Carbo.

Q. Where? A. Carbo, Virginia on the N & W Railroad.

Q. Is that in the western part of Virginia? A. It is in what we call southwestern Virginia.

Q. This part of Virginia to which I am pointing (indicating)? A. Yes, right up in there. Yes, over near the Kentucky line.

Mr. Rayson: I will mark "Clinchfield" on the map, your Honor.

The Court: Yes, sir.

By Mr. Rayson:

Q. Do you have any idea what the rates are from the Clinchfield mines to John Sevier? A. One dollar — from Carbo, I believe it is a dollar — $1.57½, I believe. Now that may be $1.54½, but it was originally $1.47½ and a 10 cent increase. I believe it is $1.57½.

Q. Is it because of that freight rate that these mines

here are competitive with John Sevier? A. Yes. The minimum freight rate to John Sevier as of the present time is $1.35. That is off Southern Railroad mines and off the Interstate Railroad in southwest Virginia and the
2951 same general area as the Clinchfield mines. For example, the mines in Campbell County, why the current freight rate to John Sevier is $1.45, I believe, 10 cents above the minimum.

Q. While we are talking about rail rates, do you know whether the Harlan or Hazard, Kentucky fields were competitive in the TVA market say prior to 1959? A. Well, the L & N put in some rates to Harriman, I believe, back in around '55, 1955 some time, with the idea of the coal moving to Harriman as the TVA owns a facility there for transshipment from car to barge. They ran a little barge movement. I think that Harriman facility can handle up to 40 or 50 tons a month and the TVA evaluated that barge movement, I believe, then at 50 cents a ton or maybe it was 45 cents a ton, so that the L & N rates, that is from Harlan, L & N, Jellico, but not Hazard, could move to Harriman at about 45 to 50 cents a ton above the Southern Railroad rates down there.

2952 Q. Well, now, has the Hazard Field become — A. Well, the —

Q. — part of the competitive situation in TVA presently? A. Yes, sir, and they cited these — this present TVA contract which was awarded in May and September to the Kingston Steam Plant, and the day those bids were open, why the L&N Railroad named a rate from the Hazard Field which we had never had before, named a rate of $2.04.

In the meantime, why the L&N had arranged with the Tennessee Central to switch this coal coming to Harriman to the Kingston Steam Plant rather than have them ship it by barge. As long as it had to be shipped by barge, the limit of L&N origin tonnage to Kingston was maximum fifty

thousand tons a month. After they arranged this switching arrangement with Tennessee Central to take the coal from Harriman to Emory Gap, the Kingston shipping point, of course they could bring in anything they wished, and the date those bids were opened, why just before the bid opening, the L&N announced this Hazard rate down there of $2.04 which incidentally has since been reduced to $2.02.

Q. Now you are referring to the bids which were submitted by the Kentucky Oak Coal Company in September and October of 1959? A. Yes, particularly in Sep-
2953 tember. That was the first one.

Q. That was it? A. It was in requisition 27.

Q. And I think — I believe you are looking at the contract shown on Exhibit 104? A. That's right.

Q. And you say that at the time that the first of these two bids by Kentucky Oak was submitted that the L&N reduced the rail rates to Kingston, is that right? A. That first bid there, the day those bids were open, about five minutes before the bids were opened, the reduction of the Hazard rate or the naming of the Hazard rate was announced.

Q. And how much was the reduction? A. Well, it was so much — I don't think there even was a Hazard rate down there.

Q, I see. Well, would the — under the prior conditions, would the Kentucky Oak bid have been competitive? A. Oh, no. No, indeed. The thing that made it competitive is this Section 22 freight rate quotation of $2.04.

Q. Now, you mentioned the Monterey coal fields. I think that we previously identified their location as midway between Knoxville and Nashville at about the "K" of the Kingston Steam Plant. How far is the Monterey
2954 field from the Kingston Steam plant? A. Oh, my guess is forty, fifty miles. I don't know to tell you the truth.

Q. Is that on a direct rail route? A. Tennessee Central.

Q. Do you know what the rate is from that mine to King-

ston? A. No, let's see, I think it is $.93. It may be $.92. I have forgotten whether that was seventeen or eighteen. They used to be twenty-eight.

Q. Do you have any idea what the rail rates are from the western Kentucky field over to Kingston? A. No, I mean they are so high that I never have paid much attention. In trying to figure out where West Kentucky would be competitively speaking at Kingston, why I have usually figured the transportation charges through Grand River and then to barge around the river.

Q. Do you know if there is a railroad that goes from west Kentucky — direct route? A. Oh, yes, the IC connects with the TC at Hopkinsville. IC serves west Kentucky, and so there would be a rail route down there.

Q. But even with that the rate would not permit competition? A. Oh, whatever the rate is, I mean if we in
2955 the East got up so high, you know, there is always — you can always get high enough to let competition come in from somewhere else, but as a normal thing, no.

Mr. Rayson: No further questions.

RE CROSS EXAMINATION

By Mr. Rowntree:

Q. This Kentucky Oak contract, that was a good sized contract, wasn't it? A. Yes, sir.

Q. That was — A. Eighty-five hundred tons, I believe, the first one.

Q. Eighty-five a week for ten years? A. Yes.

Q. And there was another one, too, was there not? A. There was what?

Q. Another contract? A. I believe in the next TVA requisition or bid opening, they bid additional — you say here four thousand. I think that is correct. My recollection is they have got about twelve thousand five hundred tons a week moving into there.

The Court: What is the date of that eighty-five
2956 hundred tons a week?

Mr. Rowntree: September 17, 1959, Your Honor.

Testimony of T. J. Hoffman

The Court: All right. What is the date of that other one?

Mr. Rowntree: October 30, 1959.

The Court: For how much?

Mr. Rowntree: Four thousand tons a week.

By Mr. Rowntree:

Q. So that is twelve thousand five hundred tons coming in each week from Kentucky Oak Coal Company by reason of this freight reduction? A. That's right.

Q. Announced five minutes— A. In other words, that whole producing area up there had no rates to Kingston prior to that L&N freight reduction and special Section 22 rate.

* * * * * * * * * * *

T. J. HOFFMAN

a witness called by and in behalf of the Cross Defendants,

* * * * * * * * * * *

2959

DIRECT EXAMINATION

By Mr. Rayson:

Q. Would you state your name, please? A. T. J. Hoffman, H-O-F-F-M-A-N.

Q. Where do you live, Mr. Hoffman? A. Business address, Madisonville, Kentucky.

2960 Q. And what is your employment? A. Employed by the West Kentucky Coal Company.

Q. What is your position with that company? A. Vice-president.

Q. May I ask your age, Mr. Hoffman? A. Seventy.

Q. How long have you been with West Kentucky Coal Company? A. Since September, 1909 with exception of 1917 and '18 when I was with the U. S. armed forces.

* * * * * * * * * * *

2961 Q. Do you recall when you became sales manager?

A. Well, no, sir, I don't know exactly, but I served about 25 years, then I was elected a vice-president in 1936.

Q. Have you been a vice-president since then? A. Yes, sir.

Q. Have you continued to have responsibility for sales as a vice-president of the company? A. Well, as well as other activities.

Q. Have you had the responsibility for any particular area of sales? A. No particular area, only in a general way other than TVA.

Q. Have you sold coal to the TVA as an employee of the West Kentucky Coal Company? A. Yes, sir.

Q. Have you continued to look after its sales to the TVA? A. Yes, sir, I have.

Q. Do you hold any other offices or position other than as vice-president of West Kentucky Coal Company? A. Well, I am chairman of the board of Kentucky Coal Agency, Madisonville, Kentucky. And I am a member of the National Coal Association traffic committee, Washington, D. C.

* * * * * * * * * * *

2962 Q. When did you first sell coal to the TVA? A. In 1944.

Q. What was the occasion of that sale to the TVA? A. Well, after soliciting an order for some time they finally gave me an order for coal for delivery in a barge at Caseyville, Kentucky. A. L. Metling Barge Line did the towing.

Q. Did your company barge coal at that time as well as ship coal by rail? A. No, sir, we did not. We had barges but we had no motive power.

Q. You had no what? A. No motive power.

Q. Before we go further with the questions of the witness, I want you to identify the location of West Kentucky on our map here. A. Yes, sir.

Q. I am speaking of West Kentucky Coal Company, Mr. Hoffman. Can you see where I am pointing on this map? A. Yes, I do.

Q. I am pointing to Exhibit No. 145. Is this little
2963 nook in the river here the location, generally, of West Kentucky Coal Company mines? A. That is right.

Q. In this general area here? A. That is right. The Uniontown mine is located in Union County on the Ohio River. It is seven miles from Morganfield, and the property in Hopkins and Muhlenberg County is about 85 miles from Paducah, Kentucky and 60 miles from Evansville, Indiana.

Q. Is the Uniontown mile also in this area marked on the map? A. That is right. Right on the Ohio River.

Q. Did you make any other sales to the TVA in the 1940s other than this contract that you worked out with them in 1944? A. Yes, sir.

Q. Did you sell very large quantities of coal to them? A. Well, I would say made sales to them that were very satisfactory as well as a rather small percentage of my company's total output.

Q. Do you recall the amount of the contract in 1944? A. I believe that was about 250,000 tons a year.

Q. Was that over an extended period of time? A.

2964 Yes, sir, it was.

Q. Now Mr. Hoffman, have you prepared a table of the sales of coal that your company has made, in round numbers, to the TVA from 1952 through 1959? A. Yes, sir.

Mr. Rayson: We would like to introduce that as our next Exhibit, your Honor.

(Exhibit No. 168 was marked for identification and filed.)

Mr. Rayson: May I say, your Honor, that the figures shown in the lefthand column under "TVA Total Receipts" indicates the amount of the tonnage of coal TVA received in those calendar years as testified to by Mr. Elmer Hill.

He did not testify as to the 1952 or 1953 and TVA records are on a fiscal year basis so we were unable to show that.

By Mr. Rayson:

Q. Now are the tons shown in the middle column there under "Shipped by West Kentucky and Nashville" the total tonnage that your company shipped to TVA during the year shown on the extreme lefthand column? A. It is.

Q. Does that include the tonnage you shipped to TVA both on term contracts and spot contracts, Mr. Hoffman? A. Yes, sir.

2965

Q. Now starting with the year 1953, could you explain to us the amount of coal shown to have been shipped to TVA in that year? Will you explain the amount that was shipped on term contracts and the amount that was shipped on spot orders. A. 1953 there were 425,980 tons shipped on term contract, and 60,000 tons shipped on spot contracts. 1954 —

Q. Before you go further, Mr. Hoffman, does that indicate that your company obtained term contracts for 425,000 tons that year? Does that mean that term contracts obtained in previous years were being fulfilled in that year, or does it mean it was a combination of both? A. It was a combination of both.

Q. All right. Now in 1954 your sales to the TVA went up by approximately 300,000 tons — 330,000 tons. Would you explain the term and spot breakdown of that tonnage. A. There was a million fifty thousand tons on a term contract for 36 months, and that goes back to the year — well, that is not 1954 although that includes coal from Uniontown and we did not take over that property until October 1, 1955. That was a portion of the Nashville Coal property.

Q. And is it your testimony then that this 978,000 tons figure shown for 1954 includes a tonnage shipped by Nashville Coal Company? A. A contract that was in existence — a 36-months contract that we took over when we took over the property.

2966

Q. You took over the Nashville Coal Company in the latter part of 1955, I believe. A. That is correct; yes, sir. And there was 110,000 tons on spot — 110,500.

Q. What was the situation in 1955? A. In 1955 we sold on term 195,000 tons over a 30-month period.

Q. Did you have several term contracts —

Mr. Rowntree: I didn't hear the answer.

Q. —you were shipping on in 1955? A. Yes, from different mines.

. . . . . .

A. (Continuing) That is from Pleasant View mine. In other words, we made several term contracts. Another 252,000 for 21 months, and another for 120,000 for 14 months.

Q. Mr. Hoffman, would you speak a little louder. I think the jury is having difficulty hearing you. A. Yes. 104,000 for 12 months; 117,000 for 18 months, and 228,300 for
2967 18 months. And during that period for spot we sold 93,000 tons.

Q. What percentage of the TVA market were your sales in 1955? A. 1955 it was 8 per cent — 9 per cent.

Q. Nine per cent? A. Yes, sir.

Q. And in the preceding year. I believe you have computed that to be 9.6 per cent, is that right? A. Yes, sir, that is right.

Q. Now in 1956 did you sell any spot coal to the TVA? A. We sold no spot coal but we made two term contracts. One for 468,000 tons for 36 months; one for 234,000 tons for 36 months.

Q. So it was the shipments on these contracts and term contracts you had in previous years which made up your total of 1,511,000 to TVA in 1956; is that correct? A. That is correct; yes, sir.

Q. Now does that include a tonnage from the Nashville Coal Company contract? A. Yes, sir, it includes all tonnages.

Q. Do you know how much that was on a yearly basis? A. You mean from Nashville?

2968 Q. Yes. A. Well, only that portion of it that was carried through from previous years where there was a long term contract.

Q. Now you have testified that the Nashville Coal Company which you acquired in 1955, had a contract with the

TVA calling for a million fifty thousand tons over a three-year period. A. That is correct. It expired in 1957.

2969 Q. And this was a contract which your company inherited when you acquired the Nashville Coal Company, is that correct? A. Yes, sir, that is so.

Q. Is the tonnage indicated by that Nashville Coal Company contract indicated in the 1955 and '56 figures? A. Yes, sir, it is.

Q. Is the Nashville Coal Company the company that was owned by Justin Potter prior to your acquisition of it? A. Yes, and associates. I don't know that he was the sole owner.

Q. All right. What —.

The Court: Where were their mines located at that time?

* * * * * * * * * * *

The Witness: Western Kentucky, adjacent to our property.

The Court: How many mines did they have?

The Witness: At that time they had about five mines.

The Court: All right.

By Mr. Rayson:

Q. The Uniontown mine to which you referred was

2970 a Nashville Coal Company mine, was it not? A. That is right. But Nashville Coal Company's charter was surrendered when we obtained the property to the State of Tennessee. It was a Tennessee corporation. Then the Nashville Coal, Inc. was created which is a Kentucky corporation and which is a wholly owned subsidiary of West Kentucky Coal Company.

Q. All right, sir. What percentage of the TVA market did West Kentucky Coal Company and Nashville Coal Company have in 1956? A. 7.4 per cent.

Q. Now in 1957 what was your total tonnage to the TVA? A. 963,384 tons.

Q. Did your company have a number of contracts which came — with TVA, which came to an end in that year? A. Yes, it did.

Q. Did the Nashville Coal Company contract which you had inherited from the Justin Potter company terminate during that year? A. Yes, it did.

Q. Do you recall when that terminated? A. I think along about June.

Q. And what was then the amount of this 963,000 tons which you sold to the TVA which was on a spot
2971 order basis? A. In 1957, there was 313,000 tons.

Q. So in 1956, whereas you had orders to the TVA for approximately a million and a half tons, all on a term basis, in 1957 you had term orders with the TVA for approximately 600,000 tons and the balance of your tonnage to TVA was on the spot order market, is that correct? A. That is correct. I was unable to continue the Uniontown contract after its expiration on a term basis.

Q. I see. Now what percentage of the TVA market did your 1957 sales to TVA represent? A. 4.9 per cent.

Q. Now in 1958 this chart indicates that your sales to the TVA increased slightly, 1,094,396 tons, is that correct? A. That is correct, yes, sir.

Q. And what part of that tonnage constituted the sale of coal on term contracts to the TVA and what part constituted the sale on the spot contract basis? A. Well, there was 624,000 tons sold from rail mines on a 36 months basis. 936,000 tons sold for delivery over 24 months from the Uniontown mine.

Q. Those tonnages were not all delivered in 1957, were they? A. No, sir.

2972 Q. Or '58? A. The rail commitment was for 36 months and the river commitment was for 24 months.

Q. What were your spot contracts to the TVA, total spot contracts to the TVA in 1958? A. 198,000 tons.

Q. So the difference between 198,000 and the 1,094,000 would be the coal which you sold TVA on a term basis? A. Yes, sir, that is right.

Q. In 1959, your sales to the TVA were 1,336,870 tons and how much of that was on a spot order basis? A. 1959, spot order basis was 10,000 tons.

Q. And what percentage of the TVA market did that represent? A. Represented 7.5 per cent.

Q. Now, Mr. Hoffman, in these sales shown on Exhibit 168, the paper that we are looking at, where were these shipments of coal by your company, that is either West Kentucky or the Nashville Coal, Inc., after you acquired it, to what plants of the TVA were these shipments of coal? A. All of these shipments went to the Shawnee plant at Paducah, Kentucky, the Johnsonville plant at Johnsonville, Tennessee, and the Colbert plant at Colbert, Alabama. Colbert had no rail connection. They were entirely dependent on water movement of coal from western Kentucky.

2973 We made no deliveries of coal whatsoever to Widows Creek, either rail or water, none to John Sevier, none to Kingston.

Q. Pointing to your mines in west Kentucky, and I take it Uniontown is in this little circle, too? A. Yes.

Q. Can you see it all right from there? A. Yes, sir.

Q. Would you tell us the water distance from the Uniontown mine to the Shawnee plant? A. Yes, sir, I can give you that. I can give it to you to all these plants. The distance from Uniontown to Shawnee by water, statute miles, is 112. To Johnsonville is 129½ miles. Colbert, 337 miles. Widows Creek, 500 miles. Kingston, 663 miles.

Q. Now does your company, West Kentucky Coal Company, own its own barging equipment now? A. Yes, we do.

Q. And does it have any other mine from which it barges coal other than Uniontown? A. No, sir, no other one.

Q. Is it feasible for your company to barge coal from its Uniontown mine to Widows Creek or to Kingston? A. No, it is not.

Q. Would you explain why it is not feasible? A. Well,

the Widows Creek plant has a rail rate of $1.55 from
2974 west Kentucky and it was a much lower rate from the Tennessee mines and also receives quantities of coal by truck from Tennessee mines. The Kingston plant has $1.10 rate from the Tennessee mines and it is obvious—

Q. What Tennessee mines are you referring to when you say — A. I am talking about mines on the Southern Railroad.

Q. You mean the mines in east Tennessee? A. Yes.

Q. Are there any practical obstacles to your barging coal to these? A. Yes, there is in addition to that, it is impractical for us to proceed up the Tennessee River to Widows Creek or Kingston for the reason when we pass Wilson Lock we encounter small locks. They are 360 feet long by 60 feet wide. One of these barges is 195 by 35 by 12, and the vessel is 147 feet long, so you just can't do it.

Q. In other words, you just can't get them through the locks there in order to barge coal up to these plants, is that correct? A. That is right. We could get through there one barge at a time and take the boat through separately, but it would be an expensive operation. It is just not a practical operation.

2975 Q. Do you know what your rail rates are from west Kentucky over to the Kingston plant? A. Kingston plant?

Q. Yes. A. Yes, sir. It is $3.20 a ton on the Illinois Central only. We have never shipped any coal there.

Q. Can you compete with mines in the area of east Tennessee with that rail rate? A. No, sir, impossible. You can't compete with a $3.20 rate against a rate of $1.10.

Q. What about your rate to John Sevier from west Kentucky? A. We have no rate to John Sevier.

Q. In other words, you can't — A. You can't get up thereby water and you can't get up there — it is above Knoxville, at Rogersville, Tennessee.

Q. What is your rail rate from your west Kentucky mines to Shawnee, Johnsville and the other steam plants in the

western division? A. Our rate to Shawnee is 99 cents. The minimum rate to Johnsonville is through Grand Rivers, rail and barge movement, which we do not participate in. But the rail rate from west Kentucky mine to Grand Rivers is 94 cents. There is a 13 cents dumping charge at Grand Rivers and a 16 cents barging rate, making a total of
2976 $1.23 to Johnsville. At Colbert, we have no rail rates and the movement there would be through Grand Rivers again, 94 cents. And there is a 13 cents dumping charge and 62 cents barging rate, $1.69.

Q. Now are your mines competitive to those areas with those rail rates? A. Yes, we could move coal by rail on that basis.

Q. The Court asked you a few minutes ago of the mines you acquired from Nashville Coal Company. How many mines did you acquire? A. I think it was about five.

Q. How many mines did your company have before that? A. We had four.

Q. Were they all in this west Kentucky area? A. Yes, they were.

Q. Now have you had to close any of these mines during the '50's? A. Yes, we have.

Q. Would you explain which mines that you have closed and why you closed them? A. Well, we opened up a mine named Atkinson in 1952. It was closed in 1957. We were unable to sell the coal.

Q. What sort of an investment does that represent,
2977 opening a mine of the type of mine that Atkinson was? A. What investment?

Q. Yes. What does it cost to open a mine like that? A. Well, that mine cost about a million and a half dollars, but it was not thoroughly equipped. It had no washing plant. It had no dryers and only had a two track tipple.

A modern mine like Uniontown will cost you 7 million dollars, or a mine like Pleasantview, where it is fully equipped with five tracks, all modern equipment including washing plants and dryers. It is a different amount, depending

on what you are trying to accomplish. In this particular case, that mine was opened up primarily to sell steam coal to public utilities and we had hoped that we could sell a substantial quantity of that coal to the TVA but we were unable to do so. After struggling with the mine for a few years, we closed it.

Q. All right, what other mines have you closed? A. Well, we closed the East Diamond in December 23, 1960. Closed Heckla mine —

Q. Why did you close your East Diamond mine? A. We closed the East Diamond mine because we worked out the No. 11. That is we didn't thoroughly work out the No. 11 — we still have some coal there, but it was not eco-
2978 nomical to continue on the No. 11 coal which is pri-
marily a coal for stoker trade, domestic stoker trade.
2979 Why we closed it although we had tremendous acreage of Number Nine coal only eighty-eight feet beneath the Number 11. That mine was a modern mine, it was equipped with all the modern conveniences, including washing plant, bue we were unable to niterest anyone in buying the Number Nine coal.

Q. You mentioned one other mine, I believe, that you said you closed. A. Well, we closed the Hecla April the 10th, 1954.

Q. And what brought that about? A. Same thing. We worked out Number 11, were unable to sell the Number Nine.

. . . . . .

Q. And now when you close a mine like that, I suppose you take the machinery out of it, do you not? A. Well, not in every case. Most of the time you do because you can't— for any protracted period, you can't hold a mine idle. It fills up with water, in west Kentucky at least, and to pump it out — we have a situation like that right now with a mine we call East Diamond, that I just mentioned. We could go down to the Number Nine coal there, and we are pump-

ing that mine, but we figure it will cost us a million
2980 dollars to keep that mine pumped out to go down to the Number Nine coal.

Q. If you don't do that though, can you go back to that mine at a later time? A. Yes. The question is whether it is more economical to continue pumping the mine intermittently or just abandon it and then sink a new shaft.

Q. Now have you — are you still in operation at the other mines that you had and acquired from Nashville? A. Yes, we are, with the exception of Kirk Mine and Stony Point. We closed the Kirk Mine July 31, 1959, and we closed Stony Point January the 8th, '57.

A mine called Pleasant View, which is one of the West Kentucky mines was closed February, 1959, and reopened October the 14th, '59, after we were successful in selling the TVA contract for 850,000 tons of coal a year for ten years. In that case we kept that mine on a stand-by basis.

Q. Now, Mr. Hoffman, have you prepared an exhibit showing the various bids that you made to the TVA from the Uniontown Mine on the TVA spot market? A. Yes, I have that.

Mr. Rayson: May we file this as our next exhibit, Your Honor?

The Court: Yes, sir.

2981 (Exhibit No. 169 was marked for identification and filed.)

* * * * * * * * * * *

Mr. Rayson: It may save time, Your Honor, if I stated what the exhibit shows.

* * * * * * * * * * *

Mr. Rayson: This exhibit shows each bid made from the West Kentucky Coal Company's Uniontown Mine, shown on the large yellow paper introduced by the Phillips Brothers Coal Company as an exhibit in their part of the case.

It shows each bid made, the amount of tonnage that was

contemplated under the bid, whether or not an award was made.

In most instances, and where available, it shows the tonnage price at which West Kentucky submitted the bid, and then under TVA Plant Evaluation, it shows the figure at which the TVA evaluated West Kentucky Coal Company's bids as per million BTU's for the Colbert Steam Plant in many instances and for the Shawnee Plant in most
2982 instances.

By Mr. Rayson:

Q. Before going on with this, Mr. Hoffman, I would ask you when you bid coal from your Uniontown Mine to Shawnee, do you submit a delivered price bid? A. Yes, we do. We are a bulk carrier; we are not a common carrier, and we transport our own material.

Q. So you are interested then when you submit a bid from the Uniontown Mine in getting a contract which includes the cost of the transportation? In other words a contract which will enable you to use your transferring equipment? A. That's correct.

Q. Your barging equipment? A. That's correct.

Q. Now is the same thing true as far as the Colbert Plant is concerned? A. Yes, it is. Colbert cannot receive any rail coal from west Kentucky.

Q. Is there any advantage to the shipper such as you in shipping coal by barge rather than by rail? A. Well, only in this way. Uniontown mine has no rail connection. If you are going to sell coal from the Uniontown Mine, it would of necessity have to be water movement.

2983 Q. Well, apart from the Uniontown Mine, is it normally cheaper to barge coal than it is to transport coal by rail? A. Yes, it is.

Q. When you barge coal, is there a minimum amount of coal that you have got to barge in order to be economical in your barging costs? A. Well, yes, and again that primarily depends on the motor vessel. You can handle a smaller tonnage with a one thousand horsepower vessel

where you can't do it with a 3,200 horsepower boat, and I might say our equipment, we have two 3,200 horsepower motor vessels, and one 5,400 horsepower, and the minimum tonnage we should handle with those vessels is twenty thousand tons.

Q. I take it that sometimes you have to do less than that? A. Oh, yes, that's right.

Q. And sometimes you get more? A. That's right.

Q. You ship — you barge coal in flotillas of barges, a number of barges all hooked together? A. Yes. Yes, sir.

* * * * * * * * * *

2984 Q. Mr. Hoffman, prior to February 28, 1957, had you submitted any bids to the TVA spot market from the Uniontown Mine? A. We did not.

Q. What was your sales activity from the Uniontown Mine at that time? A. Well, it was on term.

Q. And was one of your term contracts with the TVA? A. That's right.

Q. And did you have term contracts elsewhere? A. Yes, we had contracts elsewhere.

Q. Now would you explain just exactly what you did in connection with the first bid shown on page one of Exhibit 169? A. Well, on February 26th, we submitted a bid offering 12,500 tons of Uniontown coal at a price of $4.75,

2985 delivered at Colbert.

Q. That is a delivered price? A. That's right.

Q. And the TVA evaluation was what? A. The TVA evaluation was .2180 per million BTU.

Q. Now were you awarded a contract on that — A. We were not.

Q. —bid? A. It was unsuccessful.

Q. Did you thereafter, on March 13, submit another bid? A. We did.

Q. Submit another bid in the same manner? A. Offered 12,500 at the same price, $4.75, and the evaluation was .2180.

Q. Now, looking at Footnote B, the Footnote B to your

bid of March 13, 1957, I note that the high successful bid on that occasion was evaluated by the TVA at .1837, roughly eighteen and a third cents per million BTU's. A. That's correct, yes, sir.

Mr. Rayson: I might say, Your Honor, that these figures shown in the footnotes, in fact all of the figures shown on this, are taken from the TVA bid award which have previously been introduced in evidence.

2986 By Mr. Rayson:

Q. Now, your bid was some nearly three cents per million BTU's higher than the high successful bid at that time? A. It was slightly over three cents.

Q. Yes. A. In money value, it equaled about eighty-five cents per ton of two thousand pounds.

Q. What does a cent per million BTU's, as a rule of thumb, represent to you in the terms of cents per ton? A. One cent per million BTU would be equal to twenty-five cents per ton in money.

Q. So in other words, your bid at that time was roughly eighty-five cents over the market, is that right? A. Over the successful bids, that's right.

Q. And I notice that you again on March 20th submitted a bid at the same price, that is $4.75 a ton, that you were again unsuccessful? A. That is correct.

2987 Q. Did you thereafter reduce your price? A. I did. $4.25.

Q. I notice that at that point the TVA evaluated price per million BTU was .1916. A. That si right.

Q. What was the high successful bid to the TVA on the occasion of that bid by West Kentucky Coal Company? A. That was on March 27th?

Q. Yes. A. The high successful bid was .1629.

The Court: Is that .1616?

Q. I believe it is .1829. A. .1829; that is right.

Q. And that would represent, according to your formula, roughly, about 40 cents over the market? A. Well, I figure about 32 cents.

Q. And did you continue bidding at the $4.25 price, Mr. Hoffman? A. Yes, I did.

Q. And how many more times did you continue at that price? A. Continued at that price up and including April 24th.

Q. And were you ever successful at that price? A. No.

Q. And did you thereafter again reduce your price
2988 on the TVA spot market? A. Yes, we did. We reduced the price to $3.70 and the bid was evaluated at Shawnee.

Q. I notice that the evaluation of the bid at Shawnee at that price in the bid of September 4, 1957 where no tonnage figure is shown, was at the evaluation price, evaluated BTU price of .1675 and that it was also evaluated at Colbert at .1804. A. That is correct.

Q. Is that the same coal? Was the same coal evaluated in each of those? A. Yes. Here is the practice of TVA on these spot invitations. They send out an invitation the latter part of the month specifying that they will accept spot offers of coal each week not later than Thursday, and they have the privilege of evaluating any coal offered to any plant they see fit.

So consequently, they can either evaluate it at Colbert or at Shawnee.

Q. Now would the difference in the price between the evaluation at Shawnee and Colbert represent the greater distance that you would have had to barge that coal? A. That is correct; yes, sir.

Q. I notice that you were unsuccessful on your September 4, 1957, bid. A. That is correct. We were 13
2989 cents high.

Q. What was the situation at your Uniontown plant in September with reference to sales? A. On September 27 we submitted a bid for 18,000 tons at $3.70 and we were the successful bidder. Our bid was the highest bid acceptable.

Q. That was the September 27 bid? A. That is right.

Q. And had you submitted a bid at the same price before at which you were unsuccessful? A. That is right, on September 18th.

Q. So your first successful bid on this list of bids is September 27, and at that time, according to Footnote J, the bid of West Kentucky Coal Company was the highest bid which TVA accepted? A. That is correct.

Q. Now in September why was West Kentucky Coal Company interested in submitting bids to the TVA spot market? A. Well, the reason for it was that we had lost some tonnage, particularly movement of coal under the Nashville Coal Company contract that we had acquired. And also we had —

Q. Is that the TVA contract that you inherited from Nashville Coal that called for 350,000 tons a year?

2990 A. That is correct; yes, sir.

Q. And was that coal going from the Uniontown mine to Shawnee plant of the TVA? A. It was going to the Colbert plant.

Q. Anyway it was coming from your Uniontown mine? A. That is right. They had the privilege of taking it to either plant that they wanted.

Q. Do you recall just when that contract expired? A. I think it expired in June, 1957.

Q. Had you lost any other business at that mine in the late summer of 1957? A. Yes. We had lost some business. We had moved some coal through Mount Vernon, Indiana by barge and rail to Chicago in connection with the C.N.I. Railroad.

Q. Had you lost that order insofar as the barge coal was concerned at Uniontown? A. Yes, we had lost that.

Q. Was there any other business you had lost from the Uniontown mine about that time? A. I don't recall offhand any business we lost other than the TVA and this movement through Mount Vernon.

Q. Had you shipped any coal to the Tampa Electric Company during the summer of 1957 or spring of 1957? A. Yes, we did. We shipped 118,000 tons.

2991 Q. Was that on a term contract or on a spot contract? A. That was spot contract.

Q. Were you in a position, or were you able to ship any more tonnage to Tampa in the fall of 1957? A. No, sir, we were unable to interest them in giving us an order.

Q. Had all the coal that you had shipped to Tampa come from your Uniontown mine? A. Yes, it was.

Q. And were these the reasons you were interested in bidding on the spot market of the TVA? A. Yes, sir.

Q. Why didn't you reduce your operation at the Uniontown mine or shut that mine down? A. Well, we did reduce the operation. That mine, when we acquired that mine, it was producing about 5,000 tons per day, and at this time it was producing 8,000 tons a day, so we did cut it back to three days a week.

Q. When did you do that? A. Well, along after we finished the movement of coal to TVA and to Tampa.

Q. You are referring to the TVA contract that expired in June? A. That is right.

2992 Q. All right. Following your successful bid in September at a price of $3.70, what did you do on the spot market? A. We continued offering coal but were unsuccessful.

Q. And at what price did you continue to offer coal? A. At the same price, $3.70 a ton.

The Court: Are all these prices on Exhibit 169, spot market?

Mr. Rayson: This entire Exhibit 169 is spot market bids which were successful and some of which were unsuccessful.

By Mr. Rayson:

Q. I notice that your first bid, after your successful bid of March 27, at $3.70 was evaluated at .1668, and at that

time am I correct in saying that the highest successful award was evaluated by TVA at .1641? A. That is correct.

Q. Now also in connection with that bid I notice that under "Tons" there is a figure "18-60,000". I wish you would explain what that means. A. Well, I had discovered that the TVA practice was to take the lowest price coal offered, and if the quota was completed and there was no room for the tonnage you offered then your bid was not ac-
2993 cepted. Consequently, I give them a spread of 18 to 60,000 tons hoping we would get sixty but if they could not award that amount of tonnage they would at least award 18,000.

Q. All right. I notice then, without going through each one, that you continued the $3.70 bid for three times unsuccessfully after your only successful bid prior to October 15, 1957. A. That is correct. In other words, I made twelve bids and eleven were unsuccessful and only one successful.

Q. Now then, on the first bid shown on page 2 of this exhibit, I note that you were awarded a spot contract for 18,000 tons again at the same price, $3.70. A. Yes, sir.

Q. I note also at that time that your evaluated price was .1649, which was a somewhat more favorable price to TVA than was your previous bid at which you also used the $3.70 figure. A. That is correct.

Q. Would you explain how the evaluated price to TVA was reduced? A. Well, the high successful bid was .1630.

Q. No, sir, I am referring to the first bid on page 2 of this exhibit. A. You are speaking about the one on
2994 October 25th?

Q. I am. A. Yes. That was evaluated at .1649.

Q. Why did the valuation of that bid change from .1668 to .1649 while your tonnage price remained the same? A. That was due to some change in the guaranteed analysis. You understand, that the money value here is merely a base. They compute your bid on the basis of heat value per million BTU for a cent. Consequently, if you change your

guaranteed analysis that would reflect in your cost per million BTU.

Q. What would cause you to change the guaranteed analysis? A. Well, we take samples and run analyses ourselves every day on these coal mines, and if we note the analysis is improveing then we step up the guarantee.

Q. Does the coal in your seams remain at a constant point as far as BTUs are concerned? A. No, they don't, that varies. You might be mining towards the crop and you might get into a wet room or two, and might get into what we call a horseback that would affect the quality of the coal.

Q. Now after that successful bid of October 25, 1957, I notice that you submitted two more bids at the same
2995 price on which you were unsuccessful? A. That is correct.

Q. So that in connection with the second of those bids, that is the bid of November 6th, 1957, your evaluated price was .1649 while the TVA evaluated price was .1630. A. That is correct.

Q. Now following those bids I note that you submitted two more bids again at the $3.70 price at which you were successful. A. Yes, sir.

Q. Now in connection with the first of those, I will ask you if your bid, that is the bid of November 15th, was the highest successful bid awarded by TVA at that time? A. It was.

Q. And I will ask you in connection with the second of those successful bids, that is the one of November 22, 1957, if there were other bids at Shawnee plant for less than yours? A. Yes, there were. We were the highest bidder.

Q. After those two successful bids I note that on November 26 and December 4, you again submitted a bid at the same price, $3.70 a ton, in which you were unsuccessful? A. That is correct.

Q. I note further that at that time that the eval-
2996 uated price of your bid was .1649, where as the high successful bidders were at .1626 and .1616 for the

two respective bids. A. That is so; yes, sir.

Q. Now I note on your bid of December 20, 1957
2997 that you reduced your price to $3.62. Would you explain why and how you arrived at that reduction of price? A. Well, I noticed under my bid of 12-4 where I was unsuccessful, that was eight cents a tons higher, so consequently on the next bid I made I reduced my price eight cents.

Q. In other words, you followed the market to what it had been on the previous successful bid of some other company? A. That is correct.

Q. Now after bidding successfully at $3.62, did you again bid at $3.62? A. Yes, I did.

Q. And were you successful? A. No.

* * * * * * * * * *

Q. At that time I note that your bid was evaluated at .1616 and the highest bid was under you at .1610? A. That is correct.

Q. Now then, I note that on January 1, 1958 you reduced your price to $3.58. Would you explain how you arrived at that reduction in price and why? A. Same formula.

When I was unsuccessful on the previous bid and I
2998 got a listing of the awards, I concluded I would have to reduce the price 4 cents if I expected to get an award.

Q. Were you undertaking to find term contracts for the Uniontown mine during all of this period? A. Oh, yes, that is what we were trying to do.

Q. Were you interested in continuing on the TVA spot market? A. No, just a case of necessity.

Q. All right, after bidding successfully at $3.58, I notice that you twice again bid at $3.58 and on each occasion you were unsuccessful? A. That is so.

Q. And then on January 29 you reduced your price to $3.55 and that you were still unsuccessful? A. Yes, sir, that is so.

Q. And on the occasion of that bid, that is your January 29, 1958 bid, I notice that your evaluated price is .1586, whereas the highest successful bid was .1515. A. I believe it was .1555.

Q. .1155. A. Yes, sir.

Q. Does that represent about 10 to 15 cents below your — A. Yes, it would. Yes.

2999 Q. Your price per ton? A. That is correct.

Q. And then I notice you submitted two bids from Shawnee in February at $4 per ton at which you were unsuccessful and that you returned to your previous bid of $3.55 on March 12, 1958 and that you were again unsuccessful? A. That is correct.

Q. Did you then discontinue any bidding operations from the Uniontown mine on the TVA spot market? A. I did.

Q. And why did you discontinue bidding operations at that time? A. Because I felt it was a situation where it did not produce results and I was endeavoring to obtain a term contract.

Q. Did your production decrease at the Uniontown mine following this — A. Yes, it did.

Q. Withdrawal from this market? A. Yes, it did.

Q. Have you prepared a list of your barge loadings at Uniontown for 1958? A. Yes, sir, I have that here.

Mr. Rayson: May we introduce this as our next 3000 exhibit.

(Exhibit No. 170 was marked for identification and filed.)

By Mr. Rayson:

Q. Was January of 1958 the last month in which you shipped coal to the TVA on the spot market? A. That is correct.

Q. Do these figures indicate the reduced level of your activity at the Uniontown mine following this? A. They do.

Q. I notice that your barge shipments or barge loadings go up in the latter part of the year. Could you explain why

they did? A. I was successful in obtaining a term contract from the TVA.

Q. Mr. Hoffman, in connection with any of these bids on the TVA spot market, was it your intention to depress in any manner the price of that market? A. No, sir.

Q. What was your intention in bidding on that coal? A. My intention was to relieve the situation at our Uniontown mine as far as possible until such time as I could obtain a term contract.

Q. Were these bids of the West Kentucky Coal Company at the Uniontown mine your responsibility? Were
3001 you the one that formulated them? A. That is right.

Q. Did you confer with your other officers of the company? A. Oh, occasionally we conferred about it. On spot movement it was a case of trying to relieve the situation at the mine.

Q. Did you bid this coal on the TVA market pursuant to an agreement with any other company? A. None whatever.

Q. Did you do so pursuant to any agreement with the United Mine Workers of America? A. No — never talked to any of them.

Q. Did you do so pursuant to any instructions from Cyrus Eaton? A. No. Never talked to him about selling coal at all.

Q. Did you do so with the intention of harming coal operators in east Tennesse? A. No, sir.

Q. What is the type of coal that is produced in the Uniontown mine? Is it the resultant coal or just a mine run coal? A. It is mine run coal. It can be crushed and it has a washing plant.

3002 Q. What about your other mines that sold to the TVA, what sort of coal do they produce? A. That would be resultant coal.

Q. Would you explain to us just what that term means? A. Well, a resultant coal would be what is left after preparing a special size product. As an example, we were running stoker sizes for the domestic trade, and we would have

left an inch or a one-quarter inch by zero unwashed, or we might have a one-eighth by 32 mesh washed, which we call in the trade carbon. There is no place to sell that coal, except to some large steam user.

Q. Is this resultant coal a by-product of your regular products of your other mines? A. It is resultant from the mine run, yes.

Q. You say there isn't a large market for that sort of coal? A. None whatever. We usually sell some of it to the cement plants, but practically all of them are on gas.

Q. What can you do with this coal, if you don't sell it?

A. Well, the only thing we can do would be to throw it away.

Q. Can you keep it? A. No, you can't.

3003 Q. What is the problem there? A. Well, it deteriorates and it si expensive to put in on the ground and recover it. If you load it in the car — we work under a 25 per cent car rating, and you would have to sell it or move the car before you could get empty cars to run the mine again. I might explain this. That a coal mine is different from a manufacturing plant. After you make a run of coal, if you have got 100 or 150 cars, you have got to sell it.

Q. Will the railroad give you any more cars if you don't move the ones you have already loaded? A. Only completement to what portion you have given your no-bills, which makes an impossible situation, because you can't run a coal mine for three or four hours. You have got to make a complete eight hour run. If you can't get enough empty cars to make a run, you just have to put the mine down until you sell the coal.

Q. Why can't you run a mine for three or four hours? A. Your cost would be prohibitive.

Q. What were the other mines that you operated during this period from which you sold coal on the TVA spot market? A. Well, from East Diamond, Pleasantview, Sham-

rock, Crescent.

3004 Q. Did all of these mines produce the resultant coals of which you have spoken? A. Yes, they do.

Q. Could you tell us what other markets you had for the resultant coal? A. We had practically no other market for it. Some rather large steam plants won't pay freight on it. There have been conditions where we had to throw it away.

Q. In connection with any of those bids from their other mines, your mines other than Uniontown, did you enter those bids pursuant to any agreement with any other companies, or with the purpose of depressing the TVA market? A. No, sir, I never talked to any other company about any bid we made to the TVA.

Q. Did you do so pursuant to any agreement or understanding with the United Mine Workers? A. None.

Q. Did you do so with the purpose in mind of harming coal companies in east Tennessee? A. No, sir.

Q. You think your bids had serious effect on the spot market? A. Yes, sir.

Q. I say do you think that your bids had an effect on the price of the spot market? A. No, sir. I think the

3005 offers from other coal companies had an effect on my bid. I think the record shows it.

Q. How would you explain that? What do you mean by that? A. I mean I was unsuccessful here more than I was successful and someone else made a lower price than I made.

Q. Were you leading the market or were you following it? A. I was following it.

Mr. Rayson: Cross examine.

CROSS EXAMINATION

By Mr. Rowntree:

Q. Mr. Hoffman, I notice in Exhibit 69, annual statement of West Kentucky for 1958, the name of Robert H. Bowden listed as vice president in charge of sales, under his name appars Thomas J. Hoffman, vice president. Was Mr. Bow-

den vice president in charge of sales? A. He was vice president in charge of sales, but I have always handled the TVA account ever since I was sales manager. I was delegated for other duties in traffic and marine and he was made sales manager.

Q. He was in overall charge of sales operations? A. I didn't handle the sales, no, sir.

3006 Q. I mean Mr. Bowden was in charge of sales. A. He was in charge of sales, yes, sir, other than this TVA. I handled the TVA.

Q. Well, did you have an operating head with respect to sales that had final authority with respect to policy on sales? A. Oh, we talked about sales of all description, but ever since the original sale was made to TVA, I have handled the account.

3007 Q. I see, and of course you would have to consult with Mr. Bowden about the policy with respect to sales to TVA? A. No.

Q. You wouldn't have to? A. I wouldn't have to consult anyone.

Q. Well, of course, the sales to TVA had to be fitted in with the overall sales operation of the company, did they not? A. That's correct. I knew the situation. On these long-term contracts, we would talk about the possibility of making a bid. I usually said what I thought should be done, and filed a bid.

We conferred with Mr. Moss Patterson, the operating vice-president. We wanted to know what the costs would be, what we might expect, but as far as filing the bid, as far as handling the TVA account, I did it.

Q. But you couldn't have two sales departments for the same company? A. Oh, yes, you could have a half dozen.

Q. I mean without coordination between the departments. A. Oh, we coordinate all activities of the company.

Q. Otherwise, you both might sell the same coal at the

same time, and you would be stuck with one extra
3008 contract, is that right? A. Well, we try to avoid conflict, if that is what you are talking about.

Q. Yes, sir, and you had conferences? A. But Mr. Bowden knew that I was handling this account, and we didn't have any conflict.

Q. And if there was coal available for TVA, you would handle the sale of it? A. That's right.

Q. But it would not come into your hands until after Mr. Bowden decided that it would go to TVA? A. Mr. Bowden signed what?

Q. Coal would not be allocated to you for sale to TVA until Mr. Bowden decided — A. That is correct.

Q. — that it was available for sale to TVA. A. No, I knew what w s available. If it was convenient, we talked about it, specially on a long-term. Now as far as spot sales are concerned, why we did not consider that necessary to confer with each other.

If we were going to make a ten-year bid, then we would talk about it. We would talk with our operating department, our financial department, and all, but I was the man who made the recommendation and said what price we would bid.

3009 Q. Now, Mr. Bowden would be in charge of contracts with respect to other markets besides TVA? A. Yes, yes, other markets, yes.

Q. And West Kentucky did have a number of other markets? A. Oh, yes, we had a number of other markets.

Q. And I believe your annual statement says that you have —

Mr. Rayson: What are you reading from?

Mr. Rowntree: This is Exhibit 58.

* * * * * * * * * * *

Mr. Rowntree: Exhibit 69, I'm sorry.

* * * * * * * * * * *

Q. "West Kentucky has built up an impressive and diversified roster of customers which now includes leading

midwestern electric utilities, chemical, cement, and other industrial users, and important Canadian clientele, and a strong group of commercial and domestic markets in the Great Lakes Area as well as the South."

That is an accurate statement of your markets and
3010 your customers? A. That's right. We distribute coal in seventeen states. I think I testified to that earlier.

Q. Yes, sir. A. Including Canada.

Q. And is it not true that West Kentucky Coal Company was responsible for inaugurating the reduced rail rate from the West Kentucky field to the Widow's Creek plant of TVA? A. No, sir, I wouldn't say that that is true. I talked to the TVA and some officials of the L&N Railroad, but at such conference which occurred one time, the only purpose I served was to indicate whether or not we were in position to load one hundred cars of coal in an eight hour shift, and of course we were able to do it, and I said so, on volume movement.

Q. Well, isn't it true that West Kentucky, particularly Mr. Eastin, wanted to claim credit for the reduced freight rate? A. Well, of course, naturally the lower freight rate, the more opportunity you have to sell coal, but you understand anyone else now, that wasn't confined to West Kentucky Coal Company.

Q. Oh, no. A. That was available to any mine in the west Kentucky coal field.

3011 Q. And did you not submit some bids or one or more bids to the TVA with a view to obtaining term contract for the Widow's Creek Plant before the last term bid opening? A. We never submitted —

Mr. Kramer: Wait just a moment. Your Honor, this is in 1959, and we have of course objections to that type of testimony, and —

The Court: Overrule.

The Witness: No, sir, we did not. We do not confine any bid to any plant.

By Mr. Rowntree:

Q. Is it not true that you can sell coal competitively to the Widow's Creek Plant with the reduced rail rate? A. Never have sold any coal to the Widow's Creek Plant,
3012 water or rail.

Q. Cannot you submit now a competitive bid on the Widow's Creek Plant? A. No, sir, we never did supply coal to Widow's Creek Plant. We merely filed a bid to TVA for a certain quantity of coal, and they can take that coal to Shawnee Plant, Johnsonville Plant, or Widow's Creek. We can't get into Colbert because the Southern Railroad serves that plant, and so far, they haven't been willing to make connections with the L&N Railroad, but we do not confine the bid to any particular market. We have never sold any coal in there.

Q. What was the statement about connections with the L&N Railroad? I didn't get that. A. At Colbert, they have no connection. We can't get in there with rail coal.

Q. Yes, sir. A. From West Kentucky Coal Company.

Q. That has nothing to with Widow's Creek? A. With Widow's Creek, I can only tell you this, sir. That we have never sold any coal to Widow's Creek plant.

Q. Yes, sir, but you now have a competitive position whereby you very well may sell coal to Widow's Creek by reason of the recent rail reductions? A. There is
3013 a possibility that the TVA may take some coal from the west Kentucky coal fields to the Widow's Creek.

Q. And you have — A. But all I can tell you is we have never supplied any coal to Widow's Creek.

Q. I see. A. I might tell you this, too, sir, I'm sure you are familiar with it, that the Tennessee mines have a $.65 rate into Widow's Creek, and in one case on the TC, they have a $.60 rate, and the best rate on this volume you are talking about to the west Kentucky coal field is $1.55.

Q. And you are — A. And we have got $.95 a ton to start with.

Q. And it costs these mines in Tennessee a good deal more to mine their coal than West Kentucky, is that right? A. Cost more to produce coal?

Q. These mines in Tennessee that you mentioned? A. I don't know anything about their costs.

Q. These mines are located immediately north of the Plant there near Chattanooga, the Tennessee mines which you were talking about? A. Yes, Tennessee mines around Whitwell, and Palmer and back in there, and as I
3014 said before, you know there is a tremendous quantity of coal moved into Widow's Creek by truck.

Q. Yes, sir. A. Every time I have been around there, there was a procession there a half mile long.

Q. Now, Mr. Hoffman, turning to this three-page exhibit? A. Yes, sir.

Q. 169. Can you tell me again when your TVA contract with Uniontown Mine expired in 1957? A. It expired about June, I think, sir.

Q. And how much coal per month was shipped on that contract? A. Well, it was, if I recall, it was 1,500,000 tons for three years, be a little some — oh, about somewhere in the neighborhood of 30,000 tons a month.

Q. Now, is it not true that West Kentucky and Nashville were committed to ship Uniontown coal to Tampa, Florida, on a 1955 contract, the shipments to commence in the summer of 1957? A. You speaking about a contract that was negotiated by Nashville Coal Company?

Q. Yes, sir. A. And which was later taken over by West Kentucky Coal Company. We made no shipments
3015 under that contract.

Q. Do you know of your own knowledge — let me ask this. Did you make the decision not to ship that coal? A. No, I did not make that decision.

Q. And by reason of the decision not to ship that coal, that coal was then available to put upon the TVA spot mar-

ket? A. No, sir, we made an effort to interest the Tampa Electric in taking coal from the mine until we could work out our differences, but we were unsuccessful in doing so. The coal was available to any buyer that could use it. It wasn't entirely a TVA proposition.

Q. Yes, sir. And this Tampa contract was a substantially large contract over a term of years, which West Kentucky and Nashville already had available at that time, is that not right? A. There was a contract with Tampa Electric that was negotiated by Nashville Coal Company before we acquired the property, and on legal advice we did not make any deliveries under the contract.

Q. Just a moment, Mr. Hoffman. Did you consult with the lawyers?

Mr. Kramer: Just a moment, Your Honor, we did not go into the Tampa contract at all by this witness. It is a new field. Of course, he can make him his witness,
3016 but I think we should call it to Your Honor's attention.

The Court: He does make him his witness on this contract.

Mr. Kramer: We did not touch it. But you can ask him about it.

Mr. Rowntree: Yes, sir.

3017 Q. Mr. Hoffman, will you state whether or not you, yourself, consulted with legal counsel with respect to that Tampa contract? A. I talked to some of our attorneys, but I don't know that at that time any decision was reached. I did not handle — I did call on Mr. MacInnes of the Tampa Electric two or three times in respect to the contract and attempted to work it out.

Q. What do you mean "work it out", if I may inquire? A. What did you say?

Q. May I ask what you mean by "work it out"? A. Well, there were some aspects to it that we thought was not good practice. For instance, it was a wholly supply contract and we thought that maybe we could adjust our differences.

Q. What differences did you have with Tampa Electric Company? A. Well, it was a contract which was a violation of the Sherman Anti-trust law. We did not want to be involved in it. That is the whole answer to that.

Q. Was anybody questioning the legality of the contract besides West Kentucky? A. I understand there was. They did not question it with me.

3018 Q. Did you hear anyone complain about the legality of it? A. I heard that there was complaints about it, yes.

Q. Without regard to hearsay, did you hear anybody complain about it? A. No one complained to me about it, no.

Q. Was that old contract a low priced contract? A. Well, it was a fairly low price; yes, sir.

Q. Was one of your differences the fact that you wanted a higher price or not? A. No, that was not the primary purpose of the situation at all. We offered spot coal and made deliveries of 118,000 tons of coal hoping that we could adjust any differences in the contract.

Q. And what did you sell that spot coal for, delivered? A. Well, now I would have to quote figures from memory. The price was $3.75 per ton f.o.b. barges Uniontown. We did not arrange the transportation, or the transfer, or the unloading at Tampa. That was done by the Blue Stack Towing Company.

Q. How much did it cost you, transportation? A. Well, I think the transportation was $3.65 a ton.

3019 Q. And the price under the old contract was $6.85 delivered? A. That is about right; yes, sir.

Q. And so the net price after transportation under the old contract would have been $3.09 per ton. A. You mean f.o.b. mine?

Q. Yes, that is right. A. If you reflected it back?

Of course, I might explain this, that we did not expect to continue paying any such transportation charge as was involved in that original movement. We did not expect to

reduce the mine price. We expected to reduce the transportation cost.

Q. And will you state whether or not that was one of the things that you were bargaining with Tampa about when you decided not to ship the coal to Tampa? A. No, no, we did not. That was not discussed.

Q. The result was, Mr. Hoffman, wasn't it, that this coal was available then to put upon the TVA spot market? A. It was available for term contract. That is all we were trying to do, was sell it somewhere on a legal basis. You can't sell coal from a mine like Uniontown on the spot market.

Q. Well, of course, you can try to. A. Well, it
3020 isn't a practical situation. You can't sell coal from day to day, not with a mine —

Q. Because of the extraordinarily large tonnage involved? A. Well, it is just an impractical situation. That isn't the way it is done.

Q. And the spot market is not big enough to absorb that kind of tonnage, is it? A. That is correct in a way, because these mines nowadays will run 8,000 tons of coal a day in west Kentucky, and I think we can all understand that would be pretty difficult to move that on a day-to-day basis.

Q. And a 10,000 ton order is extraordinarily large on the spot market? A. Would you read that question please?

(The question was read by the reporter.)

A. No. That is a very small order because you wouldn't ship all that one day. If I get an order for 10,000 tons of TVA on a spot order that is for a 30-day shipment.

Q. I am talking about the normal run of spot bids on the TVA spot market. A. No, I wouldn't say 10,000 tons is a large order.

Q. Do you know any other operating company that
3021 put bids in repeatedly for 10,000 tons? A. Many operating companies?

Q. Yes, sir. A. Lots of them.

Q. Who? A. Well, Illinois. We compete with the big mines in Illinois. They have the same freight rate we have to Shawnee plant at Paducah. We compete with all of the large ines of Illinois, some of them even larger than our pr .ty.

Q. Can you name some specific companies that — operating company — that did put repeated spot bids on the TVA spot market of 10,000 tons or over? A. Oh, yes. Some of those big Illinois operations. You know who they are.

Q. Well, I am sorry, Mr. Hoffman, I don't. If you could recall. A. Well, it is a matter of record over in the TVA office.

Q. Mr. Hoffman, did you have anything to do with the negotiation of the Memphis generating plant contract with Peabody Coal Company? A. No.

Q. Has Mr. Bowden done any work in the way of selling TVA term coal for West Kentucky? A. No, sir.

3022 Q. Do you know if he has taken any trip or attended any meeting with respect to term contracts on TVA coal? A. No, sir, I don't know anything about any such trips. I can tell you this, that I had nothing to do with them, any trip he might make, whether he goes to Milwaukee or Minneapolis in pursuit of his regular duties, but I can tell you positively as far as this TVA is concerned no one told me any price to submit either on spot or term. That is definite.

* * * * * * * * * * *

3023 ALBERT PASS

a witness on behalf of the cross defendant.

* * * * * * * * * * *

DIRECT EXAMINATION

By Mr. Combs:

Q. Your name is Albert Pass? A. Yes, sir.

* * * * * * * * * * *

Q. You have testified here before in this case, have you not? A. Yes, sir.

Q. Mr. Pass, I ask you if sometime in the spring of 1955

you attended a meeting in a union hall in or near Jellico, Tennessee at which meeting there was present Ed Daniel and Taylor Maddox and whether or not that you said in substance at that meeting that coal was being sold for $2 a ton and said, "You men know that has got to be stopped"; and you said, "And it don't make no difference what it takes to stop it, either"; and then you said, "If any of you men get into any trouble stopping it, all you have to do to see me is look back and I'll be there."

Did you attend such a meeting and did you make such statement? A. I have attended several meetings in
3024 and around Jellico since I have been a representative of the United Mine Workers of America. I have never made such statements at a meeting at Jellico or any other meeting that I have attended, nor have I made such statements to any individual people.

Q. Did you attend any such meeting in April of 1955? Do you recall attending a meeting of any kind in Jellico? A. No, sir, I don't.

Q. You have never made statements of that character at any meeting at any time? A. No, sir.

Q. Mr. Pass, I believe that you have testified here before that you are the secretary-treasurer of District 19? A. Yes, sir.

Q. Now as secretary-treasurer, do you have control and have in your charge the contracts that are negotiated on behalf of District 19, United Mine Workers? A. Yes, sir.

Q. Were those contracts in your office as of 1950? A. Yes, sir.

Q. Could you estimate approximately how many
3025 contracts percentage wise that you had in the State of Tennessee? A. Percentage wise? I don't understand.

Q. Percentage wise of the total number of mines in Tennessee, what per cent of them did you have under contract

at that time? A. I would say percentage wise there would be 75 to 80 per cent of the companies under contract.

Q. That was in 1950? A. Yes, sir.

Q. And '49? A. Yes, sir.

Q. Now in 1958 what percentage of the total number of mines in Tennessee would you estimate you had under contract? A. I would say it would be practically the same.

Q. Was that consistent during the time of 1950 up through 1958? Did you have fairly consistently the same percentage? A. The various amendments that were executed to the 1950 contract, I would say would be about the same percentage, yes, sir.

Q. Are you familiar with the Meadowcreek mine that was purchased by the Clinchfield Coal Company? A. Yes.

Q. Do you recall about when that mine was pur-
3026 chased? A. I believe it was some time around 1950. I am not positive of the date.

Q. Now at the time the Clinchfield Coal Company acquired this mine, was there a union contract with this company, with the company that owned the mine that sold it to Clinchfield? A. Yes, the Tennessee Coal Company was under contract with the United Mine Workers at the time that Clinchfield acquired the mine.

Q. And as of 1958 that mine was under contract with the United Mine Workers? A. Yes, sir.

Q. Mr. Pass, did you know about the Pocahontas Fuel Company taking over the Trimore and Moore coal mines? A. Yes, I do.

Q. Were those mines under contract with United Mine Workers at the time the Pocahontas acquired them? A. Yes, they were.

Q. Are they under contract now? A. One of them has worked out. That is the Moore Coal Company mine. It is worked out, of course, and was under contract up until they worked out the coal. The Trimore mine is still operating and it is under contract with United Mine Workers.

Testimony of Albert Pass

Q. Now, Mr. Pass, at the time you testified here
3027 before you were asked some questions by counsel as to unemployment in the coal fields in the area of District 19 and Kentucky and Tennessee. I ask you, Mr. Pass, what the union has done or what is it trying to do to assist the unemployed members of the union and others unemployed? A. Well, we have urged, in particular we have urged the members of Congress to adopt some kind of solution to this terrible problem of unemployment, and particularly the depressed areas, of which, of course, Kentucky and Tennessee happen to be one. In fact, we attended a meeting in Charleston, West Virginia some few months ago, which was known as the Kennedy Conference, which was participated in by a large number of persons and as a result of that meeting other committees were created, and through the insistence of the United Mine Workers of America and the other people who participated, Congress did adopt legislation to provide certain benefits for these people who lived in the distressed areas. Of course, the bill was signed by President Kennedy.

Q. Is that what is known as the Aid to Depressed Areas Bill? A. Yes.

Q. Has the United Mine Workers in District 19 participated in committees that were set up or business groups to try to attract industry into these areas? Have you
3028 participated in that? A. Yes. Of course, all of the districts in Kentucky and District 19 met with the officials of the State of Kentucky in an effort to try to obtain some means for the people who are distressed and who are in need, and in addition to that, why we have contacted the officials in the state capital at Nashville in an effort to try to get all of the assistance that we could from them. In fact, we have talked to everybody that would listen to our plea that we thought that could help in the sit-
3029 uation.

Q. Has United Mine Workers taken the position with reference to tax reform in Congress in order to try to

put the coal industry on a more competitive basis with petroleum such as depletion tax and have they participated in that? A. Yes, we have. We feel that the coal industry is not on the same competitive basis as are other fuels of the nation, particularly oil and natural gas.

Now the oil industry has a depletion allowance as I understand of some two to three times more than does the coal industry. That of course enables the oil industry to obtain or be able to do more research work, more development, and more expansion of their business. Whereas, by reason of the fact that the coal industry is not treated in the same manner, they don't receive such consideration.

We have urged Congress, and we still are, and will continue to adopt some measures that will place these fuels on the same competitive basis.

Q. That is tax wise? A. Yes.

Q. Now, Mr. Pass, has the United Mine Workers participated in the programs to secure surplus commodities to these distressed areas? A. Yes. In fact, I was assigned by the president of the district, District 19, to help the county courts in Kentucky first, of course, because that is where it was received first, to institute the program
3030 as far as the United Mine Workers could be beneficial, and of course the county courts control it.

We did have meetings with them; we did set up the program; and we did of course obtain food for all the people who were unemployed and who were distressed.

The state of Tennessee, I have met on two or three occasions with a gentleman by the name of Mr. Gilliam — I can't recall his first name — who is in charge of the program, and of course as the program progressed, at first they only had cheese and some powdered milk, some beef and gravy, and that was about the limit at the start.

As it progressed, we began to urge that they include and add more items to the program so that the people who were receiving them could receive a more balanced diet, and in

particular, we urged that they try to obtain, if possible, meal and flour and beans and potatoes and meat. We have been instrumental in some instances in obtaining some of those items, but as of yet, we don't have them all.

Q. Now, Mr. Pass, just briefly, have you, has the United Mine Workers participated in trying to get increased unemployment benefits and better coverage both federal and state for the unemployed in general, have they participated in that program? A. Yes, we have on both federal and state levels.

3031 Q. Tennessee and Kentucky? A. Tennessee and Kentucky.

* * * * * * * * * *

CROSS EXAMINATION

By Mr. Robertson:

Q. Mr. Pass — A. Yes, sir.

Q. You spoke of the Meadow Creek Mine being under contract at the time — at what time? A. That was at the time that the Clinchfield Coal Company obtained the mine.

Q. And was that around 1950 or — A. I can't recall the exact date. It's been sometime ago. It could have been '52 or '50 or '49. I really don't remember the date on it.

Q. Is it not true that that mine was brought under contract by way of secondary boycott?

Mr. Rayson: Now, Your Honor, we object to this question, and it is highly improper and immaterial.

3032 The Court: I overrule it. You went into it.

Mr. Rayson: Your Honor, we —

The Court: You went into it, and I overrule it.

By Mr. Robertson:

Q. Mr. Pass, I ask you —

The Court: You can't go into a subject just half way. When you go into it, that enables the other side to go into it.

By Mr. Robertson:

Q. Mr. Pass, I ask you if the contract of which you speak was obtained by way of a secondary boycott, adjudicated by the United States Court of Appeals in the 6th Circuit,

and that the United Mine Workers have paid a judgment to that company in damages in the amount of four hundred thousand dollars?

Mr. Combs: Now, Your Honor, we object to that question. I asked the witness this question, whether or not —

The Court: I will let you go into the secondary boycott. You can't go into any alleged judgment. I will let you ask him if they lined up, under what circumstances it was lined up.

Mr. Robertson: Yes, sir.

By Mr. Robertson:

Q. Is it true that this contract has been adjudicated,
3033 that this contract was signed by way of a secondary boycott being imposed by the United Mine Workers against this company?

Mr. Combs: We object to the form of the question. I don't think the witness is expected to know what a secondary boycott is. It's a legal question.

The Court: Well, I don't know. He may answer if he knows.

By Mr. Robertson:

Q. Do you know the answer? A. Well, I know this about it. I know that the Tennessee Coal Company executed a contract and operated under that contract, and I know that the Clinchfield Coal Corporation executed a contract and are still under contract as my records show.

Q. But you don't know about this case to which I refer? A. I didn't participate in the case you refer to.

* * * * * * * * * *

REDIRECT EXAMINATION

By Mr. Combs:

Q. In connection with this question, Mr. Pass, how
3034 long after the Meadow Creek Coal Company signed a contract before it was acquired by the Clinchfield Coal Company? How long a time did they operate under

Mine Workers contract before Clinchfield acquired that mine? A. Well, it was a considerable period of time, but the dates I can't recall, but I would say it was some years, but I can't remember the time.

* * * * * * * * * *

3035 MARK E. EASTIN

called as a witness by and on behalf of the cross-defendant,

* * * * * * * * * *

DIRECT EXAMINATION

By Mr. Kramer:

Q. This is Mr. Mark L. Eastin, is it not? A. Mark E.

* * * * * * * * * *

Q. Mr. Eastin, where do you live? A. Madisonville, Kentucky.

Q. What is your occupation? A. I am president of the West Kentucky Coal Company.

Q. How long have you been president of the West
3036 Kentucky Coal Company? A. I was elected president, March 16th, 1956.

Q. Before going into your work what was your educational background? A. I graduated from Vanderbilt University.

(Remarks of the Court off the record.)

Q. Mr. Eastin, how long have you been connected with West Kentucky Coal Company? A. Well, actually all my working life. I worked in the summer vacations between high school years in the preparation plant, with the engineers in the coal mines, and when I went away to school. After I graduated I went back to work for the company and have worked for them ever since.

Q. Will you trace briefly your history in the company from the time you went to work for them after you graduated from Vanderbilt up to the present time. A. Well, I first went to work in the invoicing department. That was in '29. And then proceeded through the retail accounts re-

ceivables desk, the wholesale accounts receivables desk. I was transferred to Louisville where I was put in charge of the retail agency and wholesale agency there, and I was sent back to Paducah where our general sales office was and was made assistant to the sales manager, and assistant to the vice-president of sales, and I was transferred to Erlington, Kentucky, and in charge of the St. Bernard division of the company. And then I was made assistant sales
3037 manager of the company, West Kentucky Coal Company, then assistant to the president, vice-president, executive vice-president, and then president.

Q. Mr. Eastin, is the West Kentucky Coal Company a producer of coal and also handles its own sales? A. That is correct.

Q. What is the history of West Kentucky Coal Company? How long has it been in existence? A. Well, it dates back to 1904 and '5 when the North American Company, which was a utility holding company in the East, started up a coal field to go on the Ohio River in Union County and for the purpose of having reserves for the Union Electric Company, which was a utility in St. Louis, and from there on the reserves were enlarged and the company increased in size.

Q. What is the area from which West Kentucky gets its production? In other words, where does it operate? A. All in western Kentucky, and at the present time we are operating in Hopkins County and Muhlenberg County. We own some property in Webster County and have also operated in Union County.

Those counties all lie adjoining each other. They lie close together.

Q. In its production field does West Kentucky produce mostly in the field of underground mining or in strip
3038 mining? A. Yes, we have been principally underground miners since the inception of the company. In fact, we have never done any actual stripping on

own. We have had some coal stripped on our properties by others for us.

Q. Do you lease any of your coal lands to anybody for production purposes? A. Yes. We have from time to time had leases with various companies down there. Particularly with respect to our strip acreage because we are not strippers, and we have had people who have the equipment and the know-how in the stripping industry to do that stripping for us.

We have also leased some small underground areas to other underground operators. We have at present one small lease with Hatfield-McCoy Coal Company, which is an underground operator.

We have at the present time some coal leased to Pond River Collieries which is owned by Peabody. That is strip coal.

We have an acreage of coal leased to the Ruby Chandler Jordon Company, which is a strip operator near Madisonville. We have some coal leased to the Badgett Mining and Stripping Company near Providence which is also strip coal.

Q. You mentioned a moment ago that you had some 3039 lands leased to Peabody upon which they were conducting a stripping operation. How long—how far back have you leased coal lands, or a portion of your lands, to Peabody? A. Since the early '40s. They have stripped in two or three, or three or four, different areas on our properties.

We entered into one big lease in particular with them in which—at that time they were the Sinclair Coal Company of Kansas City, and, of course, that company was merged into Peabody. That goes back to the early '40s when the Homestead mine was developed on our property. We sold the coal. In fact, we helped in some respects to put the mine in but it was their mine and they operated it on our property.

Q. Did you get the coal from their operation or did they sell the coal themselves? A. We sold the coal.

Q. Now in the coal that is being produced now on this contract, the lease you have with Peabody, what about the sale of the coal? A. We have the option of selling the coal. Frankly, the coal business has been such of late that we are selling part of it. We haven't needed the tonnage. And consequently, under our lease with them, they have a right,
if we do not sell the coal, to either sell it themselves or
3040 let someone else sell it in order to operate the mine,
and at the present time they are selling most of the coal from that mine because we don't have the business to keep the mine running.

Q. Is that lease with Peabody similar to the leases you have with the other companies that are operating, in the main? A. Very similar; yes, sir.

Q. Are the mines of West Kentucky mechanized mines? A. Yes, sir, they are all mechanized.

Q. Give us a short history of your mechanizations. A. We started our mechanization program in late '40 and there was a transition from hand loaded mines to mechanized mines. I would say that our mines became completely mechanized in about 1943 or '4.

Q. What about the mechanized equipment, machinery or equipment as to improvement? What have you done with reference to improving the mechanization in your mines? A. Well, of course, we try to keep abreast of all improvements. We only have one what is known as a "continuous miner" which we use somewhat as a Guinea pig.

The balance of our mechanization is with conventional loading machine, equipment that goes through the cycle of drilling, cutting, shooting, and loading the coal. And in a
continuous miner, of course, that is all done in one
3041 operation.

Q. My attention is called to the fact that you stated—I didn't catch it at the time—that you started mechanization in the '40s or late '40s and finished in 1943. What is your statement so we have the record clear on that?

A. What I meant by that was that we put in our first mechanized mine in the late '40s and was successful, and so then we gradually converted to complete mechanization which—I am trusting to my memory, but I think that completion was about '43, 1943.

The Court: He means in the late '30s? You said you started in the late '40s and finished in 1943. A. That is right.

Q. The late '40s would be subsequent to 1943, wouldn't it? A. I don't get your point, sir. We put in our first mechanization in '40 and then we continued in the 40s—

Q. You stated "late '40". You mean late in the year 1940. A. Yes, late in the year 1940.

Q. The record shows "late in the '40s". A. I see. It took us two or three years to complete that transition from the hand loading mine to the mechanical operation.

3042 Q. So it was in the latter part of 1940 and you finished the mechanization in 1943. A. That is right.

Q. Was there in the same operating territory formerly a mine company by the name of Nashville Coal Company? A. Yes. Nashville Coal Company started as a sales agency or a jobber, coal sales agent, and they eventually became interested in actual production and in properties and acquired coal lands and developed into a right substantial operating company in the field.

3043 Q. In the early 1950's where were the operations of the Nashville Coal Company, I mean its territory or land on which it was producing? A. Principally in the same areas that we were working ourselves. They had mines in Muhlenberg, mines in Hopkins County, mines in Union County, in western Kentucky.

Q. Did the West Kentucky Coal Company acquire the Nashville Coal Company and its properties? A. Yes, after negotiating during the year of 1955, we entered into a deal with Nashville Coal Company, which was signed September 13, 1955, effective October 1, 1955.

Q. And in that contract did West Kentucky Coal Company acquire all of the properties formally owned by the Nashville Coal Company? A. Yes. We actually acquired the physical properties, the mine sites, the machinery, their boats, barges and then we entered into a lease on their coal lands.

Q. And you presently hold the lease that they had on coal lands? A. That is correct.

Q. You spoke about acquiring barges and so on which would indicate water transportation. Was West Kentucky ever engaged in transportation of coal by water? A. Well, yes, for many years in a right substantial way. I explained
3044 that the property was originally acquired for the purpose on the river—acquired on the river for the purpose of the reserve for the Union Electric Company of St. Louis, which was also on the river. Being on the river, for many years we operated tow boats and barges up and down the rivers. We had river terminals at Memphis, Vicksburg, Donaldsonville, New Orleans, and on down.

Q. Was that use of barge delivery of coal from your mines continued on continuously or was it abandoned or changed at any time? A. No. In time we gradually reduced our river activities and we had some river movement by others. Then when the North American Company, under the Securities Exchange Act, was ordered to integrate its properties, before they distributed our stock, they gave the Poplar Ridge properties, which was our river properties, to the Union Electric Company, including our barges and so forth, and so we were out of the river business for a number of years, because we had no property located on the river.

Q. When you acquired Nashville Coal Company in '55, did they have river moving coal equipment? A. Yes, operating.

Q. Was it operating in the name of a subsidiary or division or what, if you recall? A. They operated under the

name of the Potter Towing Company. It was either a
3045 partnership or separate corporate entity of some kind.

Q. Did the properties that were formerly handled in the name of Potter Towing Company come to West Kentucky at the time you acquired Nashville Coal? A. That is correct.

Q. Since that time have you been engaged in the transportation of coal you produced both by water and by rail? A. That is correct, sir.

Q. Into what areas do you deliver coal from your sales on water transportation? A. Well, we deliver coal up the Tennessee River as far as Guntersville, Alabama. We deliver coal along the Ohio, down the Mississippi, up the Mississippi by water.

Q. Now you also have rail deliveries? A. Oh, yes, all of our mines but one are located on rail.

Q. Over what areas are your sales usually made, the general area in which your coal is distributed? A. Well, the area, our market area has changed over the years. There was a time when our principal market was in the south. Due to the inroads that gas made in these markets. I would say our primary market is possibly north, northwest, in the Chicago area, Iowa, Wisconsin. We export some coal to Canada, which coal is dumped through a terminal in Chicago. Now, of course, we market coal in Tennessee,
3046 and I am speaking chiefly of west Tennessee, western Kentucky. We go as far east in Kentucky as Louisville.

Q. In connection with the marketing of coal, do you sell coal to other coal companies as well as to consumers? A. Yes, we have always done that to varying degree, depending upon what the situation was at the time. If we had surplus coal and there was demand for coal, if we had coal on tracks, we often sold that to various sales agents or jobbers who marketed coal. They had a list of customers and we allowed them a commission on it.

Q. Among other companies that you have sold coal to over the years, have you sold to Peabody? A. Yes, we have sold coal to Peabody before the merger of Sinclair with Peabody. We sold them substantial coal, a substantial amount of coal, and then after the merger, when Sinclair Coal Company became Peabody and when their sales company, the Southern Coal Company, became Peabody, we have continued to sell coal to Peabody, when they needed the coal or when it suited us mutually to act in that manner.

Q. Has there been any difference in recent years on your sales policy in sales of coal to Peabody from what has been true throughout many years? A. No, sir, there has been no difference in the policy. The demand for coal might change the situation slightly. That is if they don't
3047 need the coal, we can't very well sell it to them, or if we don't need the coal, we wouldn't buy coal from them, when we had coal in our own mines, but the policy has not been changed in any way.

Q. Mr. Eastin, have you had prepared at our suggestion a tabulation showing the production of coal by West Kentucky? A. Yes, sir. I have a copy of that.

Mr. Kramer: Will the reporter mark this as the next exhibit, No. 171.

(Exhibit No. 171 was marked for identification and filed.)

Mr. Kramer: These figures, if I may explain, your Honor, in the last column marked "National Tons" are taken from the publications that are already in the record, so I do not go back to those.

Now the figures under "West Kentucky/Nashville" showing the number of tons produced per year come from the company records, and these have been examined and are in the record, but not combined in this form.

Most of this is in that deposition you have, which has been read, but not in tabulated form.

By Mr. Kramer:

Q. Will you explain, Mr. Eastin, what you mean
3048 or what we mean by this tabulation under production? How do you get the production and what figures are included? A. Well, in these particular figures, they represent the tons of coal that were actually produced by us from our properties. Of course, there are two or three ways of figuring.

Q. That is the reason I want to get it. How is this figured? A. Well, it is actually a count of the tons of coal produced from our properties. Now that does not include coal that was mined from our properties by someone else under these leases, and, of course, it does not include coal purchased by us from others for sale. That would be sale tonnage. This is actually production tonnage we produced ourselves.

3049 Q. Did you — your own employees produced? A. Correct, sir.

Q. I notice, beginning with the year '53 and '54, under this column marked West Kentucky-Nashville, there is but one figure for each year. That is West Kentucky production because it was before you acquired Nashville Coal, Inc., is that right? A. That's correct, sir.

Q. Now beginning with 1955, while West Kentucky had been the owner of Nashville, have you separate records showing the amounts produced and so on? A. Yes.

Q. Is the figure in 1955 and so on through the years where it says West Kentucky, the coal actually produced by what was West Kentucky mines before and Nashville by what was — by the Nashville mines before? A. That's correct, the Nashville figure of course is for October 1st on 1955.

Q. I see. A. And then you have a full year of Nashville production starting the next year.

Q. Beginning 1956? A. That's correct, sir.

Q. So that the total coal produced by West Kentucky

including both the West Kentucky and Nashville
3050 divisions — I don't know whether you call them divisions or not — for 1955, was 4,112,127 tons? A. That's correct, sir.

Q. It varies from that in 1955, I believe, to a high in 1956 of 7,714,646 tons. A. That's correct, sir.

Q. And in 1957, 6,521,541 tons? A. That's correct, sir.

Q. And '58, 5,723,692 tons? A. Correct.

Q. In 1959, 5,932,869 tons? A. That's correct, sir.

Q. In 1960, 6,256,186 tons? A. That's correct, sir.

Q. Mr. Eastin, in its production of coal and its operations, has West Kentucky operated at a profit every year from its earliest days down to the present time? A. Well, hardly. I probably should correct that and say a lot of the time we unfortunately operated at a loss.

A review of the records of the company since its inception back in 1904 and '05, showed that they started off with losses in the early years. That was extended for seven or eight years, and then there have been other periods in the history of the company where you have had losses
3051 for as many as four or five years in a row, and then there's been periods of one or two years when you would have losses scattered through there.

Unfortunately, the coal business, as I have observed it, and as I know it, is full of valleys and peaks. Sometimes it is described as a business where it's either feast or famine, and we have hoped that that would level out in time, but we still have the wide fluctuation, and in those periods when demand is light, why coal companies sometimes have some bad information for their stockholders, I might put it that way.

Q. Are there certain items of expense or charges that — overhead, etcetera — that must go on regardless of volume of sales? A. Oh, yes, sir. That is one of the problems of our industry, particularly in the midwest. You have got to produce your coal and market it. You can't store it well

at the mines, and I refer in that respect particularly to coals produced in the midwest, because there is a tendency, unless they are stored very carefully and impacted and cared for properly, for this coal to ignite, to burn, and not only will it catch fire, there is the expense of putting it on the ground and picking it up.

Consequently what usually happens, you run until you get your tracks full, that is of coal, assuming the
3052 market is slow, and then you have to move that coal to run again. Well, then you might move the sizes that are in demand, current demand, and there may be some sizes there that you might refer to as resultant sizes that are left on track, and in time those resultant sizes will develop to where you couldn't run your mines, and you have got obligations for other sizes, so it creates problems.

It is not like other industries where you can produce your product, and store it, and wait for a market to develop. That situation is not quite as broad in the strip mining end of our business as it is in the underground end.

Q. Explain please. A. Well, in a strip mine, you can go ahead and uncover to a considerable degree the coal, and it is there ready for loading.

Q. Just take off the overburden? A. Just take off the overburden and leave it in what they call the pits.

Q. Yes, sir. A. And when the market is there, you put your shovels in there and load it out and rush your production up to take care of the situation.

But in an underground mine, which our company is principally operators, or which we operate mines,
3053 your have got to move that coal every day or the mine can't run the next day.

Q. During the years that are shown on this exhibit number 171, which runs from the years running from 1953 through 1960, were any of the years — were the operations of the West Kentucky during any of these years operated at a

loss? A. Well, yes, sir, we operated at a loss in 1960, which is right embarrassing. It is always embarrassing for the —

Mr. Kramer: Just before you go ahead. Your Honor, those figures of 1958 are already in the record in Exhibit 70, I think it is, or 71, and we are going to refer to that.

The Court: All right.

By Mr. Kramer:

Q. Now, go ahead, Mr. Eastin. A. Well, I said it is a little embarrassing to the president of the company to have to explain losses.

Q. You always have to do it to stockholders, so explain to us, please. A. With six thousand or seven thousand stockholders, and I even have to explain it to my family and young son why we lost money.

Q. You mean he doesn't get as much money to go
3054 to Vanderbilt on? A. Well, I don't know that that has anything to do with it.

Q. Well, go ahead. A. Anyhow, as I analyze the situation, in this country, if we have a national economy of coal production at a level of about five hundred million tons, the coal industry is in a healthy state, and I would say practically all coal companies can operate satisfactorily and at a reasonable profit.

Now when the national production falls below five hundred million tons, as it did in '58 down to 405,000,000 tons, that is a loss of ninety-five million tons — no, I beg your pardon — it fell from 490,000,000 million tons down to 405,000,000 tons. That is a loss of eighty-five million tons.

Then the industry gets into what we refer to sometimes as a depressed state. That is, there is more capacity, there is more coal than there is business.

Well, of course, every fellow feels that maybe he should operate his properties, and he's got good reasons to. Maybe he owes the banker, or he has mortgages of other types that he's got to take care of, so he makes a special effort to operate his properties, and in so doing, the effect is

that you begin to depress the market.

3055 So, you have got your fixed expenses that you mentioned a moment ago, and you want to make these fixed costs, so you start trying to find business to operate your mines and the other fellow, he's in the same shape, and you gradually work the thing down until your realization has suffered, and the first thing you know, you are in red figures.

3056 Now that is not the fault of any one particular party. It is a collective action that develops as a result of the circumstances.

Q. What about the competition for markets when you have this over-production or an under-consumption, whichever you want to say? A. It becomes very intense.

Q. Ordinarily will it reduce the prices? Will it cause a reduction in prices? A. Very definitely, yes, sir, substantial. The longer it lasts, why it seems the deeper the prices go.

Q. Let's take your figures for 1956. I see you have them in front of you. Maybe we had better begin with 1955. They are not shown on this exhibit but they can be marked on it.

Did West Kentucky during the year 1955 operate at a profit or loss? A. We operated at a profit in 1955 of $938,000.00 on a national production of 470,000,000 tons.

Q. Tell us about the year 1956? A. We had a profit of $1,465,000.00 with a 500,000,000 ton national production.

Q. Now 1957? A. We had a profit of $1,254,000.00 with a national production of 490,000,000 tons.

3057 Q. And now we come to 1958 where you told us there was a loss. A. We had a loss of $204,000.00 with a national production of only 405,000,000 tons.

Q. Let's take 1959—

Mr. Kramer: Of course, your Honor, we are continuing our objection but in view of the record we are meeting the

proof your Honor has permitted, without waiving our objection.

• • • • • • • • • • •

By Mr. Kramer:

Q. Now go ahead with 1959. A. Then in 1959 we got back in the profit column with a 410,000,000 ton production and, incidentally, $410,000.00 profit.

Q. And now what about 1960, if you have it there? A. We had $749,000.00 profit and the national production was 413,000,000 tons.

Q. The 413,000,000 ton production is the national production? A. That is right.

3058 Q. Not your production. A. That is right.

Q. Go ahead, you started to explain. A. The management would want to take credit for having made some improvements that got us in the profit column in those years, if I may.

Q. Naturally.

Mr. Eastin, was the loss suffered by West Kentucky Coal Company in 1958 due to a decrease in sales price carried on for the purpose of driving operators, any operators, out of business?

A. No, sir, never. We were just trying to look out for West Kentucky Coal Company.

Q. Did you have any agreement or understanding of any kind with any other coal producers on any reduction of price and which agreement — go that far.

Did you have any agreement among coal producers to reduce prices? A. No, sir, never.

Q. So far as you know did any agreement of that sort exist in the industry? A. No, there wasn't, that we ever heard of.

Q. If it did you people did not participate therein? A. No, sir, in fact, we are trying to improve our realization,

3059 not hurt it.

Q. Something has been said in this record about

a contract for the sale of coal which the Tampa Electric Company had with certain producers of coal in the area in which you operate.

Did West Kentucky Coal Company have anything to do with the original entry or making of that contract?

A. No, sir. The first contract with Tampa Electric was made by the Nashville Coal Company on May 23, 1955, which was before we acquired the property.

Q. While that was before you acquired the property as you say, did you people enter into negotiations or participate in any way in those negotiations for that contract? A. No, sir. We knew nothing about it.

Q. Anything to do with the pricing or the price per ton that that coal was to be furnished at? A. No. sir.

Q. Consulted about it in any way? A. No, sir.

Q. And you, West Kentucky, was not in anywise interested in the making of that contract? A. No, sir.

Q. When you purchased — and when I say "you" I mean West Kentucky — purchased the Nashville Coal Company, the Nashville Coal Company already had that
3060 contract? A. That is correct.

Q. Did you acquire that as one of the items that was acquired in the acquisition of the company? A. That is correct, sir.

Q. After having acquired that contract, what, if anything, was done with reference to that contract by West Kentucky? A. Well, initial deliveries were to start on that contract in March, 1957. We acquired Nashville Coal Company October 1, 1955, that is when we took the properties over. Much had to be done to get ready to deliver coal to Tampa. There was no coal moving down there at that time.

I say, much had to be done, floating equipment, transfer equipment, unloading equipment — those things had to be constructed. So, we immediately —

Q. How would the delivery of that coal have been made? A. It would have been loaded on barges at Uniontown,

Kentucky, floated downstream on the Ohio and Mississippi to New Orleans, or to Wood Park, Louisiana, which is about 40 miles below New Orleans, and there it would have been unloaded from the barges onto the bank at the facilities that we constructed there for that purpose, and then it would be re-loaded or transferred to ocean, or gulf — ocean going or gulf vessels, for transportation across the
3061 Gulf to Tampa Bay where the Gannon steam plant is located, and those ocean-going vessels would have been unloaded at the power plant of the Gannon station power plant, and stockpiled and burned.

Q. You refer to coal being produced or being mined at the Uniontown mine. Was the Uniontown mine one of those that West Kentucky acquired in its purchase of Nashville Coal? A. Yes, sir.

Q. You spoke about the arranging of equipment. When did West Kentucky begin the accumulation, purchase or manufacture of equipment and facilities to be used in connection with the movement of this coal? A. Well, we began almost immediately. In fact, Nashville already had—Nashville Coal Company, already had some plans. For instance, they had a large towboat on the drawing boards.

Q. Before you go further and explain, which I want you to do, you said "we began almost immediately". Explain "immediately". A. Well, just as soon as we took over the property we —

Q. As soon as you purchased it? A. Yes.

Q. All right, go ahead. A. We first had to make a survey of the situation, and we employed consultants and
3062 determined, or attempted to determine just what the problems were, and then we had people bid on the construction of this equipment that was necessary, including a large towboat that was built particularly for the movement down the Mississippi, and we proceeded to get ready to make deliveries on this contract and we were crowded for time.

Q. Now in order to meet necessities at Tampa, was any temporary arrangement made? A. Well, during the course of the situation they ran a little bit behind schedule in getting ready to receive the coal, and we were running behind schedule in our efforts to get ready to deliver the coal, and by mutual agreement the deliveries were set back a month or so. And then we finally delivered, I think it was, 118,000 tons down there on a spot order because they needed to get some coal on the ground, if that is what you have in mind.

Q. Now what happened with reference to this contract after you had started to get ready to fulfill it? Did anything occur with reference to the contract? A. Well, we were taking a good close look at the contract. We had our attorneys going over the contract; and we had an opinion from our attorneys that the contract was illegal or invalid and was not binding on either party. And since it was a 20-year contract, we were spending a lot of money to get
3063 ready to move that coal down there, it was pointed out that unless a firm and binding contract existed that most any time that the oil market was such that they might want to come along and make lower prices to the Tampa Electric Company that we might be pitched out the window, so to speak, and that we had no binding contract and it should be made a binding contract.

There were one or two factors in the contract, or provisions in the contract, that were not satisfactory, and so we then entered into negotiations with Tampa Electric people to make some changes in the contract and to make it binding and legal on both parties.

Q. During the period of those negotiations, while you were trying to make certain you would be protected by a binding contract, did anything happen or did Tampa take any attitude on the situation or procedure? A. There was considerable negotiating back and forth which was unsuccessful, and in time Tampa notified us by letter they were

terminating the contract. And then they also moved in the courts to have a declaratory judgment made of the contract to determine whether or not it was a valid contract.

Q. Now the lawsuit that was filed to determine the validity of that contract which your attorneys questioned, was filed not by you but by Tampa? A. That is correct.

3064 Q. The cancellation of that contract was made not by you but by Tampa? A. That is correct, sir.

Q. I take it, you did not request Tampa to cancel the contract? A. No, sir. We implored them to continue to negotiate with us and work with us, and we had every intent of filling the contract some way, somehow, but we wanted a firm and binding contract before we started making deliveries under it.

Q. Was any coal ever shipped by you on that contract? A. Not on the contract; no, sir.

Q. You did have this spot order that you mentioned? A. Yes, that is correct.

Q. According to this record sometime after this, shortly after probably, Tampa Electric entered into a contract with Peabody Coal Company. Did you participate in that entry, have anything to do with it? A. No, sir, none at all. In fact, we felt that that business, having — we had bought that business from Nashville Coal Company, had pioneered the movement down there, and we felt that was our business and we did not like it much when Peabody went in and meddled into it and finally made a contract. That is

3065 the situation.

Q. So that you did not cooperate or have anything to do with Peabody obtaining that contract? A. No, sir. We didn't cooperate to the extent that they came to us and wanted to use our unloading facility at Tampa and we refused to do it. They took the position it would be better for the unloading equipment to be working than sitting there rusting, but we didn't want them moving coal to Tampa Electric. We wanted to work that out for ourselves.

Q. Did you take any attitude in connection with the negotiating between West Kentucky and Tampa or the procedure that occurred for the purpose of getting released from that contract so that you could use, using the expression used here, dump coal that otherwise would have gone there into the TVA market and thereby depress it? A. Oh, no, sir, never.

Q. Did you ever have any such purpose or motive at all so far as West Kentucky was concerned? A. Certainly not.

Q. Ever have any negotiations with anybody or looking for any accomplishment of any such purpose? A. No, sir, never.

Q. Or any intent upon your part to do anything of that sort? A. No, sir.

3066 Q. After time went on and sometime after Peabody did get in there and take this market away from you, did you make an arrangement in which you might ship some coal down there? A. Yes, sir. We entered into an arrangement with Peabody whereby we would share one-half of the tonnage.

Q. Has any coal ever been shipped on that arrangement? A. No, sir, not yet.

Q. Do you know that there is existing in Memphis recently constructed a municipal steam generating plant? A. Oh, yes.

Q. Did West Kentucky enter into competition to obtain sales of any of its coal to the Memphis steam plant? A. Yes, sir.

Q. As a result of those negotiations was West Kentucky awarded a contract? A. Yes, we were awarded a contract for — I think it was for ten years at a rate of about 25,000 tons per month.

Q. And are you engaged in delivering on that contract now? A. Yes, sir.

Q. Did the entry of Peabody — I don't mean Peabody — West Kentucky into that contract have as a pur-

3067 pose any depression or interfering with the coal market in east Tennessee or in any other TVA area? A. Certainly none that I know of. I can't conceive of it.

Q. Did other people also get awards at the same time from the Memphis steam people? A. Yes, sir, they awarded the business to three concerns.

Q. Can you name them for us, please? A. Peabody Coal Company and Pittsburgh Midway Coal Company.

Q. Somebody said something in this record a day or two ago, maybe it was further back in the depositions, I don't recall, about Kirkpatrick Company being awarded a portion of that coal. Do you know anything about that? A. Well, the Kirkpatrick Coal Company's main office is in Memphis, and they have been there for many years and they don't have facilities for putting coal on water. They can ship their coal to Grand Rivers and load it on water there, but because of the rate between their mines and Grand Rivers, they wouldn't be competitive. They acted as sales agents in the thing. That is, they acted as salesman and we agreed for their help in selling the order, that we would pay them, I think it was 7½ cents a ton as a commission on one-third of our award.

3068 Q. When you say "we", are you referring to West Kentucky Coal Company? A. Oh, yes, West Kentucky Coal Company.

Q. That was your own contract with them and not the group? A. That is right.

Q. You had no joint agreement? A. No.

* * * * * * * * * * *

Q. Are you shipping on that order or on that contract to Memphis? A. Yes.

Q. Have you sold coal to either of the other parties who received bids on there, on that contract or on that award, for delivery under their contract to Memphis? A. Yes, we have been shipping Peabody's order of late for them by

agreement with the Memphis power people and agreement between ourselves and Peabody.

Q. So you are selling to Peabody the coal that they would furnish on that contract? A. That is right.

3069 Q. Now was there any agreement in connection with that sale or that coal that you made to Peabody, that that was done for enabling Peabody to dump other coal into the markets and thereby depress the markets? A. Oh, no, sir.

Q. Any such understanding or promise or agreement of any kind? A. No, sir.

Q. Is that simply a straight sale by you to Peabody of that quantity of coal? A. That is right. You understand we make the delivery, too.

Q. Yes. You sell the coal and you make the delivery of it? A. That is right.

Q. Does that coal come from your own production? A. From our Uniontown mine.

Q. So that you are selling it as a delivered coal to Memphis? A. That is right. But Memphis pays Peabody for their coal. They pay us.

Q. In other words, you haven't even taken over the contract then? It is a contract between Peabody and Memphis and you sell the coal and you get your compensation from the person to whom you sell it, namely Peabody? A.

3070 That is right.

Q. You say there are no side agreements of anything with reference to any other deliveries or sales in connection with that? A. No, sir.

Q. Mr. Eastin, what about sales of coal to Tennessee Valley Authority? Yesterday I believe your man Hoffman stated they began the sales in the early 40's, somewhere. Have you personally handled those sales to TVA? A. No, sir. Mr. Hoffman, that is his account. He looks after the sales to TVA.

Q. Have you done any of the negotiating for sales of coal

by West Kentucky to Tennessee Valley Authority? A. No, sir.

Q. So far as you know has there ever been any cutting of prices or depressing of prices in the sales that have been made by West Kentucky to TVA for the purpose of forcing out some small operators or other operators and take them away from the TVA market? A. No, sir, never.

Q. Ever been discussed in your presence as president of the company? A. Never.

Q. So far as you know has there ever been any discussion among any company personnel? A. No, sir.

3071 Q. Any authority ever been granted by the West Kentucky Coal Company to do any such thing? A. No, sir.

Q. As far as the actual sales and negotiations or submitting of bids, Mr. Hoffman looks after that? A. That is correct, sir.

Q. Does the West Kentucky Coal Company have a collective bargaining agreement with the United Mine Workers of America? A. Yes, sir.

Q. When did West Kentucky first enter into a collective bargaining agreement with the union, United Mine Workers of America? A. Oh, our first contract was signed with the United Mine Workers on February 15, 1954, effective March 1, 1954.

Q. Did you personally sign the contract or was it somebody else in the company? A. No, sir, the then president signed the contract.

Q. Was that Mr. Hooper Love? A. Yes.

Q. Is he dead now? A. Yes, sir.

3072 Q. Before that contract was signed, what, if anything, did you do to ascertain whether or not the United Mine Workers of America had been chosen as a collective bargaining agent by your employees? A. Well, the United Mine Workers first advised us in writing that they represented a substantial portion of our employees

and asked us to enter into — to bargain with them. We replied by letter that we would bargain if they could show us that they represented the majority of our employees. From there on there were a number of meetings held, which I participated in, in which they brought in membership cards, signed cards, and at first we took the position that they didn't represent a majority of our employees. There were certain discrepancies in some of these cards as we saw them and we —

Q. What type of discrepancies, just briefly? A. Well, the names didn't gibe with our payroll names in some instances. In fact, I recall there were some cards presented where we knew the men couldn't even write that were signed. Well, we said, "We can't accept those cards."

Well, the cards were returned, and the man made his mark and they brought them in later and we were satisfied that they were valid cards.

There would be occasions where maybe a card would be, for example, signed Harry Jones, when our payroll
3073 records showed that we — didn't show us having a Harry Jones, might have H. G. Jones. We said, "We don't have a Harry Jones."

They said, "That is the fellow so and so."

"Well, you will have to correct that."

So the card would go back and then eventually come back signed properly. We compared the cards to the signatures that we had in our payroll department, and in time about — I think the last meeting was about December 10, '53, it became definitely evident that they had a majority, represented a majority of our employees.

Q. And that having been ascertained, did you then enter into the collective bargaining agreement? A. Yes, sir, we signed the contract in February, the following February.

Q. Since then there have been several amendments made to the 1950 collective bargaining agreement of the United

Mine Workers. Have you people joined in those amendments? A. Yes, sir. We have continued right through.

Q. Have you signed any of the extensions or amendatory agreements personally? A. I signed the second one, yes, sir. After our original contract with the union, I signed the next one.

Q. And the others have been signed by others as representatives of your company? A. Well, the president
3074 signed the first one, I signed the second one, and I think, I am sure by that time we had joined the coal producers, the West Kentucky Coal Producers Association, who have signed for us since. They represent the other union — the other operators who have contracts with the UMWA.

Q. But your company has been and is now, has been since 1953, December — '54 — A. '54.

Q. And is now a party to this United Mine Workers' collective bargaining agreement? A. That is right.

Q. During the period that you people have been under this contract of the United Mine Workers of America, has that organization or any officials thereof attempted to dictate to you or your company selling policies? A. Oh, no, never.

Q. Pricing? A. No, sir.

Q. Tried to dictate anything in connection with the management prerogatives? A. No, sir.

Q. Have they influenced pricing policies, that is when you would price to TVA, that you had to meet certain standards or anything of that sort? A. No, sir; never.

3075 Q. Have you or your company at any time since 1950 entered into any agreement of any type whatsoever or done anything at all toward a joint policy with Island Creek Coal Company, Peabody Coal Company, Pittston Coal Company, Pittsburgh Midway Company, Pittsburgh Consolidated Company, or any other coal company

for the purpose of arranging prices for the sale of coal in the territory in which you sell? A. No, sir.

3076 Q. Or for the purpose or with the intent either of depressing the market for the sales of coal in the area? A. No, sir.

Q. So far as you are aware, has anything been done by West Kentucky with reference to accomplishing the results I have just referred to? A. No, sir, nothing that I know of.

Q. Or taking the same questions, premise, for the purpose of eliminating from the industry any coal producer, large or small? A. No, sir.

* * * * * * * * * * *

Q. Now, I ask one more question. Do you know whether Tennessee Valley Authority at the present time is contemplating — maybe already started — the building of an additional steam generating plant somewhere in East Tennessee? A. Yes, sir, I have heard quite a lot about it. I don't have any definite information about it except that it is — its approximate location, and it is to be one of the largest plants ever built, and the largest in their system.

3077 Q. Do you know about where it has been determined to locate it? A. Well, near Oak Ridge. I recall there was quite an effort made to get it located in Kentucky, but it has been located near Oak Ridge.

* * * * * * * * * * *

CROSS EXAMINATION

By Mr. Rowntree:

Q. Mr. Eastin, I believe you talked about the peaks and the valleys of the coal industry. A. Yes, sir.

Q. That's been going on ever since you have been in it, I take it? A. That's right, sir.

Q. Goes back a number of years? A. Thirty odd years.

Q. And there would be times of great demand from the markets, and you would have a peak, is that right? A. That's correct, sir.

Q. And there would be valleys when demand stopped or slowed down? A. That's correct, sir.

Q. I'll ask you if you agree with this general state-
3078 ment that Mr. Lewis, John L. Lewis, made at the 1950 bargaining conference, the first session, with respect to the bargaining over the 1950 contract.

Mr. Rowntree: This is the 1950 minutes, page sixty-six.

Mr. Kramer: Of course, Your Honor, I am going to object to that for this reason. These people were not a party to that. They didn't go into the — under the collective bargaining agreement until 1954, and they were not a party to those negotiations.

Therefore, I don't think any statement made by someone else outside is proper for questioning this witness about.

Mr. Rowntree: I am just asking him if he would agree with this statement.

Mr. Kramer: I don't know what that has to do with this lawsuit.

Mr. Rowntree: He was talking about economics.

The Court: All right. I'll let him answer for that purpose only. You are testing his —

Mr. Rowntree: Yes, sir.

The Court: His knowledge of economics?

Mr. Rowntree: That's correct.

. . . . . .

3079 The Court: Members of the jury, the Court has held that counsel may ask this question solely for the purpose of testing this gentleman's knowledge of economics and the standards that he follows in arriving at these conclusions with respect to economic questions about which he has been asked or will be asked before he leaves the stand.

Mr. Rowntree: That is page 296, 1948, where he stated, among other questions, quote:

"There are times when extraordinary conditions, world demand, wars and rumors of war made more demand for the product."

By Mr. Rowntree:

Q. That's true, isn't it? A. Oh, yes.

3080 Q. And would you agree that in 1950 there was a—

A. Yes, that's true.

Q. And would you agree that in 1950 there was a need for stabilization in the bituminous coal industry? A. I don't know what you mean by a need for stabilization. There's always—as I view it—been a need for stabilization so that you could level this thing out and not have these peaks and valleys. I think that is what any industry likes to have.

I know the utility people, when the air conditioning load developed, they had always had a valley so to speak in the daytime in the summer, and when the air conditioning load came on, it leveled out the thing and consequently you didn't have a lot of idle generating equipment sitting by, and you developed the facilities and the organization to take care of a steady load rather than a peak and a valley.

And when you are in a valley, why your fixed charges are going on just the same, and when you are in a peak, maybe you are spending extra monies trying to meet the demands, and that is not a satisfactory and economical way to carry on a business, as I see it.

Q. And these large coal companies have very high fixed charges? A. Yes, sir.

3081 Q. That continue on? A. Yes, sir.

Q. And stabilization would be tremendously desirable to the big companies? A. Well, I again don't know what you mean by stabilization. I go back to the statement that it is desirable to level out the business and not have the peaks and the valleys.

Now, if you are talking about stabilization, I recall, going way back, that there was some—well, there was an effort made to stabilize prices during NRA days, something like that.

I never subscribed to those means. I don't think it should be artificial. I think it should be a natural course of events where you are geared to meet a steady load.

I don't know what you mean by stabilization in this case.

Q. Stabilization of prices and stabilization of production. A. Well, in my experience in the coal business, you have got to — I don't know, seven thousand producers — and you have got as many or more selling that coal, and if anybody could stabilize it, they would certainly be a magician, or they would be a wonder. I don't know
3082 how you would stabilize it.

Q. In other words, you have got too many producers? A. I wouldn't say we have got too many, but we have got a lot of producers. It's not like a situation where you have got a few producers. We have just got a lot of producers, and when you have got a lot of producers, that's a lot of people to work with, and I don't see how it can be stabilized.

Q. Well, it's a problem of having so many producers in the industry? A. Well, maybe it is. I don't know.

Q. Mr. Eastin, you are familiar with barge rates with respect to the hauling of bulk coal? A. In a general way. You go and ask a quotation on a movement of coal, and a whole lot depends on where it's going to move and how many locks you have got to go through, and how long the movement is going to be. Of course you wouldn't expect to get as good a rate on a short movement as you would a long movement.

There are a lot of things that enter into it, but you go and ask people like Federal Barge Line or Mississippi Valley Barge Line, or those that are in that business, and they would probably start off by talking about a three mills per ton mile, again depending on how much lock time
3083 delay there is going to be, and how far you are going and so forth.

But you work on, and that becomes competitive like everything else, and you finally find that you can get that coal moved, in my opinion, for less than two and a half mills. I think the TVA uses two mills per ton mile plus twenty-five cents. I don't know how they arrived at that.

Frankly, I know that coal can be moved even less than that if conditions are good and you have got the right kind of equipment.

Q. Those rates apply over the country pretty generally on the riverways? A. Well again, an upstream tow would depend — have some bearing on your rates. You can tow downstream cheaper than you can tow upstream.

The prospect of whether or not if you take a tow of coal down, you could pick up a cargo of sulphur or phosphate or iron ore or something else and bring back would enter into it. This is just so many factors in considering rates that it's really pretty difficult to say what the rate would be.

Q. It varies all over the country then? A. Yes. Well, it varies to a degree depending again upon what the factors are. Now I hear talk in the trade that somebody goes to figuring, "Well, what could I deliver coal to a certain
3084 river point for?" They will almost invariably use two mills per ton mile, or maybe two and a half mills per ton mile. But they might end up, if they got the business, using some other figures.

Q. Bulk coal on the waterways is not regulated by the Interstate Commerce Commission, is it? A. No, sir.

Q. So the rates we are talking about is strictly the quotations from barge lines to shipper? A. And — that's right, and of course many people have their own transportation companies.

Q. That's right, including West Kentucky Coal Company? A. That's right, sir.

Q. And including Peabody Coal Company? A. That's right.

Q. And a number of other large coal companies? A. That's right.

Q. So really it wouldn't make much difference to them whether they went by water to the middlewestern markets with their water coal hauling it with their own barges? A. Well, I wouldn't say it wouldn't make any difference to

them. Their number one purpose, I presume, as is ours, is to market coal, but if you could go in some direction
3085 where you could get a back haul and make some money on that back haul, then that is the direction you would like to go in.

Q. And I think that would be an advantage in shipping coal by water to Tampa, Florida, right? A. That is questionable. When we first started making our investigations down there, we had been told that there was a substantial back haul business available, back haul commodities.

We employed experts, consultants, and they immediately pointed out to us that that had been greatly overrated, and that the business that did exist in many instances was seasonable—seasonable, I should say—that it didn't maintain at all times.

In other words, every haul couldn't have some back haul commodity with it. That—it was pointed out that the companies such as those I mentioned a while ago, who now enjoy that business, were not going to turn it loose to the coal company. If they were operating their own line down there, they were going to hold that business. That is their business, that is what they were in the business for.

That is what we found to be the case, and we finally have concluded now, after further observation, that possibly because of the turn around of your equipment that the back haul, and the delay in picking up these back haul
3086 products, often which are at other points, that maybe there is not much to the possibilities of profit from those back haul commodities.

3087 Q. But it did look like it was a pretty good opportunity to backhaul on the Tampa contract? A. It never did look that way to me. There was some people said that it held great prospects.

Q. What is the big commodity that is shipped out of central Florida? A. Well, phosphate and phosphate products primarily.

Q. And there is a tremendous amount shipped out of Florida? A. Well, you say a tremendous amount. When we got into it we did not find that it was so tremendous. There is some moved. Now a lot of that movement is already contracted for on long term contracts, I am told.

Q. And that field of phosphate rock is located near Tampa, is it not? A. Yes.

Q. And so you were disappointed with respect to the backhaul of that phosphate rock? A. Well, I wouldn't say I was disappointed. Of course, it would have been fine if it was there, and I don't say that it is beyond the possibility of being worked out, but I did not think it was there in the beginning. I didn't think it was practical. You are talking about my own opinion of it.

Q. This contract that was originally made May 13,
3088 1955 was expressly assumed by West Kentucky Coal Company, was it not? A. Yes, that is right.

Q. And how long after the execution date was the date of assumption? A. Well, we assumed it when we took over Nashville Coal Company, October 1, 1955. The contract was made May 23, 1955.

Q. When did — Mr. Hoffman mentioned yesterday some talks with lawyers about this contract, but he wasn't present when the decision was made. When was the decision made with respect to the legality? A. I can't tell you offhand, we had, of course, lot of conversations about that contract and other contracts we took over, and in the general course of business there is a lot of discussion about it at the office level, at my level, at the level of our directors, and we discussed it complete.

After all, we spent a lot of money. We discussed those things along with other matters of business with our directors and in the meantime our attorneys were going over these contracts, and not only the Tampa Electric but the other contracts, and after we were given a written opinion — a very firm written opinion, that this was an invalid

contract, that it was illegal, then we determined under the circumstances that we could not make deliveries under that contract unless we could negotiate it to a firm and valid contract.

3089

Q. What was the date of that opinion? A. It is a matter of record. There is no secret about it. I don't have it with me. I have a copy of it in my files, of course, and I would be glad to furnish it if it —

Q. Well, that is not necessary. I just want to get an approximate date. A. I would just be afraid to say but it happened pretty soon after we were given an opinion, and then we continued negotiations and in time why they notified us that they were terminating the contract.

I can tell you when the contract was terminated that might help, if I may refer to this.

Q. All right, sir. Do you have a copy of this letter of termination? A. Do I have?

Q. Yes. A. Oh, yes. I don't have it here but we have copies of it. Be glad to furnish it.

* * * * * * * * * *

3091

Q. I believe, Mr. Eastin, you have a date there of a letter of rescission? A. I can't give you the exact date of the letter of cancellation, I am sorry. That is one date I just don't have. I can tell you about when it was. It was shortly before February 16, 1959.

Q. Well, that was long after the lawsuit started by Tampa, is that right? A. Oh, yes, yes. The lawsuit was rather drawn out. It went through three courts.

Q. In answering the complaint filed in that case brought by Tampa Electric Company, there was no mention of any rescission of the contract on the part of Tampa Electric Company, was there?

* * * * * * * * * *

A. I still don't get the point, sir.

Q. In other words, Tampa Electric Company brought the case with respect to this contract? A. That is right.

Q. And alleged, did it not, that West Kentucky
3092 or Nashville Coal Company had refused to ship coal on the contract? A. That is right.

Q. And in replying to that allegation, West Kentucky and Nashville Coal Company made no reference to any rescission or cancellation by Tampa Electric Company? A. No, not that I know of. I will put it that way. Of course, you understand, we were negotiating at the time we got the letter, still trying to negotiate this matter to a satisfactory conclusion.

Q. What were the matters subject to negotiation? A. Well, the principal one was to make the contract a valid, a legal contract. We were also attempting to renegotiate a satisfactory escalation clause. The clause in that contract on escalation was escalation tied to a government index on the average manufacturing wage paid in the country. Normally coal escalation clauses are designed to apply to that product, to coal. The escalation clause that was in the Tampa Electric contract was not only not what I would say is a reasonable escalation clause, but it had limitations to it. The escalation was limited to 32 cents in any five year period. Well, since that is a 20 year contract, of course that is an objectionable feature because you don't know what is going to happen in 20 years. If you have a limit on escalation, you might be in trouble.

3093 Q. Isn't it true, Mr. Eastin, that that goes to the amount to be paid for the coal and you were seeking to get a higher amount for the coal? A. We weren't seeking to a higher amount, we were just seeking to get an escalation clause that would return to us whatever happened in the way of escalation. Of course, it would have worked both ways. If the cost of labor and supplies and materials had gone down, it would have actually amounted to a decrease to Tampa Electric, the type of escalation clause we were trying to put in there.

Q. But you were concerned about your future prospects

of increased costs and, therefore, worried about the amount that you would receive under the contract? A. Well, I think we can only judge the future by the past, and we have seen what has happened, inflation and in escalation, and we were willing to give them the benefit of any decrease in cost; but, on the other hand, we felt it was only fair that we should be reimbursed for any increase.

Q. And that was your concern, was it not? A. Oh, yes.

Q. And at that time you had your water facilities installed at the cost of several million dollars? A. We were working on them at that time, yes.

Q. And you had control of the water transportation to that market, the facilities for the water transporta-
3094 tion? A. Well, I don't know what you mean by control. Now we owned our own transfer facility and we had our own equipment to move the coal down there, but there are other transfer facilities down there. There is one near Baton Rouge where they could perform the same service that we do, or we would do, and then you can always transfer this coal by midstream methods.

Q. But you, I believe, stated that you had to do many things over a period of time to get ready to ship to that market? A. That is right, to do it on an economical basis.

Q. And any other shipper to that market by water would have to go through the same thing? A. That is correct. Or use someone else's facilities that are there. Of course, we didn't contemplate any profit on the use of those facilities. If you use somebody else, there is a profit involved, no doubt.

Q. So with that control, did you not feel that you had virtual control over the Tampa market there and, therefore, could make demands upon it to increase the amount that you would receive for your coal? A. No, sir, I didn't consider that at all. We didn't consider that at all. I don't know what — there was always the possibility and

the thing that happened that all rail rates would be reduced to the area.

3095 Q. Did you not conclude that you would divert that coal with the control that you had over Tampa, divert it to the TVA market and put it upon the spot coal market? A. No, sir, that never entered our minds.

Q. That is what was actually done? A. No, I don't think it was.

Q. Well, the coal was diverted to the TVA spot market? A. I don't think so, no, sir. Maybe some portions of it. We went through just a general course of business. For instance, in the year where we lost some money in 1958, that mine at Uniontown had a production of 1,700,000 to 1,800,000 tons per year. That mine ran only slightly above a million tons.

Q. And the Tampa coal would come from that mine? A. Well, that was the purpose of developing that capacity there was to take care of Tampa.

Q. And the biggest tonnage offered on the TVA spot market by West Kentucky came subsequently to this period of time; starting in September 1957, the big spot tonnage of West Kentucky came from the Uniontown mine? A. I don't know whether that is true or not. You say offered, I don't know whether we got the business. Apparently we didn't, because we didn't run the mine. If we have got the capacity, I see nothing wrong with trying to sell the
3096 coal and run the mine, and we had the capacity.

Q. But you had the coal sold to Tampa, did you not, Mr. Eastin? A. We didn't consider so because it was an invalid contract so we were advised by our attorneys, and if it was an invalid sale, it was not sold as we understood it.

Q. And it was your own attorneys that gave you that opinion? A. I don't know what you mean by our own attorneys. We employed specialists in that field to take a

look at it after there was some question brought up by our regular retained attorneys about it.

Q. And it was not Tampa Electric Company that was taking that position? A. Taking what position?

Q. That the contract was invalid. A. No, they took the position that it was valid from the very beginning.

Q. And it was subsequently held to be valid? A. That is correct, but in the two lower courts, the district court and the court of appeals, it was held to be invalid.

Q. But it was finally held to be valid by the Supreme Court? A. That is correct.

3097 Q. It was not until 1957 that any case was brought upon that subject? A. It was not until 1957 what, sir?

Q. That any case was brought on that question. A. I don't know what you mean by any case being brought, sir.

Q. Well, the Tampa case was brought in 1957, September 3, 1957, from the record in the case already? A. I presume that is right.

Q. You had approximately two years to bring a case to determine the legality of that contract before this case was brought by Tampa Electric Company? A. We did not wish to resort to those means. We wanted to negotiate the matter to an amicable settlement and we were still trying to, and would be glad to now.

Q. And you were concerned about the costs in the escalation? A. Why sure, and I think any prudent businessman would be concerned about the escalation clause, considering inflation and trends today.

Q. That is right. The upshot was that you made an agreement with Peabody Coal Company to ship half that tonnage to Tampa? A. Well, after, as I said, we felt that that was our business, be bought it— we didn't want to see them down there, but after they got the contract, we

3098 entered into an arrangement with them, and this was after the contract was made, and I am still not happy

about it personally, but we entered into an arrangement with them to furnish half of the coal.

Q. With respect to this Memphis contract, did Kirkpatrick Coal Company only solicit a contract on behalf of West Kentucky Coal Company? A. Well, I have learned since that they apparently represented Peabody. I didn't know that at the time. In fact, I didn't handle it and I didn't really know the detail on Kirkpatrick being in the picture. It was a sales matter.

Q. Isn't not true that Kirkpatrick did obtain an order in its own name? A. I don't know. If they did, I don't know about it.

Q. Isn't it true that West Kentucky Coal Company is shipping coal on it? A. If it is an order for Kirkpatrick as such, I don't know about it. I am just not clear on that. I didn't handle it and I am not right certain. All I know, we are paying Kirkpatrick 7½ cents commission, which is not unusual in coal circles.

Q. I will ask you if you did not testify in your deposition, Mr. Eastin, with respect to this Memphis contract:

3099 "Question: May I ask, did the Kirkpatrick Coal Company also obtain a contract?

"Answer: Yes, they obtained an order and we are shipping that tonnage for them."

A. Well, if I testified that in my deposition, I don't know that they have got an order or whether they are being paid a commission and we have the order. I am not sure about that. I didn't handle it. That was apparently my impression at the time. I don't know that I am clear on it right now.

Q. Who made your contracts for sale? Who was in charge of your sales? A. Generally speaking, R. H. Bowden, vice president of sales. On the Memphis contract, our sales manager, Marshall Hicks, handled that.

Q. Mr. Bowden is in charge of your sales department, is he? A. Generally speaking, yes.

Q. Where is he today? A. I don't know. He was in Madisonville yesterday.

Q. In 1959 I believe West Kentucky obtained a contract for 15 years from the TVA to supply approximately 850,000 tons a year, to TVA? A. That is correct, sir.

Q. That ran for 15 years, from 1959? A. That is
3100 the way I recall it.

Q. And in 1960 you obtained a contract for a million tons a year for ten years? A. That is correct.

Q. That gives you an assured shipping base to TVA of 1,850,000 tons a year for the next ten years? A. That is correct.

3101 Q. Do you have any other contracts, term contracts with TVA? A. None that I know of. I don't think so. I think all the old contracts have expired, all the contracts except those two.

Q. Did this last contract include an option for the sale of an additional one million tons a year? A. We made an offer of a sale of an additional million tons a year. Hoffman handled that. Hoffman has the TVA's account. I don't really know what the status of that is.

Q. But it is — has any contract — A. We would be happy to have another million tons a year from TVA on that contract.

Q. Are negotiations currently going on about that contract? A. None now that I know of.

Q. Well, you have the right to ship them a million tons? A. No, sir. I would know that much about it, if they had another million tons to ship, as bad as we need the business.

Q. And I believe the West Kentucky Coal Company takes credit for the new shipping, new freight rate, from the West Kentucky field to Widow's Creek? A. Well,
3102 any time you are successful or a rate is reduced to a buyer, you like to take credit for it, because —

Q. Yes, sir, and — A. Because that puts the buyer morally at least under obligation to you maybe to give you some coal business.

Q. Yes, sir. A. And that is the way a lot of coal business is developed.

You go in and the fellow says, "I can't take your coal, because it delivers at too high a price," and maybe you go to the railroad and say, "Look, if this fellow would give us a million tons of business, how about shaving the rate a little bit, I think we could — if we get a rate reduction, we could enjoy some of this business."

That's been going on for years and years — ever since I've been in the coal business— and you not only have to be a coal salesman, but you have got sometimes to be a rate salesman, looks like. There's nothing unusual about it, and I said we want to take credit for it, that's natural. We want to get the credit for having developed a lower price per million BTU as a result of the freight rate, and that is what we did.

Q. Do — you are not competitive in the Widow's Creek market? A. Well, I don't know about that.

3103 Q. Well, that is why you got the rate in? A. I presume so. You bear in mind, though, on bids to TVA, you don't bid to just one plant. We put it in, and they have a right to put it in anywhere, and they take the transportation costs to these various plants.

We may be shipping Widow's Creek, and they may call us on the telephone tomorrow and tell us to ship to Johnsonville, and cut off Widow's Creek.

Q. Yes, sir. A. So we don't know.

Q. And you have had discussions about a reduced rail rate from West Kentucky to the Kingston Plant? A. Well, I'm not sure about that, but if there was any chance of getting one, I imagine we have had discussions. Anywhere we think we can accomplish something that will help us sell — deliver coal cheaper, we are all for it. Don't make any difference whether it is by railroads or truck, by water, or what it is.

Q. Yes, sir. A. By pipelines. We have talked to people about putting pipe lines in.

Testimony of Mark E. Eastin

Q. Really the whole TVA system is open to you if you can get these rail reductions? A. Well, we never considered that the area over East Tennessee was open to
3104 us. We have felt that the western end of the section was easier to enjoy the business from, but I might point out that we consider that the plant at Paducah which is only sixty miles from our mines, and is on this side of the Ohio River — if you are going to say what business ought to be ours — it ought to be ours. But nevertheless the Illinois and Indiana mines ship in there, and they come across the river, and they have no freight differential against them. If we go north of the river, we have a substantial freight differential against us.

So, I don't know. I don't think the coal companies can allot what markets belong to them and what markets don't. I think you sell it anywhere you can sell the coal.

Q. It is a matter of carefully planning and developing your own markets as — A. Well, sometimes —

Q. As and where you can? A. Sometimes it is just a matter of catch as catch can.

Q. And Mr. Cyrus Eaton commenced buying stock in West Kentucky Coal Company along about 1951, did he not? A. We heard that he was buying our stock in 1951.

Q. Will you file this as next exhibit? Will you identify that as whether or not that is an annual report? A.
3105 Yes, sir.

Q. Of West Kentucky? A. Yes, sir.

(Exhibit No. 172 was marked for identification and filed.)

Mr. Rowntree: I'll just read one item in here, Your Honor.

* * * * * * * * * *

Mr. Rowntree: This is page nine.

"Net income, 1950, before taxes on income, $5,645,919."

* * * * * * * * * *

"Net income for the year after taxes, $3,270,919.

"For the year 1951, net income before taxes $4,223,814; net income after taxes, $2,916,814."

By Mr. Rowntree:

Q. The fortunes of the company have gone down with respect to making profits since then, have they not? A. That's correct, and that is not unusual. As I said earlier, it goes up and down, unfortunately.

• • • • • • • • • • •

3107 Q. Is it not true, Mr. Eastin, that the United Mine Workers has had to put up assets to support the operations of the company? A. Well, I wouldn't interpret it that way. When we bought Nashville Coal Company, the experts, and some of us, were right optimistic about what the future coal business was going to be. Well, unfortunately, the experts, and some of us, were wrong about what the future of the coal business was going to be, and we have been in a depressed area since.

Mr. Eaton is a born optimist. He was one of experts that thought the coal business was going to be good and fortunately, I am not out on a limb by myself, but when the business was not as good, and we didn't generate as much money as we had contemplated that we would, why naturally we had to have some financial help from Mr. Eaton or from some other source, and we have used other sources and some preferred stock was sold.

But I know nothing about the UMW of A's relations with Mr. Eaton except what I read in the newspaper, and except that the latter part of '59, it became — I think it was the latter part of '59 — it became general knowledge that — through the Labor Department records and maybe otherwise — that they did hold some securities in our

3108 company, but we didn't —

Q. Well, is it not true that United Mine Workers made a pledge of five million two hundred thousand dollars to support a bank loan to the West Kentucky Coal Company? A. I know nothing whatsoever about that. No, sir.

Q. Mr. Cyrus Eaton runs the company, is that correct? A. Well, I am the chief executive officer. Mr. Cyrus Eaton is chairman of the board, and Mr. Cyrus Eaton has pretty well left the running of the company to the local officers.

Q. But he was the optimist, and he decided to buy Nashville Coal Company? A. Well, he was one optimist. There were a lot of optimists in those days about the future of the coal business. In fact, the investments that were made by the various trusts over the country, investment trusts, they all jumped in and bought heavily in coal stock. West Kentucky was included.

I know one outfit that bought fifty or sixty thousand shares of half a dozen coal companies, so everybody was optimistic about what the future of the coal business was going to be, but it hasn't panned out that way unfor-
3109 tunately.

We are still optimistic. You have got to be optimistic in this game.

Q. And you have got a right to be optimistic when you have got contracts in the amounts of one million tons a year to TVA, is that not true? A. Well, if we can get some more contracts, we will be more optimistic. We needed the contracts, and as I said earlier, we'd be happy to have another one.

Q. All right, sir. A. I might say, however, that our participation — I don't know whether that's been brought out or not — but our participation in the TVA total burn has not been unusual. In fact, we used to enjoy more tonnage, percentage wise, to their burn than we are enjoying today, and I think the record, if there is such a record, will bear that out.

Q. Well, we have got a record that was introduced yesterday, I believe, of that tonnage of West Kentucky, which does not extend, however, to the present situation which involves these two recent large contracts. A. We have had some contracts expire, by the way, in the meantime.

Q. Yes, sir, but is it not true that you now have an assured business of one million, eight hundred and fifty thou-
sand — A. That's right.
3110 Q. One million, eight hundred fifty thousand tons to the TVA system? A. That's right sir.

Q. For ten years? A. That's right.

3111 Q. And have you had any meetings with other coal company representatives with respect to negotiations preliminary to the submission of bids upon invitations received from the TVA? A. No, sir.

Q. Has Mr. Bowden had any such meetings? A. I don't think so. That is against the law and that is contrary to our policy. If he has he had no authority to do so, and I don't think he has. I never heard of it.

Q. He never reported to you any such meetings? A. No, sir.

Q. Mr. Eastin, with respect to the signing of the contract, I would like to read into the record a statement of Mr. Lewis in 1956, 1956 minutes, page 545.

"When Mr. Eaton's interests bought the West Kentucky Coal Company, which was operating non-union for more than 50 years, his first official act was to instruct that company to execute the industry agreement with the United Mine Workers of America."

Did you agree with that statement? A. I don't think that is quite the fact. I can't — I don't think the record will bear that out.

Q. When did Mr. Eaton come on the board of West Kentucky?

* * * * * * * * * * *

3112 A. Mr. Eaton was elected a director on December 12, 1952.

Q. What about Mr. Eaton's colleague from Cleveland? A. Cyrus Eaton, Junior, did not come on the board until March 9, 1953. Mr. William Daley and Mr. LeFevre did not come on the board until May 12, 1953. And Mr. Robert Kaiser did not come on the board until May 13, 1958.

Q. 1958. Are they associated at Cleveland with Mr. Eaton? A. Yes, in some respects.

Q. And the contract with United Mine Workers was made in 1954? A. That is right.

Q. When did Mr. Eaton become chairman of the Board?

A. Mr. Eaton became chairman of the board May 12, 1953.

Mr. Rowntree: That is all.

• • • • • • • • • • • •

3113 Mr. Kramer: Now, your Honor, I want to read from the annual report of West Kentucky which has just been filed as Exhibit 172, reading from page 3.

The Court: Yes, sir.

Mr. Kramer: Where it compares between 1950 and 1951 figures.

1951 production from your company's properties amount to 5,513,890 tons comparing with 6,465,136 tons in 1950.

That tonnage is not in an exhibit we gave but it is set out here.

The decrease in production in 1951 was reflected in a reduction in total sales which amount to, in 1951, 5,466,189 tons compared with 6,473,135 tons in 1950.

• • • • • • • • • • • •

3114 (Witness excused.)

Mr. Kramer: We have a deposition, your Honor, that we want to read here. We are not going to read it all, a portion of it. Mr. Combs and Mr. Rayson will read.

Mr. Combs: May it please the Court and ladies and gentlemen of the jury, I would like to read some excerpts from the deposition taken on pre-trial of Mr. R. E. Phillips, September 14th, 1960.

I might say, for purpose of clarification to the Court and jury, that the part of the deposition we are reading has a bearing on the testimony of Mr. Phillips in regard to an alleged agreement that he had with Ed Daniel, that Ed Daniel told him that he could pay what he wanted to on the welfare fund, what he could, and that as far as wages were concerned that he could work that out among his men.

All these excerpts of the deposition have to do with that particular point.

• • • • • • • • • • • •

3115 R. E. PHILLIPS

being first duly sworn, was examined and deposed as follows:

CROSS EXAMINATION

By Mr. Combs:

(The deposition was read as follows:)

"Q. Explain to me what you mean you haven't had all the work you can do? "A. Well, we could have expanded and we had the orders.

"Q. You had the orders? "A. Yes, sir.

"Q. I misunderstood, I thought you said you didn't have the orders. Now you say you had orders. "A. As far as long- term contracts, we never had no long-term contracts with anyone. But through our broker has always been able to handle our coal.

"Q. But you didn't expand, is that right? "A. We expanded some, but not as much as we wanted to.

"Q. Why didn't you expand? "A. That's a good question.

"Q. Was that just something you decided among yourselves or did the union have something to do with that? "A. Well, the union had a little to do with that.

"Q. Tell us about that. "A. We was afraid to
3116 expand because we didn't know — we knew we couldn't pay no 40 cents a ton. We knew that, before we even signed any kind of a contract. And we was afraid would happen just what has happened.

"Q. What has happened? "A. The union thinks that we owe them a lot of money.

"Q. And you mean you were afraid a lawsuit would be brought by the welfare fund? "A. Through the union, yes.

"Q. In other words, you were afraid that your agreement with Ed Daniel wasn't so good; is that right? "A. Well, I questioned it.

"Q. Did you ever seek to get some sort of confirmation of that? "A. I did not.

"Q. Did you ever consider going over and talking to one of the district officers and seeing what the higher-ups would say about an agreement such as was made? "A. I thought about it, but we never did go.

"Q. Why didn't you? "A. Just didn't go.

"Q. Did you have any reason for not going? Why didn't you go? "A. I didn't have no reason for not going. We just failed to go.

3117 "Q. You were over there one day. "A. He was their representative. I thought he would handle it on that end.

"Q. If you didn't have any worries about it — evidently you did have some worries about it. "A. We didn't get anything in writing.

"Q. Did you mention it to Albert Pass the day you were over there, discussed the thing with him? You were over there one day. "A. We was over there, but we didn't discuss that with him."

(End of reading of deposition.)

* * * * * * * * * * *

3118 ELLIOTT D. ADAMS

called as a witness by and on behalf of the cross-defendant.

* * * * * * * * * * *

DIRECT EXAMINATION

By Mr. Rayson:

Q. I believe you are Elliott Adams; is that correct? A. Yes, sir.

Q. What is your business, Mr. Adams? A. I am a certified public accountant and attorney-at-law.

* * * * * * * * * * *

Q. Have you at our request examined three books, which are the Exhibits 7, 6 and 3 in this case, and which purport to be the records of the Phillips Brothers Coal Company? A. Yes, sir.

3119 Q. Did you for the years 1955, 1957 and 1958 total the number of tons shown as rail tons and total the

number of tons shown as truck tons in those books? A. Yes, sir.

Q. And did you also for those years total the receipts for rail tons and total the receipts for truck tons? A. I totalled the dollars shown as to what they got for it. Some of them were not extended.

Q. What did you do with respect to the year 1956? A. Exhibit 22 showed the tons and realization for rail tonnage and the testimony showed the total tonnage. So I took the rail tonnage and total tonnage and took the difference to be truck tonnage.

Q. I see. You did that for that one year? A. Yes, sir.

Q. Are the records available for that year? A. I didn't see any.

Q. In the books. A. No, sir.

Q. On the basis of that information do you have prepared an exhibit showing the total tonnage shipped by rail by Phillips Brothers for each of the four years in 1955 through 1958, the average price of that rail coal, the
3119a total of all coal mined by Phillips, the average price of all of Phillips' coal? A. Yes, sir.

3120 Mr. Rayson: Your Honor, we would like to introduce this as an exhibit to this witness' testimony.

(Exhibit No. 173 was marked for identification and filed.)

Mr. Rayson: Before going further with the witness, your Honor, I would call attention to the last column on the right-hand side of the page entitled National Average Price Strip Mined Coal.

On yesterday we read from Exhibit 116, from page 89 of that booklet showing the national average price for strip mined coal for the years 1957 and 1958. I would now read from page 125 of the 1957 Minerals Yearbook, Volume 2, published by the United States Department of the Interior, and I have discussed this book with counsel, opposing counsel this morning, indicating the national average price for strip mines for the years 1955 and 1956.

The strip mine national average for the year 1956 was

$3.74. That is the figure shown under that column at the right-hand of the page. For 1955, and I now read from page 107 of the 1956 Minerals Yearbook, the national average price for strip mined coal in that year was $3.48.

We do not file these books, but we make them available for examination by opposing counsel.

* * * * * * * * *

3121 By Mr. Rayson:

Q. Mr. Adams, does this figure of 33,898, does this figure indicate the total amount of coal produced by Phillips in 1955? A. I would say shipped, delivered.

Q. Shipped. A. Probably.

Q. And this is the figure shown by their books as you found it? A. Yes, sir.

Q. Is this 23,985, is this the total amount shipped by rail? A. Yes, sir.

Q. The $3.35, is that the average price of the coal shipped by rail, the 23,985 tons? A. Yes, sir.

Mr. Rayson: Your Honor, this figure, $3.35, and the figures in this column are the figures which the cross-

3122 plaintiffs have previously shown in other exhibits.

By Mr. Rayson:

Q. Now did you add the receipts which Phillips Brothers received from the sale of rail coal to the sale that they received from their other coal? A. Those were the records of what they had down there for the monthly sales.

Q. What were the total receipts shown by Phillips on its books for all coal that is sold in the year 1955? A. $133,109.55.

Q. What was the average price that Phillips received from all of its coal per ton? A. $3.93.

Mr. Rayson: Now, your Honor, we call attention to the fact that the average price which Phillips received for its coal on a tonnage basis, and that is taking all of its coal, is above the national average price for strip mined coal for the year 1955.

By Mr. Rayson:

Q. Now did you make a similar computation for the year 1956, Mr. Adams? A. I had nothing to go by for 1956, except the testimony.

Q. And by the testimony, you mean the total num-
3123 ber of tons sold? A. That is correct, and the dollars gotten for it and the amount of rail tonnage and the amount of rail proceeds, billings.

Q. Very well. From that basis, were you able to determine the average price which Phillips received from all of its coal? A. The average price, according to those figures for total shipments was $4.59 a ton.

Mr. Rayson: I would call attention, your Honor, to the fact that this is above the national average for that year for strip mined coal.

By Mr. Rayson:

Q. Did you make a similar computation, Mr. Adams, for the year 1957? A. Yes, sir, I did. I had the record on that.

Q. And what average price per ton did Phillips receive for all coal in that year? A. $3.63 1/3. $3.63 1/3.

Mr. Rayson: And here we would point out that this price is 25 and a fraction cents below the national average for strip mined coal in the year 1957.

By Mr. Rayson:

Q. And for 1958, did you make a similar computation, Mr. Adams? A. Yes, sir.

3124 Q. Did you conclude that the average price that Phillips received for all coal in that year was $3.72? A. That is correct.

Mr. Rayson: Your Honor, I would call attention that this is 8 cents below the national average for strip mined coal in that year.

I would further point out that for the years 1955 and 1956 that this chart indicates that the average price of Phillips Coal was $1.30 ahead of the national average for those two years; he was 34 cents below — that is for the combined years, for '57 and '58.

Cross examine.

CROSS EXAMINATION

By Mr. Rowntree:

Q. Mr. Adams, do your computations with respect to rail coal confirm substantially this Exhibit No. 22 so far as the figures on your exhibit are concerned? A. They agree exactly. The amounts vary somewhat. We discovered some mistakes in addition on there.

Q. I believe there is a two cents error on the 1955 average rail price. We have it on there $3.37½. A. $3.37½, that is right.

Q. Is that right? A. Yes, sir. No. For rail?

3125 Q. Yes. A. No, $3.35.

Q. $3.35. A. That is for 1955.

Q. So the exhibit is 2½ cents off on '55. But the other years are the correct average price? A. Yes, sir.

* * * * * * * * * * *

3126 Q. Are you an expert in the coal business? A. Well, I was office manager and credit manager for a wholesaler for 12 years. And I have made up tax returns, cost sheets for the coal associations, Southern Appalachian and also Harlan, a number of years back. I still have about five producers and wholesalers of coal for whom I do the tax and accounting work.

Q. Would you say that the domestic market for coal has greatly declined in this country? A. Practically negligible.

Q. Most coal companies have very little domestic market? A. That is correct.

Q. But if the truck coal of Phillips Brothers Coal Company goes to the domestic market, then is it not true that Phillips Brothers has a very substantial domestic market for coal? A. I wouldn't say that 3,800 tons or 10,000 tons a year was a substantial domestic market.

Q. But it is a very substantial domestic market for a company that puts out 25 to 35 thousand tons a year, is it not, Mr. Adams? A. Yes, that is a pretty high per-

3127 centage.

Q. Yes, sir. Now are you familiar with the type

of market that has been affected by the shipments of coal into the Tennessee Valley from outside? A. You mean steam market?

Q. Yes, sir. A. That is substantially all there is.

Q. And so the shipments of coal from outside coming to the Tennessee Valley market affect the steam market of coal, is that not true? A. I would say so, yes, sir.

3128 Q. But the domestic market is something apart from that, it being not the market at which these large tonnages are coming into the valley? A. That's correct.

* * * * * * * * * * *

3131 WELLY K. HOPKINS

a witness called by and in behalf of the Cross-Defendants.

* * * * * * * * * * *

DIRECT EXAMINATION

By Mr. Combs:

Q. Will you please state your name and your address to the jury? A. My name is Welly, W-E-L-L-Y, K. Hopkins. I reside in Washington, D. C. at my office address, and my home or residence is in Alexandria, Virginia.

Q. What position do you hold with the United Mine Workers, Mr. Hopkins? A. I am its senior counsel, Mr. Combs, and have been since twenty-one years ago

3132 this month.

Q. Would you state briefly your professional background, Mr. Hopkins? A. Well, sir, I was born and reared in the southwest Texas country town, and there started practicing law in 1923.

Prior to that time, I — after finishing preparatory school, I spent six years on a ranch, Judge, and spent three or four months in the Army in 1918, and received my license to practice law by being admitted to the Bar in July, 1923, after three years attendance at the University of Texas.

After thirteen years, I believe, approximating that, prac-

tice in that part of the State, I came to Washington, D. C., in the spring of 1936, as a special assistant to the Attorney General of the United States, then Homer Cummings, in charge of the trial section of the criminal division of the Department of Justice.

I spent four years there, and resigned to become the senior counsel of the Mine Workers of America in May, 1940.

* * * * * * * * * * *

3133 Q. Now, Mr. Hopkins, I believe you said you went with the United Mine Workers as their senior counsel in the year 1941. A. 1940.

* * * * * * * * * * *

3134 Q. And have you participated in, as counsel, the wage negotiations that the United Mine Workers have had with the operators since that time? A. Yes, sir, I have, Mr. Combs, beginning in 1943, which was the expiration date of the 1941 contract.

* * * * * * * * * * *

3135 Q. Now for clarification, I believe the 1941 contract was known as the Southern Wage Agreement, the 1941 so-called Captive Mines Contract, the 1943 Six-day Work Week, and the 1943 contract, there was a contract known as the First Illinois Agreement, 1943; a contract known as the Second Illinois Agreement, 1943; this Illinois Agreement went into — was carried forward into the so-called Ickes-Lewis Agreement, 1943; this agreement was modified by the agreement of December 17th, 1943; then these agreements as modified by the terms of
3136 the contracts were carried over and became the 1945 agreement; the 1946, the Government seizure, we have what is known as the Krug-Lewis agreement; then the next agreement was 1947 Bituminous Coal Wage Agreement which carried forward as modified the previous enumerated agreements, and then there was the Bituminous Coal Wage Agreement of 1948.

Now getting down to the terms of the 1948 contract, Mr. Hopkins, what happened with reference to the 1948 con-

tract? A. Mr. Combs, I think the chronology that you have stated is substantially correct. As to the first Illinois agreement. it did not become a part of the 1943 Ickes-Lewis agreement because it was superceded by the second Illinois agreement. It however, received the precise approval of the then War Labor Board, and the Ickes-Lewis agreement, by Presidential directive, was founded upon the second Illinois agreement and became a part of the Ickes-Lewis agreement.

The part thereafter as given in your chronology is correct.

You asked me what happened to the 1948 agreement?

Q. Yes. I might, for clarification to the Court and Jury, ask you this question. The 1948 agreement was the
3137 agreement in force and effect before the 1950 contract? A. It was; yes, sir.

Q. Now would you tell the Court and jury how the 1948 contract was terminated. A. Yes, sir.

By its terms there was a right on the part of any signatory operator or the union to terminate it on 30-day notice, on or after June 30, 1949. And the Southern Coal Producers Association, one of the signatories to the agreement, gave notice of termination, as I recall, in late April, 1949. And thereafter the union, as the other signatory to the agreement, gave notice of termination to the remaining commercial operators as represented by what is known as the Northern Coal Conference, and a notice of termination to what is known as the Captive Coal Group. That is the group that produce and use their own coal and are not in the commercial field.

Whereupon, the conferences as required under the notices as given were assembled beginning in May, 1949.

There were three in number. The first conference assembled at Bluefield, West Virginia, I believe. The second assembled at White Sulphur Springs, West Virginia, and the third was likewise held there. That is the captive

conference, it having had one initial, their first meeting, at Philadelphia in late May of 1949.

3138 Thereafter, the conferences, as thus constituted, continued their negotiations until they were terminated by the operators walking out of the conference over the objection of the mine workers on or about November 2, 1943. I believe that is the approximate date.

As to the conferences at White Sulphur Springs, they met something like 40 or 45—about 25 or 30 different days. At Bluefield I think they were in session somewhere around 40 or 45 days. The captive mine conference that was being conducted at White Sulphur, met intermittently. I would estimate from 18 or 20 different times.

The conferences failing to achieve a contract led to the filing of numerous unfair labor practice charges against the International Union and its president, beginning on or about, as I recall, December 28, 1949. There were five different groups of charges. Some 50-odd different coal associations and/or companies being the charging parties.

They were filed with the general counsel of the National Labor Relations Board, and on January 18th, 1950, as I recall, the then general counsel of the Board authorized the issuance of complaints based upon those several charges and consolidated them for hearing.

At the same time, the general counsel, acting
3139 through a man by the name of Penello, who is a regional director for the Labor Board in Baltimore, Washington being in that jurisdiction, on behalf of the Board and in the name of the general counsel, filed a petition for an injunction against the International Union and its president, Mr. Lewis, in the Federal District Court of the District of Columbia at Washington, alleging the named defendants, union and its president, by the violation of certain sections of the Taft-Hartley Act, in that they alleged that they were guilty of unfair labor practices as spelled out in the petition.

The petition—I hold a copy, or a certified copy of it

in my hand—certified by the District Clerk in the cause known as John A. Penello, Regional Director of the Fifth Region of the National Labor Relations Board, on behalf of the Board, Petitioner, versus, International Union, United Mine Workers of America, and its president, John L. Lewis, Respondents, No. 275-50, filed January 18, 1950.

It prayed for an injunction as against the named defendants—reading from the prayer of the petition as filed—that the Court enjoin and restrain respondents, and each of them, from:

"1. Insisting that any collective bargaining agreement with the employers provide as a condition of employ-
3140 ment that all of the employees of said coal operators, included among and represented by said Employers, and each of them, become and remain members of respondent United Mine Workers of America, without compliance by respondent United Mine Workers" of the Act.

3141 "2. By insisting that any collective bargaining agreement with the employers contain a so-called welfare and retirement fund to be administered so as to provide benefits therefrom for members of respondent UMW only.

"3. By insisting that any collective bargaining agreement with the employers contain such provisions as are so-called 'able and willing' and 'memorial period' clauses contained in prior agreements."

I might say there, your Honor, that those points as referred to were sections that had been contained in the 1948 agreement and were a subject of dispute in controversy in the bargaining sessions to which I have averted.

On February 11, Judge Richmond B. Ketch, in the same case, he being the judge presiding in the district case, issued an injunction and restrained the union as prayed for in the petition.

I hold in my hand a certified copy of such court order filed February 11.

Q. Mr. Hopkins, about this time did President Truman appoint a fact finding board to investigate this dispute? A. He did, Mr. Combs.

Q. Would you describe briefly— A. Yes, sir, I will in just a second. It was a fact finding board—not a fact finding board, but a board of inquiry appointed by the President under executive order No. 10106, on Feb-

3142 ruary 6, 1950, naming as the board Mr. W. Willard Wertz, who was then I believe connected with the University of Wisconsin and is now Under-Secretary of Labor in the present administration, a Mr. John T. Dunlop, who is associated with Harvard University, and Mr. David L. Cole, an attorney and arbitrator from Patterson, New Jersey, I believe. They were appointed and under their auspices several meetings were had by the parties with that board.

Simultaneously with the issuance of the injunction just referred to, Mr. Combs, there was another injunction. I don't know whether you have inquired about that or not.

Q. Yes. Would you tell us about that? I think that was the injunction sought by the Attorney General? A. It was. Based upon the report, the preliminary report at least of this board of inquiry, as appointed by President Truman, the President, upon receipt of that report, authorized and directed the Attorney General of the United States in the name of the United States to file a petition for an injunction in the District Court of the District of Columbia, to restrain the union and the named other defendants, a list of approximately 108 or 110 coal companies and associations, alleging that there was in existence a labor dispute between the named defendants, and calling upon them to collectively bargain out the dispute.

3143 I believe, holding in my hand that petition, which is styled United States of America v. International Union, United Mine Workers of America, et al, as defendants, No. 683-50, filed on February 11, 1950—

Q. May I ask one question there, Mr. Hopkins, did this restraining order or injunction that you have referred to insofar as the operator defendants were concerned, did that include both the northern and southern operators in the restraining order? A. Mr. Combs, it did. It named the various and sundry associations and a long list of individual companies. For instance, Southern Coal Producers Association, as well as the other associations, Southern Appalachian Coal Producers Association, Southern Tennessee Coal Producers Association, Tennessee Products and Chemical Corporation, Tennessee Consolidated Coal Company, Whitwell Coal Corporation, and a whole list of over a hundred others. They were all named as defendants, and under Section 4 of the petition, appearing on page nine of the petition, the petition said that this court—they were praying that this court—I am quoting: "That this court order the defendants to engage in free collective bargaining in good faith for the purpose of resolving their disputes and to make every effort to adjust and settle their differences as contemplated by the National Emergency Provisions of the Labor Management Relations Act of 1947."

3144 And on that day a temporary restraining order, ex parte, that is without notice, was issued by the district court granting the restraints as prayed for against the named defendants.

Q. Mr. Hopkins, I take it that the two restraining orders you are talking about issued on the same day, the first one that you testified about was the one restraining the union from making demands with relation to those items that you read there, including the union shop issue? A. Yes, sir.

Q. And then this restraining order that you are talking about was issued on the same day ordering the parties to bargain but the dispute they had? A. Yes, the first being issued at the behest of the National Labor Relations

Board and the second at the behest of the Attorney General of the United States.

Q. Would you tell the Court and jury then what happened? A. Well, under the scrutiny of the federal court and in compliance with orders of those two injunctions, and under the surveillance, if you want to put it that way, of the Labor Board that it sought the first injunction, and with the Attorney General as the petitioner in the second watching the negotiations, the parties continued to negotiate with the assistance at sometimes of the mem-
3145 bers of the board of inquiry and the mine workers representatives, your Honor, in accordance with those orders in commands of the injunction, negotiated in accordance therewith, and a contract was achieved on the 5th of March, 1950, that eliminated the so-called able and willing clause that had been in the '48 agreement that was one of the points of controversy and involved in the charges that it brought in the petition, amended the memorial period to allow only five days in any one year after notice. It amended that section of the preceding 1948 contract that had been in controversy in reference to the payment of welfare fund benefits to members of the union, so as to provide in the 1950 agreement payable to the employees of the employers who were contributing.

It likewise, under the same scrutiny of the officials involved, amended the union security clause so as to add the words "in the manner and to the extent permitted by law." That was added to the 1950 contract and it was executed by the parties, as I recall on Sunday, March 6, becoming effective as of midnight March 5.

That was the result of the bargaining under those conditions on the points enumerated that had been involved in the injunctions that resulted in the National Bituminous Coal Wage Agreement of 1950.

Q. Now, Mr. Hopkins, what became of the re-
3146 straining order secured by the Attorney General? What eventually became of that restraining order?

A. Well, Mr. Combs, it was eventually dismissed. But subsequent to the injunctions and the contract I have outlined, there were proceedings had under the Taft-Hartley Act on the charges as set out in the complaint that Penello obtained under the first injunction.

3147 Q. Yes, but let's handle one of the injunctions at a time. A. All right, sir.

Q. Let's talk now specifically about the restraining order that was issued ordering the parties, including all of this group of operators, to bargain with reference to that dispute. A. Yes, sir. On—I want to turn to it. I have in my files somewhere a copy of the order.

Here it is.

On the 10th of October, 1951, in cause number 27550, being the first injunction, the Labor Board moved and Judge Ketch, the issuing judge of the original preliminary injunction, granted the dismissal of that injunction.

It reads as follows:

"A temporary injunction having been entered in the above-entitled proceedings enjoining and restraining respondents, International Union, United Mine Workers of America and its agent John L. Lewis, from engaging in certain acts and conduct set forth therein, pending final adjudication of the National Labor Relations Board with respect to such matters; and

"It appearing to the Court that a trial examiner of the Board has issued his Intermediate Report and rec-

3148 ommended order in International Union, United Mine Workers of America and John L. Lewis, its president, Case Nos. 5-CB-43 to 5-CB-47, inclusive and that the Board—"

And I interpolate, these being the same ones that were involved in the consolidated complaint on which that injunction had originally issued.

"—and that the Board—"

Continuing.

"—and that the Board, having been advised that respondents are in compliance with said recommended order, has closed said proceedings before it, it is therefore

"ORDERED, ADJUDGED AND DECREED that the temporary injunction ordered by this Court in this matter on February 11, 1950, be, and the same hereby is, vacated.

"Done at Washington, D. C. this 10th day of October, 1951."

Mr. Combs: If Your Honor please, we would like to introduce that as Exhibit.

* * * * * * * * * * *

3149 (Exhibit No. 174 was marked for identification and filed.)

By Mr. Combs:

Q. Mr. Hopkins, did you receive letters of compliance from the National Labor Relations Board in connection with the order they issued? A. Yes, sir, after we complied therewith, in the spring of 1951, we did receive two letters of compliance, they arising in this fashion:

There had been an Unfair Labor Practice charge filed against the union in 1948 by some of the operators that had gone to final judgment through the Board, the Circuit Court of Appeals, and certiorari in the Supreme Court of the United States being refused in February, 1951, that being but a short time after the filing of the report by the trial examiner in the other cases that had arisen, as I said, under the first injunction in January, 1950.

Compliance was had by the union in both of those cases, and on August the 9th, 1951, I hold in my hand the copy of the—photostatic copy of a letter from the National Labor Relations Board addressed to me, 900 15th Street,

Washington, D. C., RE: International Union, United
3150 Mine Workers of America, et al, Case Number

5-CB-14, that being the number of the case that had arisen in 1948 involving the union security clause.

Reading: "Gentlemen:"

This addressed to you, Mr. Combs, and Mr. Owens and myself jointly.

"Gentlemen:

"The regional director of the National Labor Relations Board, having advised the Board that the respondent is in compliance with the Court decree in the above matter, the case is hereby closed.

"Very truly yours,
"Frank M. Kleiler
"Executive Secretary"

With copies to all parties including Mr. Penello, the regional director in Baltimore.

On August the 10th, 1951, I hold in my hand a photostatic copy of a letter written to International Union, United Mine Workers of America, and its president John L. Lewis, 900 15th Street, Northwest, Washington, D. C., RE: United Mine Workers of America, Cases Number 5-CB-43 through 5-CB-47, they being the consolidated charges, ladies and gentlemen of the jury, that were involved in the first injunction issued on February 11th, at the behest of the Labor Board that I have described to you.

3151 That letter reads as follows:

"Gentlemen:

"The regional director of the National Labor Relations Board, having advised the Board that the respondent is in compliance with the intermediate report in the above matter, the case is hereby closed.

"Very truly yours,
"Frank M. Kleiler
"Executive Secretary."

Copies to all parties, including Mr. Penello,

Mr. Combs: May it please the Court, we don't desire to introduce that as an exhibit unless counsel would like to have in there. We don't have very many copies of it.

Mr. Kramer: It's read into the record, so it is a part of the record.

The Court: All right.

By Mr. Combs:

Q. Mr. Hopkins, what became of the injunction issued at the behest of the Attorney General in respect to the emergency that you referred to? A. Mr. Combs, I hold in my hand a photostatic copy of a motion for discharge of the preliminary injunction filed in that case, number 68350, by the Attorney General of the United States, on August the 29th, 1951.

3152

It reads as follows:

"MOTION FOR DISCHARGE OF PRELIMINARY INJUNCTION"

That being the one, ladies and gentlemen, that was issued also on February 11, 1950, at the behest of the Attorney General, acting under the President of the United States.

"The United States of America, by the Attorney General of the United States, moves to discharge the Preliminary Injunction issued and entered herein on March 3, 1950, and represents to the Court as follows:

"'1. The action in which the injunction was issued was commenced by the United States of America on February 11, 1950, pursuant to the provisions of Section 208 of the Labor Management Relations Act, 1947 (29 U.S.C. 178). The defendants were (a) International Union, United Mine Workers of America, and its president, and (b) numerous bituminous coal operators and associations of operators signatory to the National Bituminous Coal Wage Agreement of 1948. The purpose of the action and of the Preliminary Injunction issued therein on March 3, 1950—" and I interpolate to say, gentlemen, that the temporary restraining order, that is the first action, was issued on February 11th, and the preliminary injunction based upon that restraining order was dated March the 3rd, and that is what is referred to here, it having

3153

taken the place in the legal sense of the temporary restraining order.

Continuing:

"—issued on plaintiff's motion was to restore normal operation and production in the bituminous coal industry of the United States, such production having virtually ceased as the result of a work stoppage in the said industry that commenced on or about February 6, 1950 due to unresolved labor disputes between the signatories to the National Bituminous Coal Wage Agreement of 1948 which had expired on June 30, 1949. The Preliminary Injunction was directed against all defendants in the action and its fundamental provisions enjoyed the International Union and its officers from continuing the strike then in existence in the bituminous coal mines in the United States and enjoined the other defendants from encouraging, causing or engaging in a lockout in the said mines.

"2. The Preliminary Injunction entered by this Court on March 3, 1950 provided in the last paragraph thereof that it shall 'be and remain in full force and effect until the further order of this Court.'

"3. On or about March 5, 1950 the parties to the 3154 labor disputes agreed to a settlement of their differences, which settlement was followed shortly thereafter by the return to their employment of the employees in the bituminous coal industry represented by the International Union, United Mine Workers of America. In consequence thereof normal production of bituminous coal was restored within a short time after March 5, 1950, and the national emergency which gave rise to the injunctive proceedings herein ceased to exist."

Then it recites Section 210 of the Labor Management Relations Act, that makes it, the duty of the government, quote:

"Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge

the injunction, which motion shall then be granted and the injunction discharged."

"The balloting contemplated by the said section and the preceding section of the Act did not take place but, as above stated, a settlement of the labor disputes between the parties thereto, defendants in the instant action, was reached on or about March 5, 1950."

Then it recites an appeal motion filed by the representatives of the government for the—to the Circuit
3154a Court of Appeals, asking leave to discharge in injunction, and the Circuit Court referred it back to the District Court so it winds up by the prayer:

"WHEREFORE, the plaintiff United States of America prays for an order discharging the Preliminary Injunction issued by this Court on March 3, 1950, and for such other, further and different relief as the Court may deem just and proper.

"Signed J. Howard McGrath
"Attorney General
"By: Homes Baldridge
"Assistant Attorney General
"George Morris Fay
"United States Attorney"

Based upon that motion to vacate, I hold in my hand a certified copy in the same case of an order filed on September the 12th, 1951, reading as follows:

"This cause having come on to be heard on September 12, 1951, on the motion of the United States of America for the discharge of the preliminary injunction, and it appearing to the Court that the entire controversy has become moot, it is this the 12th day of September, 1951,

"ORDERED that the preliminary injunction entered in this action on March 3, 1950, be and the same is
3155 hereby discharged, and it is further

"ORDERED that the action be and the same is hereby dismissed without costs.

"Signed Edward W. --------
"District Judge"

Q. Now, Mr. Hopkins, these restraining orders and charges that you are talking about started prior to the execution of the 1950 contract, it had to do with the dispute that arose between the parties with reference to a successor contract of 1948 contract, and then the letter orders of dismissal had to do with the action of the same Court proceedings and Labor Board proceedings after the execution in 19— A. That is correct, the contract was executed on March the 5th; the injunction obtained on February the 11th by the Labor Board; was discharged by separate order in 1951.

The National Emergency injunction was on motion of the Government dismissed in 1951, on September 12th, as I have just read, all subsequent to the contract of 1950, which was achieved after the issuance of the first two injunctions.

Mr. Combs: May it please the Court, we have read the parts that we want in the record of those proceedings, and we have them here. We have no desire to introduce them, but they are available for counsel or the Court
3156 if they would like a copy.

By Mr. Combs:

Q. Now, Mr. Hopkins, you refer to questions relating to the union shop clause as being a question that was involved in the Labor Board charges. That union shop clause, I take it from your testimony, was in the 1948 contract? A. Yes, sir.

Q. Which you have described its termination. A. Yes, sir.

Q. I would like to ask you, please, if you would give a brief history of the union shop clause preceding the 1950 contract, and the clause that is contained in the 1950 con-

tracts. A. Well, Mr. Combs, I'd be glad to try to do that, sir, as nearly chronologically as I can.

3157 The 1941 agreements, they were two in number, called the Appalachian and the Southern agreements, expired by their terms on, I believe, March 30, 1943.

In those 1941 agreements the union security clause was provided for by a memorandum, an explanatory memorandum that was incorporated in those contracts, that said "With reference to the sentence in the enabling clause stating that all employees shall 'be' members of the United Mine Workers of America, the word 'be' is used in its future tense, and the clause so noted becomes effective and operative after an individual has been employed and starts to work."

Now that clause, so worded, remained in the contract, was carried forward by reference in the second Illinois contract heretofore referred to, that became the basis of the Ickes-Lewis agreement, and was carried forward by reference of the Ickes-Lewis agreement, November 3, 1943, into the contract that was executed by the operators and the mine workers on December 17, 1943, the basis of that being the Ickes-Lewis agreement; the National Bituminous Coal Wage Agreement of 1945, was carried forward into that; carried forward by reference into the Krug-Lewis agreement of May 29, 1946, which was an agreement reached between the mine workers and the Secretary of the Interior acting under Presidential direction in 1946, and was carried forward into that contract.

3158 Now in 1947, the explanatory note that I have referred to, your Honor, came into the 1947 contract, and reads as follows in its enabling clause.

Mr. Combs: While Mr. Hopkins is looking that up, I might say the contracts that he has referred to are contained in the pamphlet—I think it is Exhibit 77 here.

A. (Continuing) The wording: "It is further agreed that as a condition of employment all employees shall be, or become, members of the United Mine Workers of Amer-

ica, except in those exempted classifications of employment as hereinafter provided in this Agreement."

Those exempted classifications being in the nature of supervisory personnel or management employees.

So that is the wording in 1947, and that is the wording, your Honor, that was in the contract expiring in 1948. And in 1948, the negotiations leading to that contract, had, among other things involved, the question of the union security clause as I have described it, whether or not it would be carried forward into the 1948 agreement. There was much dispute over it and argument.

Finally, the contract of 1948 was signed with the wording just as I have read it from the 1947 agreement and the parties, the operators that is and the union, agreed

by stipulation under the auspices of the Federal
3159 District Judge of the District of Columbia, that the question involved in it as to whether or not it was in conformity with the Taft-Hartley Act would be litigated.

The stipulation that was filed with the court by the parties on July 13, 1948 read that the contract included that clause was to be operative to June 30, 1949 "subject to final decision of the Court of the last resort."

Whereupon, the contract came into effect, Mr. Combs, and it was litigated and processed in due order, that is, the question of whether or not the union security clause was violative of the law of whether or not the mine workers were guilty of an unfair labor practice in demanding it in the negotiations.

Q. I take it, Mr. Hopkins, that this question arose because of the enactment of the Taft-Hartley Act in 1947? A. It did. There had been no question about the clause prior to Taft-Hartley, Mr. Combs, and it arose only because of the enactment of the Taft-Hartley Act.

I might say there, your Honor, that the Taft-Hartley Act, as I recall, was enacted by the Congress in June, 1947, but did not become effective until late August, 1947; there-

fore, the contract of 1947 was not within the ban of the act at all, but in 1948 it was involved as to whether
3160 or not it was in conformity with the Act.

During the 1948 negotiations, I should like to refer to the fact that during those negotiations the operator representatives in collective bargaining sessions, in discussing the question of the union shop, made a proposal, and I should like to read it, your Honor, as quoted in the petition for injunction. That is the first injunction, we call the Penello injunction that was filed on February 11, 1950.

Among other allegation as made by the plaintiff based upon the operators' charges is the following:—I read from Section (e), page 6 of the petition:

"In June 1948 in anticipation of the expiration of the said Agreement, the signatories thereto met to negotiate a new collective bargaining agreement to succeed the said Agreement of 1947.

"(f) In the course of said negotiations for a new agreement, the representatives of the Employers submitted to respondents a written statement concerning terms for a new collective bargaining agreement, including therein, the following statement with respect to the unionship provision of the said Agreement of 1947:" "—this is their written statement.

" 'Our present contract contains a union shop provision. Because of the Labor-Management Relations Act,
3161 1947, this provision cannot be carried into the new agreement without first following the requirements of the law. This means that before any such clause can be made effective, the National Labor Relations Board must certify that at least a majority have voted to authorize the union to make such an agreement. The operators, however, are willing to insert into the contract a union shop provision to become effective when and to the extent permitted by law.' "—

Continuing to read sub-division (g) from the same page: "Thereafter the Employers and respondents reached an agreement with respect to all conditions and terms of employment, but not including an agreement on a union shop provision for the new contract in conformity with the Act."

Q. Now, Mr. Hopkins, this occurred at what time, did you say, this particular question? A. This was during negotiations for the 1948 contract, which, as I recall, was signed on the 25th of June, 1948, I believe. I can verify that in just a second. June 25, 1948; yes.

Now continuing the history of that clause. It was,
3162 of course, in litigation as I have previously related through the Board by the stipulation agreed to between the parties in July of 1948, through the Labor Board, through the Circuit Court of Appeals, and upon petition to the Supreme Court of the United States it became final and it was upon that that the mine workers undertook their compliance as I have previously related.

Q. Mr. Hopkins, if I can interrupt your line of thought I would like to make this one thing clear. This proceeding you are talking about being stipulated between the parties, referred to the captive mine group; is that correct? A. That is correct, and it involved the union security clause. That is in the captive mine case I refer to.

Q. The captive mine case, after the action of the Supreme Court, became the precedent for the National Labor Relations Board in what we know as the Leff opinion? A. The Leff opinion, as I recall, was as a result of the consolidated charges brought by the operators in December 1949 and January 1950, but it came out in December 1950; the last action in the captive mine case under the stipulation to litigate that clause came out in February, February 11, and the compliance was had in both of them by the union in the spring of 1951 and that was the compliance which was noted as I have related.

3163 Q. Thank you. A. The union security clause remained in the contract, as I have undertaken to

describe, your Honor, and being the subject of the controversy and dispute leading to the two injunctions.

I hold in my hand a photostatic copy of a letter dated January 25th, 1950, on the letterhead of the Operators Negotiating Committee, National Bituminous Coal Wage Conference of 1949, and I suggest it here, Mr. Combs, because I have just related the operators' proposal in 1948 in reference to the union security clause, they offered a clause to the extent permitted by law—

Q. All right. A. This letter is dated Pittsburgh, Pennsylvania, January 25, 1950, addressed to Mr. John L. Lewis, President, International Union, United Mine Workers of America, Washington, D. C., dear sir.

Then it goes on to recite the fact that they offer a contract on certain terms—same hours, same high wages, and same so forth. But in Section 7, the final section of the letter, reads as follows, and I quote:—that is the last proposal that they make for a new contract—rather the last item in the new contract that they suggest be written into the agreement in 1950, as follows:

"The union shop as recognized in the coal industry
3164 may be included in such contract to the extent and . . . in the manner permitted by law.

"We request a prompt reply. Very truly yours, Operators Negotiating Committee, National Bituminous Coal Wage Conference of 1949, signed Frank R. Amos, chairman, J. William Wetter, Harvey Cartwright, T. J. Gerow, Hugh Lee, B. P. Manley, and the other name I can't make out.

That was before the issuance of the injunction of February 11, 1950, and upon that overture the mine workers representative undertook to negotiations for a period of a couple of days or so—I think around February 1 and 2, with the operators.

Having received this letter we requested bargaining conferences. They came to no avail. The Board of Inquiry

then was formed on February 6th, as I have related. They made their first report to the President on February 11th, and I hold in my hand a photostatic copy of such report. I think I have referred to it before. It is a board appointed by President Truman. It is entitled "Report to the President", under date of February 11th.

And they undertake to recite, and do recite, the background of the dispute, giving the chronology of it, but as to the union shop controversy they first recite that on January 18th a District Court in Washington had been requested to grant an injunction restraining the
3165 union from asking for the able and willing clause and the union shop, and so forth.

And on page 4 of this report, under the heading called "Stated positions of the parties", it says:

"The Union was demanding a wage rate increase . . . the Operators' position was a flat refusal . . .

"'The Union was demanding an increase in the amount of the Operators' contribution to the welfare fund; the Operators refused to consider any increase at all." and so on.

3166 And then it goes down to non-wage issues included in these items, and gets down to this, and I am quoting:

"B. The union shop provision in the old contract. The operators maintained that the union shop provision had been held illegal by the National Labor Relations Board and that this provision would accordingly have to be dropped unless the union met the statutory requirements of the Labor Management Relations Act of 1947."

On page five from the same document they make the statement:

"The significant fact, which emerged from this inquiry, is that this is basically a dispute, at the present stage, over the wage and welfare fund contribution issues. Behind the tactical maneuverings of the negotiators is fundamentally an issue of dollars and cents. * * *

"It is evident, however, from the bargaining which the board observed, that mutually acceptable terms covering these non-wage issues can be negotiated once the money issues are resolved. Responsible representatives of all the parties involved reflected this belief."

And that is the statement of the board of inquiry on February 11, prior to the negotiation of the contract achieved on March 5, 1950.

Now since 1950 that has been and now is the union
3167 security clause, your Honor.

Q. That is the wording that was inserted in the
1950 contract? A. That is the wording, and I should just like to read it at this juncture in its fullness so my testimony, I hope, will be complete upon that point:

"It is further agreed that as a condition of employment"—and I read from the printed copy of the 1950 agreement—"as a condition of employment all employees shall be, or become, members of the United Mine Workers of America, to the extent and in the manner permitted by law, except in those exempted classifications of employment as hereinafter provided in this agreement."

Q. Now, Mr. Hopkins, I believe that since 1950 through 1958 there have been some five amendments to the 1950 contract? A. Mr. Combs, there has. The contract of 1951, the National Bituminous Coal Wage Agreement of that year, of 1952, of 1955, 1956, and 1958, all of which carried forward by precise reference that same wording of the union security clause that I have just read into the record.

Q. Unchanged? A. Unchanged.

Q. Mr. Hopkins, has that particular wording been before the courts since the 1950 contract was negotiated?
3168 Yes, sir, it has. I think a number of cases, Mr. Combs, as a matter of fact.

Q. All right. A. I can refer to them, I think, briefly, if you should like.

Q. Do you mind referring to just the particular decisions,

not go into any detail? A. There is what is known as Fentress Coal Company case decided in 1958, which approves as legal and not violative of the statute the wording "to the extent and in the manner permitted by law" in the contract, decided in the Middle District of the District Court of Tennessee.

The Hixson Coal Company case in 1959 in the Western District of Arkansas, the Currins case in 1959 in Indiana, Southern District.

The Quality Coal Company case, which arose, as I recall, in Indiana and went before the Seventh Circuit Court at Chicago, in which a petition for certiorari was denied, in 1959 and 1960, the court there precisely holding that the quoted words were not violative of the statute and sustained the validity of the clause.

There has been, so far as I can recall no court has ever held that clause under that wording to be illegal or violative of the statute.

Q. Mr. Hopkins, are you familiar with certain
3169 charges before the National Labor Relations Board that were brought by the Progressive Mine Workers of America some time subsequent to the acquisition of Peabody Coal Company to the Millstadt and O'Fallon mines in Illinois? A. Yes, sir. I recall it. As I remember it, it arose in the fall of 1958 by charges being filed by the Progressive Mine Workers Union or some of its officials with the Labor Board, charging the Mine Workers International Union and its District 12, which is the State of Illinois, of being guilty of unfair labor practices and violative of the act, in reference to the two mines you have just enumerated, the Millstadt and what was the name of the other mine?

Q. O'Fallon mine. A. O'Fallon mine owned by the Peabody Coal Company in Illinois. Upon those charges hearings were had by an examiner. It went to the Labor Board. The board ruled and it went before the Seventh Circuit Court of Appeals in Chicago on the petition to review by

the company, a petition to review by the union, and on a motion or petition on behalf of the board to enforce the order as laid down by the board and the examiner.

On the 2nd of December of this year the Seventh Circuit Court held in a written opinion, which is recorded, the citation of which I do not remember at the moment, it held precisely that this phrase, this union security
3170 clause, "to the extent and in the manner permitted by law," was not illegal, was not violative of the act, and it precisely reaffirmed its previous holding of the same clause in the Quality Coal Company case that had arisen in the State of Indiana and affirmed the wording in the Quality case, which said the qualifying phrase expressly modifies and limits the application of the clause relating to union membership so that any requirements it imposes is conditional on conformity to existing or future law and further it imposes no requirement as a condition of employment which would conflict with the Taft-Hartley Act or any other law.

Q. I was going to read excerpts—are you through? A. I was merely going to say, as a result of that opinion, there is now outstanding a decree of the Seventh Circuit Court of Appeals that says precisely that an election shall be held at Millstadt and O'Fallon mines under the auspices of the board and it shall be held at the earliest possible moment, and that whereupon the company will bargain with whoever wins the election and has been certified as the collective bargaining agent. That order is outstanding, that decree.

Mr. Combs: If it please the Court, I would like to read some brief excerpts from this case that we think are applicable to the issues raised here.

3171 This is the case of Perry Coal Company and Peabody Coal Company, et al v. National Labor Relations Board. There are two petitions, No. 12889 and No. 12915. This was decided by the Seventh Circuit Court December 2, 1960. I read from page 2a of the slip opinion:

"The charging party is the Progressive Mine Workers of America. Among the sections of the Labor Management Relations Act claimed to have been violated are: Sections 8(a) (1); 8(a) (2); 8(a) (3); 8(a) (1) (A) and 8(b) (2)."

I read as follows:

"No employee of either of the coal mines hereinafter described complained of any coercion or discriminatory conduct. Fundamentally, this is a struggle between the Progressive Mine Workers of America (Progressive) and the United Mine Workers of America (UMW) with the employer, Peabody, being more or less in the middle.

"For many years prior to the summer of 1957, Progressive and its Local 167, represented employees of Midwest-Radiant Corporation (Midwest) at the Millstadt mine, and Progressive and its Local 75 represented employees of Perry Coal Company (Perry) at the O'Fallon mine. This representation was accomplished by means of labor
3172 agreements between Progressive and its Locals 167 and 75 and Coal Producers Association of Illinois of which Perry and Midwest were members.

"For many years prior to the summer of 1957, Peabody, as a member of the Illinois Coal Operators Association, had recognized UMW as the exclusive bargaining representative at twenty-seven other mines which it owned and operated in Illinois and other parts of the country. The collective bargaining agreement included the National Bituminous Coal Wage Agreement of 1950 as amended, and the Wage Agreement and Working Conditions of District No. 12."

* * *

"Through a process of liquidation and merger occurring about October 3, 1957, the properties of Perry and Midwest became the properties of Peabody. The only employer now involved in these proceedings is Peabody.

"In May or June, 1957, which was after Peabody acquired control of the Millstadt and O'Fallon mines, Hugh

White, president of UMW's District 12, notified Hartman, general mine superintendent of Peabody, and McCollum, a vice president of Peabody and formerly a vice president of Perry, that Peabody must comply with the provisions in the National Bituminous Coal Wage Agreement by
3173 recognizing UMW and applying the terms of the contract at the Millstadt and O'Fallon mines. His demand was not based upon a claim that District 12 represented any of the employees at these mines."

I might pause to interpolate that this was the letter that was introduced in this record that the court refers to of Mr. Hugh White.

"McCollum and Hartman agreed the contract applied to all Peabody operations, and stated that they would apply the contract as a matter of course when their contract with Progressive expired, and when UMW could show that it represented a majority of the employees."

I read from 6a of the slip opinion:

"The National Bituminous Coal Wage Agreement of 1950 contains the following provision: 'It is further agreed that as a condition of employment all employees shall be, or become, members of the United Mine Workers of America, to the extent and in the manner permitted by law'."

* * *

"The Board . . . held the Union security clause in the 1950 agreement provides for an unlawful closed shop in spite of the provision '* * * to the extent and in the manner provided by law.' Such a holding is contrary to our
3174 decision in Lewis v. Quality Coal Corporation.

"The Board seeks first to distinguish Quality on the ground that that case involved private litigation. It then asks us to reconsider our decision in Quality Coal, and cites the same cases which this Court considered and rejected when it handed down the Quality Coal decision.

"It is entirely immaterial that Quality Coal arose in the context of private litigation. The question that was fully

litigated in that case was decided adversely to the present position of the Board.

3175 "We decline the cordial invitation of the Board to abandon our decision in Lewis v. Quality Coal Corporation. We adhere to that decision. For whatever significance it may have, it also is of interest to note that the United States Supreme Court denied certiorari in Quality Coal, 361 U.S. 929.

"We are of the view and hold that the Board was in error in holding the 1941 agreement, which provided for a closed shop, was not amended or modified by the 1950 agreement. It seems clear that the contracting parties contemplated that changes might be necessary under the law, and evinced a desire to conform to such changes.

"The intention of the parties is also shown by the manner in which employment practices were carried out at the two mines. No employee claims his rights —

Mr. Rowntree: If Your Honor please —

Mr. Combs: " — under Section 7 — "

The Court: Wait just a minute.

Mr. Rowntree: That point right there it is our contention is a very important point. The sentence he just read.

Mr. Combs: Thank you. I will continue to read. I would like to start over on that quote, so it will be

3176 clear.

The Court: All right.

Mr. Combs: "The intention of the parties is also shown by the manner in which employment practices were carried out at the two mines. No employee claims his rights under Section 7 were violated. Further more in the transition from Progressive to UMW, no employee at either mine lost his job. Membership in UMW was not a condition of employment. An employee did not need to belong to UMW to retain his employment."

"In the instant case —"

Mr. Rowntree: It is our contention, Your Honor that the facts of this case must be applied to that law.

Mr. Combs: Well, now, we are talking about two things, Your Honor. Here it would too.

We are talking also about the question of representation at those mines.

"In the instant case — "

I continue reading from page 10a of the slip opinion.

"In the instant case, no employee did lose his job in the change-over to UMW. No employee complained or testified that he was coerced into signing dues cards. There is clear evidence in the record that membership in
3177 UMW was not a condition of employment. Furthermore, at the time of the contract with Peabody, employees at both mines, by cards, and my election at O'Fallon, indicated their choice of United Mine Workers."

Mr. Robertson: Your Honor, we point out that we rely heavily on the statement of the Court that the employees were not coerced. In our case, we think the facts are quite different.

Mr. Combs: Your Honor, I think that the Court was talking about the question of insistence on the part — the charge of insistence on to the mine workers in relation to this. And of course I understand counsel's position to be that they are saying that the Court will look into the facts, but the question of per se violence was also before the Court, and the Court said it was not a per se violation, and I think that when we read the Fentriss case and the Miller cases that the question of going into the facts on a per se charge, that the Court is not holding that at all.

Now — and I want it still clear that we have not contended at any time that during the period of 1950 up to the repeal of the so-called reporting provisions of the Taft-Hartley Act that the union did have an effective union
3178 shop. That is what the Courts held. We didn't have that. What we are talking about is not in violation of the Act.

Counsel has been claiming that all the way down through

that it is a per se violation, that the language itself is a per se violation, and the Court says it is not a per se violation.

Mr. Rowntree: We say that the language has to be interpreted by the acts of the parties in this specific case, just as the Court held in that case, and we have introduced the proof on that.

Of course, with respect to the Peabody matter, we say that the case there, out there, the question out there, the facts out there must be adjudged here on the proof in this record by the witnesses.

Now, I understand that counsel is reading this material here with respect to the question addressed to the witness as to what cases have been brought and what were the holdings of the cases.

Now we don't concede that these adjudications with respect to those facts are material here except to explain the rulings. But we say that we brought independent proof in here to show what happened out here with Progressive.

Mr. Combs: Of course, Your Honor, I am reading
3179 this because I think it is applicable to the facts that they have brought in here. Talking about the litigation, and I want to clear our position on that.

I might also point out that counsel has brought in findings of fact in some cases here for proof of what his contentions are there. I think this is the same procedure here. I think that the Court acted upon the very questions that we are talking about here. I think they were specifically making that, and I have some authority to cite to Your Honor and the Court and to bring out by this witness.

Now there is one more item in connection with this case that I would like to call attention to. Now this opinion that I have been reading from was the opinion of the Court that was entered as the judgment of the Court, but the Court in its opinion asked the parties to submit to a decree to enforce its opinion.

Now the Court has — both parties have appeared with

reference to the decree to be issued, and the Court has issued its decree. Now this decree and order is dated April the 5th, 1951.

Now this is the decree of the Court based upon the opinion that I have been reading of the Seventh Circuit. I call attention to page 14a of the slip opinion having to
3180 do with the decree, paragraph two. First paragraph a, little a.

"Ordered, Adjudged and Decreed by the United States Court of Appeals for the Seventh Circuit that the Petitioner, Peabody Coal Company, its officers, agents, successors and assigns shall:

"a. Cease and desist from"

* * *

"(2) Recognizing United Mine Workers of America, its District 12, and its Locals 1227 and 1229, as the representative of any of its employees at the O'Fallon and Millstadt mines for the purposes of dealing with it concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment; unless and until said labor organizations shall have demonstrated their exclusive majority representative status pursuant to a Board conducted election among the Company's employees; said election to be conducted as early as possible under applicable rules, regulations and practices; it being understood that Peabody need not bargain with any union claiming to represent the employees at the O'Fallon and Millstadt mines until the Board has certified the results of the election so held."

* * * * * * * * * *

3181 CROSS EXAMINATION

By Mr. Robertson:

Q. Mr. Hopkins, I believe you stated on direct examination that the negotiations for the 1950 contract were carried on under the scrutiny of the District Court of the District of Columbia.

By that statement, you didn't intend to say that the negotiations for the 1950 contract were carried on in the District Court and under the supervision of the District Judge of the District of Columbia, did you? A. Mr. Robertson, I intended to say, if I did not say it directly, that those negotiations were carried out in accordance with orders of the Court, under the Court's scrutiny.

As a matter of fact, on one occasion, if you ask me about it, the Court had some of the parties doing the negotiations before him in chambers to talk to them about certain phases of the negotiations.

So it was under the scrutiny of the Court and of the Attorney General and of the Labor Board and in com-
3182 pliance with the orders of the Court.

Q. But the temporary — A. In the city of Washington.

Q. But the temporary restraining order was issued just like any other temporary restraining order, was it not, served on the parties by the marshal or some appropriate persons, copies left with them? A. The temporary restraining order of the National Emergency was issued ex parte about eight o'clock at night on Saturday evening, and we were served, I think, about twelve o'clock that night with a copy.

Q. And in the order of dismissal of this temporary restraining order, there is nothing contained in this order adjudicating the legality or the illegality of any provisions of the 1950 contract. That is correct, is it not? A. When you speak of the order dismissing the Penello injunction, or the National Emergency injunction?

Q. Yes, the Penello injunction. A. I do not have it in front of me, but it speaks for itself.

Q. (Hands document to the witness.) A. Merely recites, as I believe I read it into the record to the ladies and gentlemen of the jury, that at the present recitation that the temporary injunction is vacated, after recitation of the

fact that the defendant, International Union and
3183 Lewis, and I quote: "are in compliance with the recommended order."

That is the Board order, and further; that the Board, quote: "has closed its proceedings," end quote.

Q. And so, Mr. Hopkins, after the parties reached agreement, then the temporary restraining order became a moot question, and there was nothing left to be done but for it to be dismissed, just as any other injunction case? A. It didn't become a moot question at all, Mr. Robertson, until the completion of the Labor Board proceedings of which the Court took note after compliance. It was in full force and effect from the time of issuance on February 11, 1950, until it was dismissed on October 10, 1951, about eighteen months later.

. . . . . .

Q. The adjudication of the legality or illegality of the provisions of the contract, they didn't take each provision of the contract and either construe or adjudicate the legality of those provisions under any of these orders here? A. Why the precise question involved in the hearings that were held pursuant to the Penello charges was held by
3184 the examiner and finally through the Circuit Court of Appeals, was whether or not we were guilty of an unfair labor practice charge based upon the wording of the old contract, to wit, the 1948 agreement which contained the same wording in it as the 1947 agreement, and was not the wording that is presently in the 1950 agreement.

It being arrived at under the orders of the Court, as I have outlined, and that wording has received the imprimatur and approval as to legality in several courts as I have related, including Circuit Courts.

Q. Yes, but I am talking about at the time of the 1950 agreement, execution of the 1950 agreement, you are not saying that this was — the legality of this contract was construed? A. No, sir.

Q. At that time. A. It was a result of bargaining under the compulsion and under the order and in accordance with the mandate of the Court in the injunction proceedings.

Q. Mr. Hopkins, I would like to read a statement from the 1952 convention minutes of the United Mine Workers of America which appears as a portion of an address by you at that convention.

That is page 524, the top of page 525.

And I will ask you if you did make this statement:

3185 "And it also comes to my mind that this new contract that is going to be presented to you and discussed perhaps by the report of your Scale Committee in just a few minutes, represents just one facet of the many things that your International officers have done in all the turmoil and travail of litigation.

"They have brought forth a contract, not on account of, not because of, but in spite of the Taft-Hartley Act, that one of these days is going to be repealed."

I'll ask you if you recall making that statement. A. I am quite sure you read accurately from the minutes that you have in front of you. I don't have them in front of me, but I recall the occasion, Mr. Robertson, and I might say to you that as I recall those remarks, certainly my intent in making them was in trying to say to that convention, which was the first one held after all the difficulty and the litigation of 1949 and 1950, that we had achieved, even in the face of the opposition that the operators so strenuously raised with us by virtue of their invoking the Taft-Hartley Law, so as to get the first Penello injunction and invoking, causing the government to invoke the second injunction by the Taft-Hartley.

3186 So assuredly the contract was achieved by the Taft-Hartley Law, because nothing in the law as applied in those proceedings gave us any comfort. It put restrictions on us, and we were able to negotiate it within the boundaries, within the four corners of the statute, but cer-

tainly the restrictions against us were harsh and rigid, and I think that is what I meant.

Q. And you mean you were able to negotiate out with these various operators this contract? A. Yes, sir, there is nothing in there that inferred or intended to say that the 1950 contract was in violation of the Taft-Hartley Act or that was illegal.

* * * * * * * * * *

REDIRECT EXAMINATION

By Mr. Combs:

Q. Mr. Hopkins, you spoke of the parties being before the Court during the period of the negotiations of this contract in 1950 as a result of that restraining order. Would you tell us what you meant by that? A. The parties before the Court? Q. Yes, if they went back to the Court for advice on the restraining order. A. As I recall, it
3187 was once during the negotiating sessions — I can't recall which one — but a legal spokesman, Mr. John Gall, for one of the coal associations, Southern Coal Producers Association, was taking the position that his association did not have to participate in an overall conference representing other segments of the industry.

The union took the position that he was mandated or required under the injunction to do it. He demurred.

We went down to the Court for instructions. He saw us in chambers, and he told us in polite language that he thought the conference should be participated in by everyone, and he went back to the conference and participated as the representative for the Southern Coal Operators Association.

Q. I believe he also told anybody at that time that any one who left that conference left it at their own peril? A. He certainly did, sir.

Q. Now, in connection with the question that counsel asked you as to whether or not the 1950 contract was adjudicated by any of this litigation, you have testified of

course that the charges brought by the operators before the Board resulted in the restraining order, and its dismissal occurred thereafter.

Now, I ask you whether or not you know whether
3188 the counsel, the general counsel for the Labor Board, at that time who I believe was Mr. Denham — . A. Yes.

Q. And whether or not he knew about that contract and in effect approved the contract as being in conformance with the Labor Board charges and in compliance with the Labor Board order? A. Mr. Combs, I know of my
3189 own personal knowledge that he was aware of it, not only by word of mouth from me but by a written communication from others representing the operators themselves that the contract had been achieved, that the union shop clause had been settled "with the use of the words to the extent and manner permitted by law", and that was known to the general counsel. And further than that, when the hearing opened before the trial examiner, we made the fact known to the trial examiner and it was in part of the official records of that hearing.

Q. And this temporary restraining order, under the law that was asked by the National Labor Relations Board was dismissed because under the law the Labor Board had finally adjudicated the items that were raised that resulted in the temporary restraining order? A. That is right, sir, and the adjudication, I might say, by the board of the issue upon which compliance was had, did not undertake to challenge in anywise as being illegal or violative of the statute the words that were put in there to the extent and manner permitted by law although the words were well known to the Labor Board and the general counsel.

Q. Mr. Hopkins, just one question for clarification, I read from a decree of the Court in the 7th Circuit in the Perry Coal Company case — I read from a decree
3190 dated April 5, 1961 and a certain paragraph there. I ask you was that decree issued as a result of the

Court's opinion in that case? A. Yes, sir, it was, in the same case and issued on April 15, 1961 as the decree by the Judges Duffy, Schnackenberg and Mercer, and they were the same judges who wrote the opinion in the same case as published on December 2, 1960.

Q. I believe you followed me as I read from that decree and it was from that decree that we are speaking of now? A. Sir?

Q. I believe you followed me when I was reading that excerpt from the decree, and that is the decree? A. I did, sir.

RECROSS EXAMINATION

By Mr. Robertson:

Q. It is in this record, Mr. Hopkins, and I will ask you if you recall that the Penello restraining order was dismissed at the instance of both the union and the operators signatory to the contract? A. It wasn't dismissed at the instance of either one of us. It bears the wording, and read from
3191 it, "we consent to the entry of the foregoing order:" signed Dominick L. Manoli, Attorney for the National Labor Relations Board, and signed by me as attorney for the respondents. But it was prepared, I might say to you, sir, by the Labor Board, presented by the Labor Board, and I merely approved it as to form and was present when it was entered.

Q. You said that the Labor Board, back in 1950, was satisfied as to the legality of the union security clause. I wonder if you can explain to me why in 1960, in the Perry Coal Company case, the Labor Board took the position that this clause was in violation of the law? A. I said to you, Mr. Robertson, that the wording used in the 1950 agreement in the security — union security clause, were well known not only to the general counsel of the Board but all of its representatives and the members of the board for the reasons I have stated.

Now they undertook to accept charges and issue a complaint in 1958 — I believe it was — in the Perry Coal Company case, alleging the union to be in violation of the unfair labor practice section of the law, and as one facet of it they averred that the union's demand for the contract to contain that clause was an unfair labor practice. But the Court of the 7th Circuit did not agree with that, and they specifically said that that language was legal and was not viola-

3192 tive of the statute.

Q. But the Labor Board did, before that Court —

A. They said that wording constituted an unfair labor practice, but the Court did not agree with them.

* * * * * * * * * * *

(Witness excused.)

By Mr. Rayson: Your Honor, we desire to read into evidence certain portions of the Annual Report of the Tennessee Valley Authority, 1957 and 1958.

The Court: Yes, sir.

Mr. Rayson: We have shown these reports to opposing counsel, and as I understand it there is no question but what these are the reports we are now reading.

Reading from the Annual Report of the Tennessee Valley Authority for the fiscal year ended June 30, 1957,

3193 at page 32, under the general title "Steam-Electric Generation."

"Steam-electric generating facilities continued to operate at high efficiency. For the second year in succession the average annual heat rate was well below 10,000 BTU per net kilowatt-hour generated. In the fiscal year 1957 the average rate was 9,705 BTU per net kilowatt-hour, compared with 9,780 BTU the year before. The national average in the calendar year 1956 was 11,400 BTU per kilowatt-hour.

"Because of the favorable hydro conditions it was unnecessary to operate the older and less efficient steam plants. Even Watts Bar Steam Plant, built by TVA dur-

ing World War II, remained idle. Memphis Steam Plant was used for minimum generation for load regulation.

"The steam plants burned 18.2 million tons of coal during the year at an average cost of 19.35 cents per million BTU. This was an increase of 3.6 per cent over the cost of coal in the previous year."

There follows a statistics table which I shall omit. And then from the same report, at page 33, under the heading "Coal Supply":

"The steam plants received 20.4 million tons of coal, as compared with the 18.2 million tons burned, and the
3194 stockpile was increased by 2.2 million tons. At the end of the year, TVA had a 100-day supply of coal on hand, as compared with a 60-day supply at the beginning. A total of 5.3 million tons was in storage.

"The total delivered cost for coal was $91.8 million. The average cost per ton was $4.51, as compared with $4.36 the year before. The cost per million BTU, delivered was 19.36 cents, a 3.5 per cent increase over the fiscal year 1956.

"Increased coal costs reflected several factors. Miners' wages increased during the year, with some significant fringe benefits added. Several rail freight rates increased. Considerable heavy buying in the early part of the year to achieve prompt buildup of stockpiles was done in the face of unusually high prices in some supply areas. Prices in the TVA area were influenced by the national picture in which the demand for coal began a rise in the latter half of 1954 that continued through 1955 and most of 1956. It began leveling off late in 1956 and early in 1957.

"In the last half of the fiscal year 1957, after 12 consecutive 6-month periods in which demands increased, there
3195 was a decrease of nearly 8 per cent in TVA's coal purchases. This resulted from the completion of the stockpile buildup plus the favorable hydroelectric supply situation.

"At the same time, prices of coal in some areas began to decline somewhat. It appeared that the rise in fuel costs,

which had increased from 18.11 cents to 19.36 cents per million BTU over the past 2 years, would be interrupted, at least, in fiscal year 1958. Spot coal prices declined about 30 cents a ton at Kingston and John Sevier steam plants and about 20 cents at Widows Creek during the year. Prices in the west Kentucky and southern Illinois fields were trending downward at the end of the year.

"Long-term coal contracts made in previous years have had a moderating effect on average fuel costs, both in the period of rising prices and in the recent period in which prices showed signs of declining."

And from the TVA 1958 Annual Report, under the section entitled "Power Generation", which section begins at page 52, I will read from that section beginning at the top of page 53. This involves the fiscal year ending in June, 1958.

"Rainfall and runoff were above normal for most of the year, with the result that the hydro system was
3196 heavily loaded most of the time. In fact, during certain periods—January, February, late March and early April—the hydro system was used for base load operation, thus reversing the normal roles of hydro and steam power on the system.

"The reservoirs were 76 per cent full as the fiscal year began, a high level for that period, while ground water levels were also high. These factors, plus adequate steam capacity, made it possible to maintain a satisfactory level of hydro production during two low-rainfall months—July and August. September rains totaled 7.7 inches in the watershed above Chattanooga, where most of the storage reservoirs are located, and water supply was ample from then to the end of the year. In fact, although the hydro system generated more than 2.2 billion kilowatt-hours in December, a record for any single month, it was necessary to spill water at some of the tributary dams instead of running it through the turbines in order to bring the reservoirs down to flood control levels. Although January,

February, and March rainfall was below normal, runoff remained high and heavier than normal rainfall in the last 3 months of the fiscal year, permitting heavy loading of the hydro system. Hydro generation in May was
3197 second only to December as the highest month of record.

"As a result of good hydro conditions, it was possible to meet system loads at times with several of the large new steam-electric units shut down. Only limited use was made of the four Widows Creek units without a reheat cycle, and use of units at Colbert and John Sevier plants was limited at times. It was also possible to keep units out of service for longer periods of regular maintenance, thus reducing overtime labor costs.

"With reduced steam-electric generation, the system heat rate rose slightly, but it remained well below the 10,000 BTU level. Average BTU required per net Kilowatt-hour generated was 9,760, compared with 9,705 the year before."

I will omit again the table that is shown at this point in the annual report. And then under the section "Coal Use and Purchases"—this is at page 53.

"The steam plants consumed 17 million tons of coal during the year, a reduction of nearly 7 per sent from the 18.2 million tons used the year before. Purchases of coal during the year amounted to 18.6 million tons, or 1.8 million tons less than the year before.

3198 "Purchases exceeded use by 1.6 million tons, and the stockpiles at the plants totaled 7 million tons at the end of the year. More than half the stockpile gain occurred in the last 3 months of the year when, because of favorable hydro supply and some decline in loads, daily average coal use declined to 41,884 tons compared with a 48,200-ton average in the preceding 9 months.

"The cost of both coal received and coal burned went down slightly compared with the previous year. The lower costs were largely the result of the business recession,

several freight rate reductions, reduced purchases and increased mechanization of mines.

3199 "Total cost of coal purchased during the year was $81.3 million. The cost averaged $4.49 per ton, or 18.94 cents per million BTU, about 2 per cent less than in the previous year. The cost of coal burned, including that purchased last year at higher prices, amounted to $4.54 a ton or 19.13 cents per million BTU."

There again appears a table subsequent to which was introduced in evidence through the TVA witness Hill, and then this paragraph:

"In the interest of assuring an adequate, low-cost fuel supply, TVA continued to encourage greater mechanization in mines and improvements of mining methods. A contract was awarded to a company in Tennessee for coal to be produced from experimental operation of an underground auger. This will be the first use of this equipment in the area supplying TVA, and, if successful, could lead to economical mining of some Tennessee coals where underground mining has virtually ceased because of poor roof conditions. Another long-term contract called for submission of a plan by the contractor for improving efficiency of his mines by mechanization. By the end of 1958, despite some delays, an experimental mine had produced sufficiently good results to prompt the contractor
3200 to extend mechanization to his other mines. At present, coal is loaded by hand and hauled to the surface by mules.

"During the year work was begun in cooperation with the Kentucky Geological Survey on an investigation of coal reserves in western Kentucky. Coal reserve studies for northern Tennessee were continued."

* * * * * * * * * * * *

Mr. Kramer: May it please the Court, the original plaintiff and cross-defendant rest.

The Court: Anything further for the original defendants and cross-plaintiffs?

Mr. Rowntree: We have four short items, your Honor, odds and ends.

The Court: All right.

Mr. Rowntree: First, we would like to add the unemployment index on two important counties. Anderson County, and reading from Exhibit 122: Anderson
3201 County average monthly covered employment and annual payrolls in the coal industry in Tennessee counties, 1950 through 1956—in Anderson County, 1950 average monthly employment, 1,032. Dropping to 1956, average monthly employment, 467.

This is in the coal industry.

The employment index in Anderson County dropping from 100 per cent in 1950 to 45.2 in 1956.

Morgan County, in Morgan County in 1950 average monthly employment in the coal industry, 254. Dropping to 1956, to 95.

The employment index in Morgan County dropping from 100 per cent in 1950 to 37.4 in 1956.

The next item, reading from Exhibit 114, steam electric plant capacity, Table No. 1 in that exhibit, pages 13 and 14, there is a column showing the design of each plant with respect to fuel for comsumption and this column gives under some plants coal, gas and oil; with respect to others, coal and oil. With respect to the TVA plants, including the plants Widows Creek, Colbert, Shawnee, Johnsonville, Kingston, John Sevier and Gallatin, in each instance the fuel designated is coal and coal only.

We have as a third item, the BTU on the Phillips coal, and we wonder if counsel will stipulate on the average BTU.

Mr. Kramer: Yes. What does this purport to
3202 show, Mr. Rowntree?

Mr. Rowntree: That purports to show the BTU contained in the bids of Phillips Brothers Coal Company,

the guaranteed minimum BTU, both on a dry basis and an as delivered basis.

Now I believe that we have had both kinds of figures inserted in the record. For instance, Mr. P. B. C. Smith was on the stand yesterday testifying as to the average BTU used in steam electric generation in Illinois and Indiana, and I think it will be agreed that that would be on as delivered basis.

Mr. Kramer: Are these figures that you are now wanting to show or wanting to introduce—and I understand this is a tabulation taken from your bid sheets?

Mr. Rowntree: That is correct.

Mr. Kramer: And that this tabulation taken from their bid sheets, your Honor, is a tabulation of the specification as made by Phillips Brothers when they submitted their bids.

Mr. Rowntree: That is right.

Mr. Kramer: It is not—in other words, as I understand this, there is submitted with each bid that goes to
3203 TVA—it is really hardly an estimate—but it is the amount of BTU that the bidder thinks is in his coal from tests he has made; then the payment is made on the test of the delivered product, and these are shown by their bids the figures that they gave for BTU when they submitted bids, is that right?

Mr. Rowntree: That is right. It is the guaranteed minimum BTU.

Mr. Kramer: In other words, there will be an adjustment made in price, if they don't meet it?

Mr. Rowntree: That is right.

Mr. Kramer: We will stipulate that this is a tabulation taken from their bids on that basis.

Mr. Rowntree: I might say Mr. Scollon, the witness from the Department of Interior, talked about average BTU's and I think that he was talking about a dry basis. Would you agree to that?

Mr. Combs: I don't think we can, your Honor, because this is just a little bit too complicated. We would refer to the record on his testimony. That is a little too complicated.

Mr. Rowntree: All right.

Phillips Brothers Coal Company's average BTU computed as stated as delivered, 12,383. BTU of Phillips Brothers on a dry basis, 13,215.

3204 We have one further item, your Honor.

Mr. Kramer: I take it what you are saying is that the average of the various bids?

Mr. Rowntree: That is right.

Mr. Kramer: In other words, what he has, your Honor, is an item by item of bids, and now he has the average of all their bids submitted, the BTU.

Mr. Rowntree: This next item pertains to the files introduced by Miss Roche with respect to beneficiaries of of the welfare. I don't think it will take very long.

Mr. Robertson: Miss Roche introduced by her testimony six files, being Exhibits 138, 139, 140, 141, 142, and 143. We have gone through these files and of those six files, three of those, Exhibits 141, 142 and 143, were files in which the applicants filed their applications after the answer in this lawsuit was filed and, therefore, the trustees knew that this would be at issue in this court, and were completely processed after the filing of our answer, and, therefore, we take the position that these three exhibits have no probative value in this case at all.

As to the other three files, Exhibits 138, 139 and 140, I would like to point out certain matters contained in those files.

3205 First of all, I might state in all three of these files, these men had left the industry as of the time that he applied for his pension. On the first of these, Mr. Clem Terreo, Form 13E, which he is required to submit

shows that he was a union member up until the time that he left the industry.

3206 It might be well to point out also that this applicant wrote a letter to the Bureau of Information, Washington, D. C., on January 6, 1955, asking for copies of eligibility requirements. On January 18, 1955, Miss Josephine Roche replied to him that, "No copies of fund regulations were available for public distribution," and did not send him any application forms.

On January 27, 1955, by letter, Mr. Terreo inquired as to whether or not they would send him some application forms. By letter of February 4, 1955, Miss Roche answered and sent the forms, which forms asked about his union affiliation.

He submitted these forms properly filled out, and on March 16, 1955, he wrote to Miss Roche asking for them to acknowledge receipt of this application together with the supporting documents, and he apparently received no answer.

He was compelled to hire an attorney—

Mr. Kramer: Now, just a moment, Your Honor. We object to the conclusion of counsel.

The Court: I sustain that.

Mr. Kramer: He was compelled to hire an attorney.

The Court: I sustain that.

Mr. Robertson: A letter from an attorney dated

3207 April 23, 1955, addressed to Miss Roche, states as follows:

"We have been requested by Clem Terreo, 322 Burgess Street of this city, to write to you concerning his application benefits from the Welfare and Retirement Fund. He states that he forwarded his application on February 10, 1955, and on March 16, 1955, he wrote again requesting your acknowledgment of the receipt of the application and thus far, he has heard nothing with regard to the matter.

"Please advise the status of this application, and the

approximate time Mr. Terreo can expect to hear from you regarding this matter.

Mr. Kramer: I would like to point out, Your Honor, in order to be consecutive in this file, that in this file between the dates of those communications, there is a letter written to ascertain—March 2nd—ascertaining whether or not the job he says he was working in last is within the eligible jobs for which—because it says if you are not in classified employment, you cannot receive benefits whether you are union or non-union—and a letter was written on March 2nd inquiring whether or not the job he was holding which was armature winder was within the classification or without the classification before benefits could
3208 be awarded.

Mr. Robertson: I will point out that that letter is March 2nd, prior to the time that Mr. Terreo wrote to Miss Roche on March 16th.

Mr. Kramer: Yes, but it is the earlier letter when you say the time elapsed.

Mr. Robertson: The first letter inquiring about it was on March 16th, after March 2nd when she wrote inquiring about that, and then the attorney wrote again on April the 20th.

Mr. Kramer: Yes, that's correct.

Mr. Robertson: A letter to this attorney from Mr. Val J. Mitch, counsel for the Trustees, in which he states that he "shall go into this matter very carefully, and you should hear from me within a reasonable period of time."

May 3rd, 1955, an inter-office correspondence sheet from Mr. Val J. Mitch to Miss Roche stating that in his opinion Mr. Terreo meets the requirements of eligibility for pension, and a letter of June 7, 1955, in which Mr. Mitch informs the attorney that the pension has been granted.

The second file we believe is pertinent is that of Steve John Molner, which is Exhibit 139, and this—his pre-

liminary application is sworn to on the 4th day of
3209 June, 1957, shows that he was a member of the United Mine Workers of America as of the time he applied for the pension.

I refer to the blanks there: "Is miner a member of the United Mine Workers of America?" and the answer is "Yes." "If yes, list—"; and the local union number if 472, and his district number is Number Two.

Mr. Kramer: And this same application says, Your Honor, "Is the miner presently employed?" "Yes." "By what company?" "Maryland Casualty Company." "Job classification?" "Gardner." "Place of last employment in the coal industry?" "Johnstown Coal and Coke Company," Date of last employment in the industry was in August, 1949, and that the recent employment since then was for the Maryland Casualty Company for whom he began his employment in July, 1952, and that this application is dated on the 4th day of June, 1957.

So the last employment in the industry, Your Honor, was in 1949.

Mr. Robertson: Of course, I stated in the beginning that all three of these men had left the industry as the Fund requires them to prior to application.

3210 Mr. Kramer: Oh, no, wait a minute. That is not accurate. That is not the testimony, Your Honor. I ask Your Honor to instruct the jury to disregard that statement.

The Court: Oh, yes, disregard that. Statements by counsel are not evidence, remember that, members of the jury.

Mr. Robertson: I point out that I am in error as to the requirements of leaving the industry, but that sole requirement so far as being in the industry is that unless he was regularly employed in the coal industry immediately prior to May 28, 1946, twenty years required service within the thirty years immediately preceding the filing of the application must all have been worked after May 28, 1946.

Mr. Kramer: That is correct, but that is certainly vastly different from what counsel stated, Your Honor.

Mr. Robertson: This man had left the industry but was nevertheless still a member of the union.

The third file, being Exhibit 140, on John Shenkarik.

• • • • • • • • • • •

3211 Mr. Robertson: In Mr. Mitch's testimony here as to the application forms that are sent to those who apply directly to the Fund, that the union district and local union certification portions are torn off.

On that particular contention, this—the application blank is shown in this particular file, showing the place for the certificate of the local union and the certificate of the district, to certify that the applicant is a member in good standing of the United Mine Workers of America.

Mr. Kramer: And that is true, Your Honor, but those certificates are not filled out. By accident they got the wrong form and sent it out, but when this came back and the pension was later granted, those were blank.

Mr. Robertson: I refer to a note, a scratch pad sheet in the file which says:

"Not a member, continue processing if meets requirement of eligibility. Refer to RTB," And the initials "JR".

Mr. Kramer: "Not a member, continue processing if meets the requirements."

Mr. Robertson: Now I point out a letter from Mr. Donald L. McFarland, Supervisor, Review Unit,
3212 Pension Benefits, to Mr. Samuel Caddy, Jr., Secretary-Treasurer, District 30, United Mine Workers of America:

"Dear Mr. Caddy:

"We are enclosing the yellow, white, blue and pink copies of Mr. Shenkarik's application for pension in order that Items 16 and 17 might be completed.

"When this has been done, would you please send the yellow copy to this office at your earliest convenience."

Items sixteen and seventeen are the certificate of local union and district membership.

Mr. Kramer: Now there is a response to that in there.

Mr. Robertson: "When this has been done, would you please send the yellow copy to this office at your earliest convenience.

"Your assistance in this matter is appreciated."

That letter, incidentally was dated May 2nd, 1956, the same month that the pension was authorized.

Sorry, Your Honor, they tell me there is a response to that.

Mr. Kramer: It is my recollection that there is a response to a similar letter in one of these files. Maybe I am wrong. What is the date of that letter?

3213 Mr. Robertson: May 2nd, 1956.

I might point out that that letter was sent to the district the same month that the pension was authorized, if I am not mistaken, bearing on Mr. Lewis' testimony that that was done in order to get information from the District on the pensioner, and I find no such correspondence in this file.

I further point out that none of these files relate to the medical and hospitalization benefits, and I would like to read from the Standard Authorization for Pensions, Form 1-P, Revised 6-15-54, and these authorizations for pensions contain these provisions:

3214 "This pension is subject to suspension at any time by the Trustees for any reason stated in the rules and regulations heretofore adopted by the Trustees, and shall be subject to termination at any time by the Trustees for any matter, cause or thing, of which they shall be the sole judges and without assignment of reason therefore."

And then the provision that the pension payments will be made the first day of each month—strike that.

Mr. Kramer: That paper was read by us, or by op-

posing counsel—I am not sure which—when these files were introduced. And it is already in there because, of course, as conditions develop the amount of the pension has to be reduced—and pensions have been reduced, and that is in the record—a pensioner is granted a hundred dollars a month and because of the financial condition of the Fund it is necessary to reduce it to $75.00 a month, that is the record and that was proven—that was the purpose of including things of that sort.

Mr. Robertson: Of course, it is our contention that such things as this, and the fact that the districts and local unions are notified of these pension applications, that this is a cooperation on the part of the Trustees for
3215 the union to impose the constitutional—the inactive dues upon these pensioners as required by the United Mine Workers constitution would also enable the unions to hold these pensions over these mens heads in order to use them for union activities as we have shown in the record.

Mr. Kramer: Now, of course, that simply is a matter of argument. We have introduced six of those applications of different dates. They speak for themselves in everything that is in here. There is some more correspondence in this Shenarik file, and I haven't happened—it is a very voluminous one, and I would like just a minute to get something more. I didn't know that this particular thing was coming up.

I do find one letter that is in this file I want to read, Your Honor.

Juror Wilson: May I ask the file number?

The Court: Yes. The file number?

Mr. Kramer: You mean the exhibit number?

Juror Wilson: Yes.

Mr. Kramer: The exhibit number is 140—S-h-e-n-k-a-r-i-k. There are others in the file.

The Court: All right.

3216 Mr. Kramer: This letter is dated February 15, 1956, after Mr. Shenkarik made his application. It says:

"Your correspondence of January 13, 1956, concerning pension benefits, has been referred to this office for reply.

"According to the rules and regulations of the Welfare and Retirement Fund, as set up by the Trustees"—.

This is a letter written on the letterhead of United Mine Workers of America, District No. 30, by Sam Caddy, Jr., Secretary-Treasurer.

Mr. John Shenkarik, Box 301, Olive View, California, dear sir:

"Your correspondence of January 13, 1956, concerning pension benefits, has been referred to this office for reply.

"According to the rules and regulations of the Welfare and Retirement Fund, as set up by the Trustees of the Fund, the eligibility requirements for Pension Benefits are as follows:

"1. Applicant must be 60 years of age or over when he applies.

"2. Applicant must have retired from or ceased work in the Bituminous Coal industry after May 29, 1946,
3217 following regular employment in a classified job for an operator signatory to the National Bituminous Coal Wage Agreement.

"3. Applicant must have been regularly employed
3218 in a classified job in the coal industry immediately prior to May 29, 1946.

"4. Applicant must have completed twenty years of classified service in the coal industry within the thirty years immediately preceding the date of his application for pension.

"Your application for Pension Benefits should be made

direct to the Welfare and Retirement Fund. Their address is as follows:

"UMWA Welfare and Retirement Fund
907 Fifteenth Street NW
Washington 5, D. C."

That was the information that was given to this applicant.

You will note there is no requirement for union membership there.

There is in this file, your Honor, the correspondence between this man and others writing for him, stating his employment, including one from the Consolidated Coal Company which states when he was employed by them, one from the United States Steel Corporation, which states the years he was employed as a captive miner, and another one from the United States Steel Corporation, giving dates—all of this correspondence, your Honor, in
3219 this file, and showing that he had not been for a considerable period of time a member nor employed in the coal industry. He had at one time been a member, this record shows.

. . . . . .

Mr. Rowntree: The defendants and cross-plaintiffs rest.

Mr. Kramer: The original plaintiffs and cross-defendant United Mine Workers of America rest, your Honor.

. . . . . .

(Thereupon, the jury retired from the courtroom and the following proceedings were had in the absence of the jury.)

Mr. Kramer: We want to present to your Honor two motions, and Mr. Rayson will make one and Mr. Combs the other. We will argue, if you care to hear argument.

The Court: I don't care to hear additional argument, gentlemen.

. . . . . .

3220 Mr. Rayson: The Trustees, John L. Lewis, Josephine Roche, and Henry G. Schmidt of the United Mine Workers of America Welfare and Retirement Fund

renew their motion for a directed verdict in the manner, form, and language made on behalf of the Trustees at the conclusion of the Cross Plaintiffs' proof, which is to say, without reference to that detailed language we used at that time, that the Trustees move for a directed verdict on the grounds that there is no evidence on which the action against the Trustees may be sustained.

The Court: All right, Mr. Combs.

Mr. Kramer: Mr. Combs suggested that I make it, and I do so.

Now at the conclusion of all the evidence, comes
3221 the Defendant the United Mine Workers of America and renews its motion on the entire records as made up to this time for a directed verdict—for the Court to direct the jury to return a verdict in its favor—and for the same reasons, based upon the same grounds that we stated in our motions at the close of the plaintiffs'—yes, the Cross Plaintiffs' evidence it would be.

The Court: During and at the conclusion of the arguments of counsel, in support of motions, and the arguments of counsel resisting the motions, the Court indicated its views about the case.

The Court overruled those motions at that time, but indicated to counsel for the defendant, cross-complainant, that he was much concerned about the status of the Trustees in this lawsuit. The Court further indicated that it did not feel that the question was nearly as close with respect to the United Mine Workers under the proof that is in this record.

Now insofar as the Court can determine at this time, there have been no developments in the proof of the original plaintiffs and cross-defendants that would cause the Court to change his mind with respect to the motion, except this last proof of Mr. Hopkins, in which he
3222 filed Court records of one of the District Courts in the District of Columbia, and the record pertaining

to certain directives or orders of the Labor Board.

It seems to this Court that those records put a grave burden upon the Phillips Brothers Coal Company to convince the tryers of fact that the 1950 Collective Bargaining Agreement was not reached after long and patient deliberations and possibly in response to the prodding of the District Court in Washington.

3223 In the opinion of this Court, those records, Mr. Rowntree, greatly weaken, if not destroy, the position that the UMW and one or more of these so-called large operators agreed to stabilize the coal industry in 1950 and that in furtherance of that conspiracy, which Phillips Brothers Coal Company says was an illegal one, raised the wages of coal employees to the point that the small coal operators could not pay, which the union and the coal operators knew they could not pay, and raised the royalties on the coal so high that again the small operators could not pay them, which the UMW and the so-called large coal operators knew they could not pay.

Phillips Brothers Coal Company says this basic agreement, evidenced by the writing of 1950, was signed by the union through its officers and the coal operators, of which Phillips Brothers Coal Company was one, for the specific purpose of stabilizing the coal industry, and in order to reach that end it was necessary to put the little operators out of business which Phillips Brothers says the union and large operators agreed to do.

If that was the agreement, of course such an agreement was illegal under our anti-trust laws. But the difficulty with that contention, Mr. Rowntree, stems from

3224 these recent court records introduced by Mr. Hopkins. Those court records indicate to this Court that those coal operators and the union were contesting many of the points involved in this agreement.

I believe that the witness stated that the coal operators —Southern Coal Operators and the union representatives met up there in Bluefield for periods of about 40 days,

and that they met at White Sulphur Springs, West Virginia on about 30 days.

Mr. Rowntree, how do you get around those court records?

3225 Mr. Rowntree: You are talking about these court records, the Verifax copies?

The Court: Yes, these last records.

Mr. Rowntree: If your Honor please, those records were in our direct proof. They are in the minutes of the convention. We read most of them into evidence. We used them to show that this was not any ordinary labor-management bargaining business. This was a collision between two great forces in a basic industry in this country. It was not just a matter of a 70 cent increase in wages. That is obvious.

The President of the United States had to intervene in this matter twice in these negotiations and appoint fact finding boards. He had to pursue the injunctive remedy through the Department of Justice. This was a basic struggle in the industry and these court records prove that.

The Court: Do they prove that there was concert of action and unity of design on the part of these coal operators and the union?

Mr. Rowntree: Yes, sir, because of the record which immediately preceded this. The record is clear that there was a crisis in the coal industry. The record is clear that the union was seeking to represent all members before this time, and this is an issue upon which Mr.

3226 Lewis has split his testimony. In the deposition he answered the questions with respect to this matter of spreading the work in the industry. He answered the questions with respect to his statement back in 1948, that there would have to be a stabilizing plan in the bituminous industry, just like there was in the anthracite industry. He stated in 1948 that in the anthracite industry "we have spread the work with the cooperation of the State of Pennsylvania. We have a stabilizing plan. We

have work for everybody. It is a production control plan."

And he said in 1948 that when the time came in the bituminous industry "we will spread the work in that industry. We will have a three-day work week, if it becomes necessary."

Now in these negotiations, in the period of 1949, he imposed the three-day work week, and he testified in his deposition that three-day work week was for one purpose and one purpose only, to spread the work, just like in the anthracite industry.

This great struggle which the President of the United States had to settle was not just about 70 cents in wages. The fact finding board said that. It was not just a matter of these little trivalities in a contract. It was a struggle between big industry on one hand and big labor
3227 on the other as to how this control and this stabilization of a basic industry will be carried out and the industry was contending that these large mines will have to cut down on their working time and carry this heavy load factor of cost, incurred by tremendous investments; they would have to cut down and increase their costs and, as Mr. Lewis said, the operator said, "No, that hurts us on our left hip pocket. It hurts us in our purse."

That is what the struggle was about.

The Court: Now, Mr. Rowntree, I recognize that you refer to these court records in your proof in chief, but I did not get the force of them at that time as I did from the orders which were read here today.

Now what is a conspiracy? In the law, conspiracy is an agreement by two or more persons to do an unlawful act or an agreement by two or more persons to do a lawful act in an unlawful manner.

I am not a trier of fact. If there is any dispute about these facts, I am required to submit them to the jury. There is no rule better established than that. But these court records indicate to me that these parties were acting through regular channels. They were bargaining with

each other. They weren't acting in concert, as I
3228 get the purport of these orders. They were acting in part, if I interpret these orders correctly, because they were made to act.

Well now, if they were made to act under the law and if they were made to bargain under the law, and one side gives up some points and the other side gives up some points and they finally reach an agreement, now can it be said when they are acting under valid law and finally reach an agreement, that agreement is proscribed by another federal law, namely one or both of Sections 1 and 2 of the Sherman Act?

3229 Now that is just what is running through my mind.

As I understand conspiracy, either civil or criminal conspiracy, the parties to it must act wrongfully. Now if these parties have negotiated, if they were doing what they were required to do under the law, then how can it be said that they violated another Federal Act?

Mr. Rowntree: By entering into a lawful agreement on its face with the understanding, the conspiratorial understanding, may it please the Court, as to how that contract would be later used, and we think that the evidence is clear on how it was later used.

The Court: You think that as a part—you think this proof shows that as a part of all of those negotiations, that there was an agreement made—

Mr. Rowntree: Conspiratorial agreement.

The Court: Sir?

Mr. Rowntree: Yes, sir, conspiratorial agreement.

The Court: To drive these little operators out of business.

Mr. Rowntree: Resolving this dispute as to how stabilization would be attained, and we think the record is clear that they did attain, that the record with the course
3230 of these big mines up to 1950, and then the reversal, and immediately subsequent conduct of the

parties. They walk out of the settlement, they say, "Well, the big mines, the operators now have control of their working time; the union has given up on that; we are turning that welfare fund over to the union."

The Court: Now if they reached those agreements by conspiring in this collective bargaining agreement, and I would have to say as a matter of law that they did on the record, then could there be violation of the anti-trust laws?

Mr. Rowntree: They could easily enter into a contract that would satisfy the authorities, and at the same time have an understanding with respect to how that contract would be used in the future. And I think that it is clear what a tremendous advantage is given to form a conspiracy by having the weapon of labor—big labor force—against the small companies, and the weapon of great economic force in the competitive economic field, one seeking to push out of the market, reduce the market of the small companies, the other seeking to increase its costs, and the facility that was given to a conspiratorial plan by the national contract—and we are not saying that it was illegal to have a national contract— but the
3231 facility of that instrument, we say, was obvious to those people at that time.

The Court: You are saying that this contract was used to put the little ones out of business?

Mr. Rowntree: Subsequently, yes, sir.

The Court: Well, are you saying that there was an understanding to that effect, oral understanding to that effect?

Mr. Rowntree: We are saying there was an oral conversation, one, two, or three conversations, probably discussions over a period of time. Because the issue was obviously of tremendous importance in this industry in that period of time.

The Court: Well, now, how can the Trustees, specially Miss Roche, the deceased Trustee—

Mr. Rowntree: Mr. Owen.

The Court: —Mr. Owen, and this Trustee, had so much trouble making up his mind whether to resign or not to resign?

Mr. Rowntree: Senator Bridges?

Mr. Combs: Van Horne.

The Court: Van Horne. When Judge—what's his name?

Mr. Kramer: Dawson.

The Court: When Judge Dawson went to Wash-
3232 ington to be a trustee, he wasn't recognized.

Now which of those trustees do you say, if any of them, participated in this alleged conspiracy?

Mr. Rowntree: We say those named in the 1950 contract who were Lewis, Mr. Owen, and Miss Roche.

3233 Mr. Owens and Miss Roche, we believe, were the parties nominated by Mr. Lewis in accordance with the testimony in the record that Mr. Lewis was trying to nominate two stooges, according to one representative of the operators. And one representative of the operators said that he was trying to name the full board of trustees, and we think the testimony of Judge Dawson shows clearly that somebody with the operators had nominated him.

We think that the testimony is clear that he was duly appointed but he was not the man Mr. Lewis wanted on the board so he did not get on it. The contract named Mr. Owens.

We think that Miss Roche is subject to criticism, that she was pretty much tied to the union before she got on as a so-called neutral trustee, and that it has been easy for this fund to be manipulated in such a way that the benefits of the fund are paid only to union members; that the participants in the pensions may be controlled by the union, and their cooperation in organizing deals has been used in subsequent campaigns to drive out small mines

or bring them under the contract or to force them to sell to the big coal companies, and whatnot.

3234 We think that their participation has been largely one of omission. For instance, the record is clear that old men were used on picket lines for as long as two years in hot weather, cold weather, rain and snow.

We don't think that that is the kind of things that ought to go on under the pension there, and I don't think the trustees would have permitted it if they were representing their offices as they should.

The requirements of the union with respect to process applications, the retention of membership on the part of pensioners—all those things could not have been carried through if this fund was operated in accordance with the Taft-Tartley Act and in accordance with the contract that it be operated by a party representing the union and a party representing the employer and a neutral party, and the Supreme Court has said that Congress was concerned about union officials obtaining tremendous control and power by reason of developing control of the gigantic welfare funds.

Mr. Combs: May it please the Court, may I make just one observation. The Court has indicated that it does not want any argument on our side, but I would like to make one observation.

3235 In connection with the statement of counsel, of course there comes a time when it is the evidence in the record that we have to look to and it is not the statement of counsel.

Now in connection with the Court's observation concerning these judicial actions in Washington, I think that that case applied, your Honor, with full force in this lawsuit. And I just want to quote one line from the case—it is the case of Great Northern Railway Company v. Delmar Corporation, 283 U. S. 686, 691, and this case teaches this:

"Where two constructions of a written contract are

possible, preference is given to that one which does not result in violation of law."

The Court: I expect to charge the jury that; yes.

3236 Mr. Combs: I think that goes to the question of whether or not there is any evidence here that would give possible chance to construction—

The Court: Gentlemen, I overrule the motions.

How much time do you want to argue?

Mr. Kramer: Your Honor, I want to renew another motion, that a mistrial be entered because of the introduction of certain testimony over the objection with reference to the alleged conspiracy and the introduction which includes, of course, the evidence with reference to acts of violence, it being introduced, your Honor, upon the premise that it would later be connected up with some act that would amount to a conspiracy. But there has been no proof in this record connecting it up so as to make it competent evidence, and that, not being connected up, could not be cured even by striking, and it is prejudicial, and, therefore, we would be entitled to a mistrial.

The Court: I overrule that motion.

Mr. Kramer: Then, your Honor, I make another motion. I submit that there is no evidence at all, your Honor, so far as the Island Creek Coal Company is concerned, so far as the Pittston Company is concerned, so far as the Consolidated Coal Company is concerned, so far as

3237 Peabody Coal Company is concerned, so far as Pittsburgh Midway is concerned, under which a verdict could be sustained as to them as being conspirators and at least to that extent we should have a directed verdict.

The Court: That motion is overruled. They are not sued, gentlemen.

* * * * * * * * * *

The Court:

* * * * * * * * * *

3238 This is not an easy case. This is a very complex case.

The court realizes the force of these motions, that is the first two. Now these that Mr. Kramer made, they were sort of decorative motions, these last ones about partial and summary judgement and things like that, but that motion for the trustees for a directed verdict is a serious motion and the Court recognizes it is a serious motion and it is a highly debatable motion. The Court also recognizes that this motion for a directed verdict for the UMW is a serious motion and is a debatable motion, certainly.

Now you have entered records here involving the
3239 facts, and this jury is entitled to know this in detail from each individual, from each side, what they are to decide and why they are to decide it, and it is going to take, in my opinion, meticulous arguments on both sides for this jury to understand this case.

* * * * * * * * * *

3241 The Court: Now what do you gentlemen think about those verdict forms?

Mr. Rowntree: The forms are agreeable with us, Your Honor.

Mr. Kramer: Your Honor, I am not certain whether — we thought of course in our request that if they found there was a conspiracy, if the jury found there was a conspiracy —

The Court: A conspiracy?

Mr. Kramer: Yes, sir.

The Court: Mr. Kramer, I did that to show the answers, Why? Because certain companies were named and in order to hold those companies they had to be named by the jury.

This is not this case, these companies are not before this Court, and why should this Court, in the absence of
3242 their representatives, in the absence of their counsel, require this jury to put their names down in their verdict? I just don't see the necessity of it. I don't see

that it will add anything to the case one way or the other, and I don't believe it is proper under the record.

Mr. Kramer: Well, I just would like to say this, Your Honor, we would like — Your Honor may be correct. I am not saying Your Honor isn't correct.

* * * * * * * * * *

3243 Mr. Kramer: But, Your Honor, will you give us an opportunity to look at these and check the authorities. Your Honor may be right.

I had the impression we were entitled to a charge — I do not have a case — before I agree to these charges, would you give us an opportunity?

The Court: Yes. I told counsel in chambers that we would put this in here and the Court reserves the right to formulate these issues the way it thinks proper.

Mr. Kramer: And before the argument Tuesday, we will be willing to tell Your Honor whether it is acceptable and if we resist it formally we will try to have some authorities, rather than make a spot judgment on it.

* * * * * * * * * *

3244 (At 9:00 a.m., counsel for the respective parties appeared in chambers before the Court and the following proceedings were had in the absence of the jury.)

The Court: All right, Mr. Kramer.

Mr. Kramer: Your Honor, we want to request on the record that in the Verdict Form No. 2, which is the form that is applicable to the cross-action against the United Mine Workers of America, that Questions 2 and 3 be made Questions 3 and 4, and that Question 2 in the suggested form which your Honor has showed us ask the jury, if they find a conspiracy, that they name the parties to the conspiracy.

The Court: Now the Court deferentially overrules that request.

Mr. Kramer: Now aside from that, and this may be off the record —

(A discussion was had off the record.)

Trustees' Renewal Motion for Directed Verdict; Closing Arguments

Mr. Rayson: May it please the Court, we would like to restate the motion made after the close of evidence Friday afternoon, the motion for directed verdict on behalf of the Trustees, so that it will clearly and properly appear
3245 in the record in this fashion.

John L. Lewis, Josephine Roche, Henry G. Schmidt, Trustees, United Mine Workers of America Welfare and Retirement Fund, now at the conclusion of all the evidence renew the motion for a directed verdict in their favor as heretofore made at the conclusion of the defendants' proof, on the grounds and for the reasons there stated now based on the entire evidence, it being understood that was the motion we made.

The Court: Yes, sir. Same ruling.

(At 9:20 a.m., Court convened in open court and the following proceedings were had in the presence of the jury.)

3306 Mr. Templeton: May it please Your Honor, ladies and gentlemen of the jury, it would be my purpose in the next fifteen minutes or less to state to you in a general way our position in this lawsuit, we being the defendants and cross complainants.

Conspiracy is our sword of defense and of offense. It is the only question that you have to decide, whether or not one existed, whether or not it affected us.

3307 Each of these things that have been done by these conspirators, taken alone, is not subject to criticism of any kind. It is perfectly legal for them to do it. The thing that makes it illegal is that it is a part of a diabolical scheme or plan to take over a large part of the coal markets of this country, including principally the granddaddy of them all, the TVA, which incidentally, ladies and gentlemen, is the only haven of refuge left for Buster Phillips and Jim

Pennington and little operators like them, and that is where they have gone.

Now when did this conspiracy start? We don't say it started on a certain date in 1950 or even in 1950. We don't know exactly when it started. We just know that it is there,

. . . . . .

Mr. Rowntree:

3331 We say this conspiracy started in 1950. The negotiations over the 1950 contract were long and bitter. The country as a whole suffered. The record shows that governors of three states tried to intervene. Finally the President of the United States directed his Attorney General to intervene with injunction suits. The operators brought a raft of cases before the National Labor Relations Board complaining about terminology in the contract.

The fact finding board appointed by the President found that behind the maneuvering over these contract terms, there were certain basic economic questions, matters of dollars and cents. This was a real national crises involving a basic industry of the country. The country labored, and what came out of it was a mouse, or so it looked on its face, a contract hardly distinguishable from the contract of 1948. It had certain added terms and provisions here and there, and in two or three clauses of the contract.

Now was that what all the fussing and the fuming
3332 was about in that year 1950? Why, of course not.

We say this contract of 1955, was innocuous and innocent enough on its face to satisfy everybody, but we say that there was a final decision, a final reaching of a basic understanding at that time between these two powerful contending forces with respect to the future of the coal industry.

3333 With respect to how this innocent looking contract would be used to attain the purposes agreed on, basically our contention is this:

That certain forces, powerful forces, were wilfully and conspiratorially set in motion in 1950 to attain this purpose

that certain large coal combines would take over the business of producing the coal of the country and barring from that portion all other companies and their employees, and that this coal wage agreement of 1950 was to be used to attain that purpose.

We say that the strings of this conspiracy have been drawn tighter and tighter in these intervening years and that in recent time the danger has picked up, and that the climax is near at hand.

We believe the record shows clearly that there was a crisis in the coal industry in the period of 1948 and 1949; that a decision was made, that the pattern was successfully set for the coming years.

• • • • • • • • • • •

3432 (Thereupon, Court and counsel returned to the open courtroom where the following proceedings were had in the presence of the jury.)

The Court: Members of the jury: This suit was instituted by John L. Lewis, Henry G. Schmidt, and Miss Josephine Roche, as trustees of the United Mine Workers of America Welfare and Retirement Fund, hereafter referred to as "Trustees", and James M. Pennington, Ralph E. Phillips and Burse Phillips, individually and trading as Phillips Brothers Coal Company, hereinafter referred to as "Phillips Brothers", for $55,982.62 alleged to be due pursuant to the terms of a trust provision contained in a collective bargaining agreement which existed between United Mine Workers of America, hereafter called "UMW" and the defendants, Phillips Brothers, and being alleged royalty payments due said defendants on coal mined under said agreement.

3433 The only defense raised by Phillips Brothers to the claim of the Trustees is that the collective bargaining agreement, which provided for the royalty payments, was an instrument used in a conspiracy to violate

Sections 1 and 2 of the Sherman Anti-trust Laws, and that the Trustees participated in the conspiracy.

The sole question for you to decide in the suit of the Trustees is whether the plaintiff Trustees engaged in a combination or conspiracy so as to unreasonably restrain trade or to monopolize commerce among the several states as alleged by Phillips Brothers.

Phillips Brothers, by cross-claim, charge that UMW conspired with various coal companies, particularly Consolidation Coal Company, Peabody Coal Company, West Kentucky Coal Company, Nashville Coal Company, Island Creek Coal Company, the Pittston Company and Pittsburgh-Midway Coal Company, and others, to restrain interstate trade or commerce among the several states in the bituminous coal industry in violation of Section 1 of the Sherman Act and that they monopolized or attempted to monopolize trade or commerce among the several states in the bituminous coal industry in violation of Section 2 of the Sherman Act.

It is the contention of Phillips Brothers that after World War II the economics of the bituminous coal industry became unstable by reason of the fact that there was
3434 more coal being produced than the market required; that before 1950 the major coal producers and the Union agreed that the major problem of the industry was over-production and that the growth of small, independent and non-union producers was contributing to the problem; that the major companies and the Union disagreed on the solution of the problem immediately following World War II.

3435 That the Union contended that the working time of the employees should be cut and urged a three-day week. That the major coal companies were opposed to the Union's dictating the working time of the men in the industry.

That a marked change occurred in the relations between the Union and the major coal companies in 1950; that the

express understanding at the time of the signing of the 1950 Bituminous Coal Wage Agreement was that the major coal companies were to decide on the working time for their employees; that this was a surrender on the part of the Union of its previous policy of seeking to control the economics of the industry by controlling the working time; that the understanding was that the problem of stabilizing the economics of the industry was to be taken care of by eliminating the smaller and weaker companies in great numbers.

That the conspiracy involved the use of the National Bituminous Coal Wage Agreement and its successive amendments as an instrument in accomplishing the purposes of the conspiracy; that the accomplishment of the purposes of the conspiracy was furthered by the domination of the Union over the men in the industry and that in 1950 the Welfare Fund was turned over the Union's control, and that rather than oppose the Union's efforts to evade the Taft-Hartley Act as they had before, the major companies fostered the Union's domination of the men of the industry so

that the terms of the National Bituminous Coal
3436 Wage Agreement could be imposed upon the small mines; that by successive amendments to the Uniform National Bituminous Coal Wage Agreement's terms and wage scale, the Welfare Fund payments per ton were raised to exceedingly high levels; that the mechanization program of the major coal companies was to go ahead rapidly and that the successive increases in wage scale and Welfare Fund Payments were designed and tailored to meet the abilities of the major coal companies to mechanize and not have their profits affected by the increasing labor costs in the successive amendments; that the successive amendments to the labor contract were made after careful consideration of the abilities of the major coal companies to make the increases without affecting their profits; that the Union had no concern as to whether the weaker companies could pay; that the Union displayed its knowledge that the weaker companies could not pay and that they

would fall by the wayside by reason of the increased terms; that the Union favored the taking over of the industry by the large combines of coal producers and that the Union worked toward this end; that the campaign to impose the wage contracts upon the smaller companies was intense after 1950; that in the areas of strong resistance mobs and terrorism were used; that the Trustees of the Welfare Fund stood by as pensioners under the Welfare Fund were or-
ganized into bands which had as their purpose the
3437 imposition of the uniform contract upon the smaller
and non-union companies; that the paying of the Welfare Fund benefits to men in the industry depended upon the retention of membership in good standing in the Union, certified to by local, district and international Union officials; that the enticement of benefits under this Fund was held out to the men in the industry as being under Union control; that the finances of the Union and the finances of the major coal companies have been used to further the drive to bring all production under the contract; that one or more major coal companies has assisted in crushing the opposition of the principal Union competitor of the UMW in the bituminous coal labor fields; that the result of this conspiracy and these activities has been that large numbers of small companies have been driven out of employment; that to accelerate the demise of the smaller companies devices were inserted into later amendments of the National Bituminous Coal Wage Agreement to further restrain their trade; that companies which could not afford to pay the wage scale were barred from operating on the lands of signatories to the contract; that the small companies were prohibited from selling coal to the signatories to the contract, including the major companies which supplied coal to the large market under large contracts.

That in 1955, the conspirators manifested their
3438 intent to take over the TVA market by working with
the Secretary of Labor to obtain a determination of a minimum wage in the bituminous coal industry under the

Walsh-Healey Act; that the purpose was to drive out of the Government market, particularly the TVA market, the small coal producers; that this determination imposed a wage rate upon a producer of coal supplying coal to a Government market twice as high as the wage rate determined by the Secretary of Labor in any other industry; that this determination of a minimum wage effectively barred Phillips Brothers from participating in the term market of the TVA because they could not pay the kind of wages set forth in that determination; that because contracts for less than $10,000.00 were exempted from the minimum wage determination, Phillips Brothers was able to ship coal on TVA spot orders; that the conspirators set about to eliminate or drastically reduce the spot market of TVA; that when this effort failed to bring results, the conspirators adopted the practice of predatory pricing to drive the spot coal market price down to a price which a small producer could not meet at a profit; that in this phase of the campaign, the West Kentucky Coal Company and its subsidiary, Nashville Coal Company, took the most prominent part; that the Union had over $25,000,000.00 of capital invested in these companies; that large amounts of tonnage were dumped upon the spot coal market of TVA at constantly reduced
3439 prices; that the spot coal price was beaten down to such extent that Phillips Brothers suffered large losses in trying to retain their position in that market and finally had to abandon their sale of coal to that market and it became necessary for them to abandon the partnership business.

That the small companies who survived the onslaughts of the conspiracy have been killed off by such lawsuits as this brought by the Trustees of the Welfare Fund; that prior to 1958 some three or four cases were brought by the Trustees against some of the larger producers in the area; that cases against the smaller producers were commenced in 1958 and that some forty-one of these cases have been brought and are presently pending against the small com-

panies of the area in the State of Tennessee since January 1, 1958.

That the UMW, in carrying on the foregoing activities pursuant to its understanding and agreement with the major coal companies was not acting alone to further its own interests, as an organization of wage earners, but was aiding, abetting and cooperating with businessmen in an effort to restrain trade of small companies and to monopolize the industry for the major coal companies; that the conspiracy involved boycotts and the purpose to stabilize the prices of coal in the industry; that the practices used pursuant to the conspiracy, particularly the imposition of the constantly increasing terms of the National Bi-
3440 tuminous Coal Wage Agreement upon the small coal companies such as Phillips Brothers and the price-cutting practices of the conspirators on the markets supplied by Phillips Brothers were unreasonable.

That a central part of the agreement among the alleged conspirators was that the terms of the National Bituminous Coal Wage Agreement would be imposed upon the smaller and financially weaker coal companies with the knowledge and intent that these companies in large numbers would go out of business because they could not pay the increasingly higher prices and welfare royalties which were designed to meet the abilities of the large combines to pay as the mechanization programs of the large companies progressed; that the purposes of the conspiracy were effectuated by the major coal companies' permitting the Union to assume a dominating role over the labor force in the coal fields by evasion of the labor statutes which protected the rights of the employees of small companies to join or not to join a union and to select their own bargaining representatives; that thereby, the employees of the small companies have been deprived of any real choice as to whether they will be represented by the Union or not and as to whether their bargaining agreement with their employers will be on such a basis that their employers can stay in

business and their jobs can be preserved; that in this
3441 case, the Union completely ignored the employees of Phillips Brothers, and, having no authority from those employees and without having them as members and without their knowledge, the Union extracted the signing of a copy of the National Bituminous Coal Wage Agreement from Phillips Brothers; that several months thereafter, and before the employees knew of or had ratified the contract, and with the use of mobs and in an atmosphere of coercion directed against the company and its employees, the Union shop clause of the contract was enforced by the Union and the employees were required to join the Union in order to go back to work; that they were not given cards under the Welfare Fund until they did join the Union; that it was only under these circumstances that the Union received any authority or right to act as bargaining representative of the employees of Phillips Brothers Coal Company.

That the conspiracy involved open defiance of, and a scheme to evade, the labor statutes of the United States.

Now in response to those contentions of the orig-
3442 inal defendant and cross-plaintiff, Phillips Brothers Coal Company, the United Mine Workers of America denies that it entered into any contract or joined in any combination or conspiracy in restraint of trade or commerce in violation of the Sherman Act; it denies that it has monopolized or attempted to monopolize or that is combined or conspired with any other person or persons or group of persons to monopolize any part of the trade or commerce among the several states.

It says that by virtue of Section 6 of the Clayton Act, which is Title 15 and Section 17 of the United States Code and which is the provision that exempts labor unions from the anti-trust laws while engaged in activities that further the legitimate objects of labor unions, and that by virtue of the provisions of the Norris-LaGuardia Act, 29 United

States Code, Section 10, et seq., the negotiations and the execution by the Union of the National Bituminous Coal Wage Agreement of 1950, and that agreement as amended, and its acts and conduct in connection the enforcement thereof, do not constitute a violation of the Sherman Act.

That U.M.W. is a labor organization within the meaning of Section 6 of the Clayton Act and it acted as such for its members in the negotiations for and execution of the collective bargaining agreement known as the Na-
3443 tional Bituminous Coal Wage Agreement of 1950, and the amendments thereto.

U.M.W. denies that there was upon its part any conspiratorial conduct or any wrongful conduct, or that it committed any wrongful, conspiratorial, illegal or monopolistic acts violative of the Sherman Act and that in the period of time involved herein of the acts done by U.M.W. and involved in this action were motivated by legitimate labor goals and for the purpose of securing union standards of wage and better conditions of employment for its members.

U.M.W. denies that it participated in, or that it authorized or ratified any acts of violence complained of by Phillips Brothers. It denies that in any of the activities complained of in this case it conspired or joined with coal operators or any other non-labor groups for any purpose in any manner. It contends that the mechanization of mines and the changes of mining methods which have occurred in and since 1950 are not the result of any conspiracy or any effort to restrain trade or any effort to create a monopoly, nor have such occurred by reason of wrongful conduct on its part, but that such changes have occurred as an outgrowth, result and development of American economy in the industry over the years.

It denies that there was upon its part any conspiratorial conduct or any wrongful conduct or that it com-
3444 mitted any wrongful, illegal, conspiratorial or monopolistic acts in connection with the actions which

were had under the Walsh-Healey Act for the establishment of wages by those employed in the mining industry.

It denies that Phillips Brothers have any right to rely upon any proceedings with respect to the Walsh-Healey minimum wage determination either as a basis of liability under the Sherman Act or as a part of an alleged conspiracy under said Act.

U.M.W. contends that with respect to each act Phillips Brothers Coal Company complains of, that it acted in its capacity as a labor organization and that its objectives were always labor goals for the betterment of its members and itself.

It contends that there was no conspiracy on its part with any group and it is not liable to Phillips Brothers in any amount.

Now for response to the contentions of Phillips Brothers Coal Company, the Trustees of this trust fund rely upon all of the matters raised as defenses by the U.M.W. insofar as they are applicable to the Trustees' phase of the case.

The Trustees deny that in the administration and enforcement of the trust fund they have surrendered their duties and obligations to the U.M.W.

3445 The Trustees say that their conduct or actions in instituting this particular suit, or any other suit or suits which they have instituted for the collection of welfare funds, was not in futherance of any conspiracy or any monopolistic intent, but assert that their conduct and actions in this respect were in furtherance of their duties and obligations under the trust.

The Trustees deny that they have any control of or right to exert control over the actions of the beneficiaries of the fund.

The Trustees deny that the right to receive or retain benefits of the fund is dependent upon membership in the U.M.W. of America.

Both U.M.W. and the Trustees say that if there was any interference with the production of coal by Phillips Brothers, the amount of interference in the reduction of the production is not sufficient to bring any claim or to sustain any claim for violation of any of the provisions of the Sherman Act.

Both the U.M.W. and the Trustees deny that Phillips Brothers suffered any damages as a result of any alleged illegal or wrongful action or conduct on the part of either of them.

The issues for you, the jury, to determine in this case insofar as the cross-claim of Phillips Brothers against the U.M.W. are as follows:

3446 (1) Did the cross-defendant, U.M.W., engage in a combination or conspiracy so as to unreasonably restrain trade or to monopolize or to attempt to monopolize commerce among the several states outside and beyond the exemption created by the anti-trust statutes to a labor organization as alleged by cross-plaintiff, Phillips Brothers?

If you answer Question 1 "No",—that is the question I have just stated—the remaining questions need not be answered.

(2) If the answer to Question is "Yes", was cross-plaintiff, Phillips Brothers Coal Company, damaged in its business or property as a direct and proximate result of the conspiracy?

(3) If the answer to Question 2 is "Yes",—and that is the one I have just read—the jury will fix the amount of the damages.

The sole issue to be decided by you, the jury, on the claim of the Trustees against Phillips Brothers is whether or not the Trustees engaged in a combination or conspiracy so as to unreasonably restrain trade or monopolize commerce among the several states as alleged by Phillips Brothers.

The question as to whether the Trustees are or are not

entitled to recover the unpaid royalties from Phillips
3447 Brothers is one of law for the determination of the Court after receipt of the verdict of the jury on the question of whether or not the Trustees did or did not participate in the alleged conspiracy.

Now members of the jury, we come to discussion of the applicable provisions of the Sherman Act, and also some of the rules of law that govern this case.

The pertinent part of Section 1 of the Sherman Act is as follows—and the Court is now quoting from Section 1 of the Sherman Act:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal."

The pertinent part of Section 2 of the Sherman Anti-trust Act is as follows:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states or with foreign nations," shall be deemed guilty of a violation of law.

"Commerce", as defined in Section 12 of the Clayton Anti-trust Act, means—and the Clayton Act is a part of the anti-trust laws, keep that in mind—means "trade or commerce among the several states and with foreign
3448 nations, or between the District of Columbia or any State, territory or foreign nation, or between any insular possession or other places under the jurisdiction of the United States."

The term "conspiracy to monopolize" as used in Section 2 of the Sherman Act, means to combine or conspire to acquire or maintain the power to exclude competitors from any part of the trade or commerce among the several states or with foreign nations, provided they also have such a power that they may be able, as a group, to exclude actual or potential competition from the field and provided

that they have the intent and purpose to exercise that power.

Section 15 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any District Court of the United States . . . and shall recover three-fold the damages by him sustained."

3449 Section 15(b) of the Clayton Act provides that "any action to enforce any cause of action under" the anti-trust laws "shall be forever barred unless commenced within four years after the cause of action accrued."

The pertinent part of Section 6 of the Clayton Act provides that labor is not a commodity or article of commerce, and nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; "nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

This provision exempts labor unions from the application of the anti-trust laws while acting alone and carrying out the legitimate objects of labor unions. However, a labor union is not entitled to this exemption and it does come under the anti-trust laws when, in order to further its own interest, it aids, cooperates with, conspires or combines with business groups in order to accomplish purposes which the anti-trust laws prohibit.

Phillips Brothers Coal Company filed its cross-claim in this suit on February 14, 1958 and if entitled to re-

3450 cover at all would not be entitled to recover any damages sustained prior to February 14, 1954. The damage period, insofar as the cross-claim is concerned, is from February 14, 1954 to December 31, 1958, the latter date being the date that Phillips Brothers terminated its

business as a partnership. This means that Phillips Brothers Coal Company, if entitled to recover, cannot recover any damages allegedly sustained prior to February 14, 1954, or subsequent to December 31, 1958.

It is not every act in restraint of trade that is prohibited by the anti-trust law, but the question is generally one of reasonableness of the restraint. Section 1 of the Sherman Act prohibits those classes of contracts or acts which are deemed to be undue or unreasonable restraints of trade and those which new times and economic conditions would make unreasonable. Section 2 of the Sherman Act makes the prohibitions of the Act all the more complete by embracing all attempts to reach the end prohibited by Section 1, that is, restraints of trade, by any attempt to monopolize or monopolization thereof.

However, there are classes of restraints which from their nature or character are unduly restrictive and hence are forbidden without regard to the question of reasonableness. Group boycotts or concerted refusals by traders to deal with other traders, have long been held to be
3451 in this category. They have not been saved by allegations that they were reasonable in these specific circumstances. Even when they operated to lower prices or temporarily to stimulate competition they have been banned.

Any combination which tampers with price structures is an unlawful activity. Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce, is illegal.

The jury must determine from all of the evidence in the case whether the Union, on the one hand, was acting alone to further the interest of its members in wages and working conditions. Or, on the other hand, was acting in combination with the large coal companies to restrain trade of small companies or to attempt to monopolize the industry for

large companies. If the jury finds that the Union was thus acting in combination with the larger companies, then the jury must determine the reasonableness of the types of restraints employed, including a consideration of the character and extent of the restrictions and the reasons for the restrictions; but if the jury finds that the restrictions include the use of boycotts or price-fixing or price stabilization restrictions, these types of restrictions are illegal, regardless of the reasons for, or the character of, those
3452 restrictions.

With respect to the claim of Phillips Brothers that the alleged conspiracy involved a plan to evade the labor laws, the Court charges you that the defense of Phillips Brothers to the claim of the Trustees and the claims asserted in the cross-claim are not based upon the labor laws, but upon the anti-trust laws. Moreover, this Court has no jurisdiction in this suit to decide any question as to whether there have been or have not been unfair labor practices committed by anyone. Issues with respect to unfair labor practices under the labor laws are exclusively under the jurisdiction of the National Labor Relations Board.

As previously indicated, Phillips Brothers Coal Company charges that it was the purpose of the Union and the large coal companies in the 1950 National Bituminous Coal Wage Agreement, and the amendments thereto, to fix the wages and royalties so high in these agreements that the small companies could not pay them, and that the Union and the large companies knew that the small companies, including Phillips Brothers, could not pay them and that the small companies would be forced out of business, and that it was a part of the conspiracy to drive the small companies out of business.

It is for the jury to determine whether there was a purpose among the alleged conspirators to impose the national

contract upon small operators for the purpose of
3453 restraining trade, monopolizing and driving small companies out of business; or, whether the purpose was to improve working conditions, better pay, more welfare benefits, and better job security. The labor law protects the rights of employees to join a union or refrain from joining a union. It protects the rights of employees of a particular employer to make their choice about joining a union free from encouragement or discouragement on the part of the employer and free from coercion on the part of a labor organization. Under the labor law the normal collective bargaining is carried on with the employer by a representative, usually a labor union, designated or selected by the majority of the employees of that employer unit, which representative "shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining."

In the normal process of collective bargaining where simply labor or employer-employee relationship purposes are involved, specific unfair labor practices which violate these rules are in the exclusive jurisdiction of the National Labor Relations Board, not in a District Court such as this Court.

However, as stated, Phillips Brothers Coal Company does not assert a defense or claim founded on these labor provisions of the law, but asserts that there was a conspiracy violating the anti-trust law which involved a plan to
3454 impose the National Bituminous Coal Wage Agreement upon small companies such as itself—not for the normal labor or employer-employee relationship purposes —but with the purpose, knowledge and intent that the national contract with its successive amendments would finally force the company out of business.

If a labor organization, by force or violence or any other means, gains the right to represent employees of an employer in the collective bargaining process, the means em-

ployed to obtain this right of representation, even if of an unlawful nature, would simply be an unfair labor practice outside of the jurisdiction of this Court, if the purposes were solely to represent those employees and carry on collective bargaining with the employer on behalf of employees. But if there is a purpose on the part of the labor organization to impose a contract upon an employer, regardless of whether it had gained authority to represent the employees of that employer, for the purpose of driving the employer out of business and putting the employees out of the industry, so that the industry markets would be left to business groups with whom the labor organization conspired, then such activity comes under the anti-trust law and is prohibited.

3455 Finally, with respect to the labor law, that law permits the establishment of welfare funds in collective bargaining agreements but it provides that the benefits under the funds shall be paid to the employees of the employer or employers signing the agreement and this law does not say that the benefits may be paid exclusively to union members, and the law provides that the employees and employers shall be equally represented in the administration of the fund together wih such neutral persons as the representatives of the employers and representatives of the employees may agree upon. Violations of this part of the labor law are subject to restraint by District Courts. Here, again, Phillips Brothers Coal Company asserts that part of the alleged conspiracy in restraint of trade and to monopolize, directed against small coal companies was the understanding, on the part of the alleged co-conspirators, that the United Mine Workers was to have control over the Welfare Fund. The company says this furthered the conspiracy in two respects: In the first place, it is contended that this assisted in the domination of employees as a means of bringing small companies under the national contract with a view to putting them out of business. The company asserts that the latter purpose was facilitated by holding

out benefits to small company employees as being under union control and dependent on union membership. In the second place, it is contended that domination of the fund by the Union gave the Union the opportunity to use beneficiaries of the fund to carry on picketing and other
3456 activities that helped bring small companies under the contract for the ultimate purpose of putting them out of business.

With regard to the welfare provision for the payment of 40 cents per ton royalty, the claim of the Trustees against Phillips Brothers Coal Company will be finally decided by the Court after the verdict of the jury. But the jury must decide the issue of whether the Trustees participated in the conspiracy alleged. Phillips Brothers Coal Company contends that participation in, and assent to, the alleged conspiratorial purposes on the part of the Trustees of the fund was a necessary and essential part of the conspiracy, without which the domination of employees of small companies and use of benefficiaries of the fund by the Union against small companies could not have been at-
3457 tained.

The Court instructs you that, under the law, Phillips Brothers Coal Company, as a signatory to the collective bargaining agreement, had an equal responsibility with the Union with respect to the Trust Fund and a part of Phillips Brothers Coal Company's responsibility to his employees was to inform them that they were entitled under the agreement to apply for benefits from the Fund. The Phillips Company knew that the employees were entitled to apply for benefits from the fund.

As previously indicated, Phillips Brothers Coal Company charges that there was a conspiracy to monopolize under Section 2 of the Sherman Act, in addition to the conspiracy to restrain trade under Section 1. Section 2 of the Act prohibits not only actual monopolies, but also prohibits attempts to monopolize and conspiracies to monopolize.

An actual monopoly consists in the ownership or control of so large a part of the market supply or output of a given commodity as to stifle competition, restrict the freedom of commerce, and give the monopolist control over prices. However, where the charge is not that there was an actual monopoly, but a conspiracy to monopolize, the alleged conspirator may be held guilty of, or liable for, the conspiracy to monopolize with' 't it being shown that he ever acquired the power t carry out the object of the conspiracy,
3458 that is, to exclude actual and potential competitors from the market.

It is not necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade results as the consequence of the alleged conspirators' conduct or business arrangements. You will note that the anti-trust law provides that not every act in restraint of trade is illegal but only when it is the result of a combination, contract or conspiracy. Those words, so far as this case is concerned, mean practically the same thing, and it is a necessary element in the cross-claim of Phillips Brothers Coal Company that you should find that there was a combination or a conspiracy to restrain trade or suppress competition or to monopolize and that the conspiracy was national in character but affected Phillips Brothers Coal Company in its operations in Campbell County, Tennessee.

Or Anderson County, if it operates in Anderson County, but instead of Campbell County, it could be said—the Court doesn't remember the proof, whether it operated in more counties than Campbell or not — but to be on the safe side, instead of Campbell County, whether the alleged national conspiracy affected Phillips Brothers, operations in Tennessee.

3459 A conspiracy may be defined as a combination of two or more persons or corporations or unions, who by concerted action seek to accomplish or succeed in ac-

complishing an unlawful purpose or a lawful purpose by using unlawful means. Corporations only act through their officers, agents and employees, and if the officers, agents or employees are acting within the scope of their authority, the corporation for whom they act is bound by their acts.

Similarly, unions act through their officers, agents, employees and members and no union participating or interested in a labor dispute may be held responsible or liable in any court of the United States for the unlawful acts of individual officer, members or agents, except upon clear proof of actual participation in, or actual authorization of, such act, or of ratification of such acts after actual knowledge thereof.

Before you can return a verdict that the Union attempted to monopolize the bituminous coal industry, specific intent to restrain trade or to build a monopoly is necessary in order to violate Sections 1 and 2 of the Sherman Act, where the acts committed by the party or parties charged fall short of the results prohibited by the Act. But, if restraint of trade or monopoly results as the consequence of the cross-defendants' conduct, or alleged conduct, or alleged business arrangement, specific intent to restrain or monopolize is not necessary in order to find that Sections 1 and 2
3460 of the Act have been violated.

Strikes or agreements not to work, entered into by laborers to compel employers to yield to their demands, may restrict to some extent the power of employers who are parties to the dispute to compete in the market with those not subject to such demands. Laborers, however, have the right to strike and enter into agreements not to work, and unions have the right to induce laborers to enter into such agreements. Such agreements are not in themselves violations of the anti-trust laws.

The fact that a coal company which prior to the signing of the National Bituminous Coal Wage Agreement was able to produce and sell coal more cheaply than other companies

because the wages and benefits it paid to its employees were then less than those required by agreement, became unable to produce and sell coal on the same basis after they signed the Agreement, cannot be a ground for finding the Union liable under the Sherman Anti-trust Act.

Phillips Brothers Coal Company has charged that the wage provisions of the National Bituminous Coal Wage Agreement were set at high rates, and liberal welfare payments were provided for, and that small operators such as the cross-plaintiffs were driven out of the coal business. The Court charges you that if the wage and welfare payment provisions in these contracts were arrived at
3461 by the parties as a result of collective bargaining, the coal companies on their behalf and in their own self-interest, and the United Mine Workers on behalf of its members, and in their own self-interest, there is no violation of the Sherman Act in the establishment of the wage rates and welfare provisions through the contract, provided there was no agreement between the Union and coal operators to fix high wage rates and royalty payments in order to drive the small coal operators out of business.

Proof that the membership of the Union did not unanimously support the position taken by the Union and its leadership on collective bargaining questions in itself will not support a finding on your part that the Union violated the Sherman Act.

It is not a violation of the anti-trust laws for the Union to insist on the same wage and benefit provisions in all of its collective bargaining agreements with small, medium and large coal companies alike.

The fact that the Union was able to make investments of considerable size with its assets, does not constitute a violation of the anti-trust laws.

The activities of labor unions which are not violative of the Sherman Anti-trust Act do not become violations of

the Sherman Act even if such activities are carried out by violent means. Acts of violence in and of themselves are not material to the determination of the question of whether the anti-trust laws were violated.

3462

The Union during the entire period involved in this case had the right to make a substantial investment in a company engaged in the production of bituminous coal, and such investment, of itself, does not constitute a violation of the Sherman Act. Neither does it constitute a violation of the Sherman Act for the Union to make such investment for the purpose of having the company recognize and bargain with the Union and pay the Union scale of wages and fringe benefits, or for it to finance others in their acquisition of control in a company for the purpose of having that company recognize and bargain with the Union.

Evidence has been introduced in this case regarding the "union security clause," or the so-called "union security clause" in the National Bituminous Coal Wage Agreement, and the cross-plaintiffs have contended that this clause violated the Taft-Hartley law. You are instructed that the Taft-Hartley law is not one of the anti-trust laws and that you are not concerned in this proceeding with awarding damages for any violation of the Taft-Hartley law. You must in this proceeding consider simply whether there has been a violation of the anti-trust laws, not the Taft-Hartley Act, by the Union or the Trustees, causing damage to the cross-plaintiffs. You are further instructed that even if there were a violation of the Taft-Hartley Act regarding the Union security clause, there would not, on that account, be a violation of the anti-trust laws.

3463

The proof introduced in this case discloses that in the National Bituminous Coal Wage Agreement of 1950, there is a provision to the effect that the operators signing the contract would not lease any of their respective coal lands as a subterfuge to avoid the provisions of the Agreement. In 1958 a provision (called the Protective Wage Clause) was added to the agreement providing in effect that com-

panies which sign the agreement would not buy coal from mine operators who were not paying the equivalent of the Union standards of employment. The Court charges you that in the period relevant here, you must consider that both of these contract provisions were lawful and that neither of them was in violation of the Sherman Act, provided these provisions were inserted in the Agreement at the instance of the Union in the desire upon its part to protect the Union scale of wages and other benefits and to prevent the operators who had signed agreements from evading their obligations under the contract, and provided that such provisions were not the result of an agreement with large coal operators to drive small operators out of business.

Phillips Brothers Coal Company has charged that it was a violation of the anti-trust laws for the United Mine
3464 Workers, together with certain coal operators, to approach the Secretary of Labor in order to obtain a minimum wage determination under the Walsh-Healey Act. The Court charges you that everyone has a right to approach officers of his Government to induce them to take lawful governmental action benefiting him. Any approach to the Secretary of Labor, which was designed to raise the minimum wages to be paid by coal operators doing business with the TVA or other governmental agencies, was not a violation of the anti-trust laws. Therefore, you will not give any consideration whatever to this approach to or meeting with the Secretary of Labor or any action taken by the Secretary of Labor, unless you find that the approach to the Secretary of Labor was a part of the conspiracy to get the prevailing wages establish in the coal industry so high as to drive the small operators out of business.

Without implying that the fact has been proved, the Court charges you that selling coal below the average prices at which coal is sold in the country does not of itself constitute a violation of the antitrust laws; nor does selling coal below cost of itself constitute a violation of these laws.

In order for these matters to be a basis for a finding of

liability in this case, you must find that pursuant to a conspiracy, the coal companies priced their coal to
3465 the TVA for the specific purpose of damaging the cross-plaintiffs, or damaging persons in similar situations to the cross-plaintiffs. Further, you must find that these bidding policies accordingly had the effect of damaging the cross-plaintiffs in their business.

3466 The Court instructs you that the right to compete in a free market presupposes a right to lower prices in good faith to meet the price of one's competitors on comparable quality of coal. It is not within the scope or purpose of the anti-trust laws to protect a business against loss in a competitive market; and a coal producer which reduces its prices in defense of its economic life may not be held guilty of eliminating competition or its competitors. The Court further instructs you that if price reductions made by a coal producer are made to increase the coal producer's volume and decrease its unit cost in order to retain its proportionate share of a diminishing market, such conduct is valid and may not be regarded as conduct violative of the anti-trust laws unless done with the specific intent to injure a competitor or unless done in combination with others to injure or drive a competitor out of business.

A conspiracy is a partnership in unlawful purposes. Conspiracies a eldom capable of proof by direct testimony and may be inferred from the things actually done.

A conspiracy may be proved by direct evidence or by facts showing there was a concert of action and a unity of purpose in effecting an unlawful object.

The conspiracy does not have to be in writing and there does not have to be formal agreement between the parties to establish such a combination, provided there is
3467 actually a combination of two or more persons, corporations or unions to do an unlawful act.

Conspiracies seldom would be proven by formal agreements, all of the facts and circumstances must be con-

sidered and the acts of the particular alleged conspirators must be looked at with reference to them. Conspiracy is seldom established by direct or positive testimony, but from its very nature is usually established by what is known to the law as circumstantial evidence. That is by proof of existence of such facts as authorize you to infer the existence of that which constituted a conspiracy, and showing unity of design and purpose to an agreement or compliance between the parties to do the things charged.

Before a fact sought to be established by Phillips Brothers Coal Company can be said to have been proved by circumstantial evidence alone, such as the alleged conspiracy, it is necessary not only that the circumstances proved by the evidence shall reasonably give rise to an inference of such facts, but also that no other equally reasonable inferences to the contrary can be drawn from the same circumstances.

If two equally reasonable inferences can be drawn from the circumstances proved by the evidence, one consistent with the facts sought to be proved, such as the alleged conspiracy, and the other inconsistent therewith,
3468 you should not infer the facts sought to be proved from such circumstances alone. In other words, if two inferences can be reasonably drawn from the same facts, one pointing to culpability and the other to innocent conduct, then it is your duty to infer that which indicates innocent conduct. This would mean that the inferences are in balance; that there is not that preponderance required for you to accept the inference in favor of the cross-plaintiff.

The existence of a conspiracy cannot be established against the Union or the Trustees by the acts or declarations of either of their alleged co-conspirators done or made in the absence of the Trustees or the Union. The existence of the conspiracy and each alleged co-conspirator's connection with it must be established by independent

proof based upon the reasonable inferences to be drawn from each such alleged co-conspirator's own acts, his own declarations or its own declarations through its officers or agents acting within the scope of their authority and his own conduct.

Before Phillips Brothers Coal Company can defend against, or defeat, the claim of the Trustees and before it can recover on its cross-claim, it is required to make out its case substantially as alleged in the cross-claim by a preponderance of the evidence. Preponderance means merely the greater weight of the evidence. A party who is required to make out his case substantially as
3469 alleged must meet its obligation with the greater weight of the evidence. The balance must be tipped in its favor. If the evidence swings the balance more heavily on the opposing party's side, Phillips Brothers Coal Company's case must fail. Also, if the evidence is in the state of even balance, Phillips Brothers Coal Company's case must fail, because in that event the parties are in the situation they had before the lawsuit was instituted.

In order to recover under its cross-claim based upon the conspiracy, Phillips Brothers Coal Company must show by a preponderance of the evidence that the conspiracy alleged in the cross-claim, substantially as alleged, existed during the period of this case, namely, from February 14, 1954 through December 31, 1958. Phillips Brothers Coal Company has the burden of proof upon this question. The burden of proof and the preponderance of the evidence ordinarily have reference to direct evidence and indirect or circumstantial evidence. Direct evidence is that contained in the testimony of a witness to a fact, the knowledge of which the witness acquired through one of his own senses. Indirect evidence is that knowledge which is inferred from known facts. It is not permissible to draw an inference from another inference. However,

it is permissible to draw reasonable inferences from proven facts.

Sometimes direct evidence falls short of proving the final and all important fact which a party seeks to
3470 prove. However, it is sometimes possible to prove facts of such significance or related character that the final or conclusive fact can readily be inferred from what has been proved. That is what is meant by proving a case by circumstantial evidence.

The major coal companies that Phillips Brothers Coal Company charges with being co-conspirators in the alleged conspiracy, of course, had the legal right to pursue activities which they considered to be in their own sound business judgment to the best interest of their respective companies, so long as they were not conspiring together and with the Union to restrain trade, or to monopolize or to attempt to monopolize. Likewise, the Union had the legal right to pursue activities which, in the judgment of the officers of the Union were to the best interests of the members of the Union in their wages and working conditions, so long as the Union was not conspiring with the other alleged co-conspirators for the purpose of restraining trade or bringing about a monopolization. If you find that the actions of the Union in this case were prompted solely by the motive to improve the working conditions and wages of its members, independent of the kind of conspiracy alleged by Phillips Brothers Coal Company, then you must answer that there was no conspiracy upon the conspiracy question. In making this determi-
3471 nation, you must consider all of the evidence in the case.

There is nothing unlawful in trying to get possession of a market through skill, efficiency, superiority of produce or by entirely laudible steps. It is unlawful to combine with others to monopolize the market in a certain commodity in order to drive out or to stifle competition, or hamper competition.

If there was conspiratorial action by the Union, it would not be protected by the Norris-LaGuardia or Clayton Acts. On the other hand, if it is found that the Union was acting in its own self-interest and for the betterment of its members, free and independent of a combination with non-labor groups intent upon violating the anti-monopoly laws, the Union would not be liable.

It is the objective of any national labor organization to eliminate price competition based on differences in labor standards, but this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.

It is not a violation of the anti-trust laws for a labor organization to bargain collectively with a multi-employer group.

Hence, multi-employer bargaining in the coal industry is not a violation of the anti-trust laws.

3472 The Union's liability or non-liability ultimately depends upon the facts. The same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the Union acts alone or in combination with business groups.

The quotation "The same labor union activities may not be in violation of the Sherman Act, dependent upon whether the Union acts alone or in combination with business groups," is the language of the Supreme Court of the United States in the case of Allen Bradley v. Local Union, reported at 325 U. S. at page 810, et seq.

If you should determine that there was an agreement or conspiracy violative of the Sherman Act, recovery against the Union can be had only for conduct which "the conspiracy contemplated and embraced." A party to the agreement or conspiracy is chargable with the acts of other parties thereto only if the acts are done in furtherance of the joint venture. An individual party cannot be held responsible for what others do beyond the reasonable intendment of the common understanding.

As the Court has mentioned before, you cannot return a verdict against the Union or the Trustees unless you find that they knew of the conspiracy and participated in it. A conspiracy cannot be inferred merely from the fact that several persons engage in similar business
3473 conduct with the same end in view, or, in this case, that the Union or the Trustees contracted with or dealt with coal companies.

Phillips Brothers Coal Company charges an unlawful conspiracy in restraint of trade which it says was participated in by the Union and the Trustees. Phillips Brothers Coal Company charges that there were various other participators in the conspiracy, specifically a number of coal companies. These coal companies are not defendants in this action so that if you find that there was a conspiracy in violation of the anti-trust laws but that only the coal companies participated in it, you must find in favor of the Trustees and the Union. However, to find against the Union it is essential that you find a violation of the anti-trust laws involving the coal companies, and participated in by the Union before you may find against the union.

3474 A combination of employees necessarily restrains competition among themselves in the sale of their services to an employer; yet such a combination, that is, a labor union, is not an illegal combination under the anti-trust laws. Accordingly, the fact that the Mine Workers Union obtained a large membership and bargained collectively on behalf of its members in itself is no ground for holding that union liable under the Sherman Act.

The Court charges you that restraints brought about by labor unions on the sale of employees' services to employers, however much such restraints curtail competition among employers are not in themselves combinations or conspiracies in the restraint of trade or commerce under the Sherman Act.

Phillips Brothers Coal Company charges that the wage

provisions of the National Bitmuinous Coal Wage Agreement were set at high rates, and liberal welfare payments were provided for, in order to drive small operators out of the coal business. The Court charges you that if the wage and welfare payment provisions in these contracts were arrived at by the parties as a result of good faith collective bargaining, and there was no agreement between the Union and operators to establish the wage rate and royalty payments so as to drive small operators out of business, the establishment of wage rate and welfare provisions through the contract would not be a violation of the Sherman Act.

3475 We come now to a discussion of the principles involving the alleged damages, members of the jury, insofar as such principles relate to Sections 1 and 2 of the Sherman Anti-Trust Law, and in that connection the Court charges you that under the anti-trust laws, every contract or combination in restraint of interstate commerce is declared illegal and every person who shall monopolize or attempt to monopolize or combine or conspire to monopolize any part of interstate commerce is guilty of an illegal act. The violation of these laws standing alone, does not, however, permit a recovery by any person or corporation or partnership unless he or it can establish that the business or property of that individual, partnership or corporation has been injured or damaged by reason thereof.

Phillips Brothers Coal Company, if injured by the Union's alleged violation of these laws, is entitled to recover only such damages as you may find to be the direct and proximate result of the wrongful acts on the part of the Union or such of them as you may find were committed by other co-conspirators pursuant to the alleged conspiracy with the Union. Phillips Brothers Coal Company is not entitled to recover any losses which may have been suffered as a result of a general economic condition, such as, for example, the decline in coal prices which did

not proximately result, in whole or in part, from
3476 predatory pricing or price cutting by alleged co-conspirators pursuant to the conspiracy. Phillips Brothers Coal Company is entitled to recover only such damages as you find have been established by a preponderance of the evidence to have been suffered as a direct and proximate result of the alleged conspiracy.

Phillips Brothers Coal Company's right to recover is limited to actual damages, the amount of which must be determined with reasonable certainty from the evidence. It is not entitled to damages which are speculative, remote or uncertain. The Phillips Brothers Coal Company is not to be denied damages simply because its damages may not be computed with exactness. Damages are recoverable if you are satisfied that they can be reasonably approximated from the evidence in the case. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect to their amount. The question of the amount to which Phillips Brothers Coal Company would be entitled, if you conclude that it is entitled to recover, is entirely and solely your responsibility, but the amount must be founded upon evidence that furnishes some approximation of the damages that the plaintiff has sustained.

Phillips Brothers was required to take all rea-
3477 sonable steps available to it to avoid loss of its business and to remain in business. It is not entitled to recover for any damages which could have been avoided through the exercise of reasonable efforts on its part. It is not entitled to increase its damages through inaction, but must take all reasonable steps to mitigate its damage and to avoid or reduce its loss.

Phillips Brothers Coal Company claims as an element of damage that the alleged conspirators depressed the price of coal on the TVA spot market by offering large

tonnages of coal on that market in 1956, 1957 and 1958 at low and dropping prices. In this connection, the Court charges you that cutting prices is not per se, that is in and of itself, unlawful under the anti-trust laws when done by a single seller, but must be accompanied by proof of intent to restrain trade or to monopolize, or constitute part of a conspiracy to restrain trade or monopolize. A conspiracy or combination for the purpose of depressing prices is illegal per se.

Phillips Brothers Coal Company contends that its principal market for steam coal in 1956, 1957 and 1958 was the TVA spot market and that it was a part of the conspiracy for the coal producers to offer large tonnage of coal on the TVA spot market at low and dropping prices
in order to drive Phillips Brothers and other small
3478 producers from the industry and to monopolize the markets, particularly the large and growing TVA market, for the large coal companies.

It is contended that the Tennessee Valley steam coal market in the years 1950 through 1954 was relatively poor because the generation of electricity in the valley was accomplished by the large TVA hydroelectric system rather than by the use of coal. But with the development of the great TVA steam plant system, particularly in the years 1955, 1956 and 1957, this steam coal market in the valley tremendously increased, and that the market expanded by 450 per cent in a short period of time. It is contended that the market price partially responded to this tremendous increase in the market in 1956 but then dropped even below the price in the preceding period in 1957 and dropped still lower in 1958 because of the alleged price-cutting practices of the alleged co-conspirators.

It is claimed that the principal perpetrators of the price-cutting scheme were Pittsburgh-Midway Coal Company, Peabody Coal Company and West Kentucky Coal Company and its subsidiary, Nashville Coal Company, the latter two being the claimed principal violators. It is

further claimed that UMW gained control of West Kentucky Coal Company and Nashville Coal Company by outright purchases of capital stock and by loans to Cyrus Eaton and certain corporations affiliated with Mr. Eaton, and that these companies were operated at losses
3479 or without regard to profit during the period of the alleged practices. It is claimed that these companies were used to beat off the competition of local producers such as Phillips Brothers Coal Company by price-cutting practices.

It is insisted that the United Mine Workers and its alleged co-conspirators commenced an attack upon the small producers of coal selling to TVA by obtaining the determination of a minimum wage in the coal industry under the Walsh-Healey Act specifically for the purpose of eliminating the small coal producers from the TVA term market, thus squeezing them into the TVA spot coal market which was largely made up of sales of coal under the $10,000 exemption afforded by the Walsh-Healey Act; that the UMW, through its president, commenced pressures upon the TVA to reduce the spot coal market and that the Union participated with large coal producers in conferences with TVA applying pressure to that authority to reduce the spot coal market; that while these pressures were being applied the alleged practice of price-cutting aforementioned was carried on by the co-conspirator coal producers to hasten the extinction of the local producers selling coal on the spot market.

It is insisted further that the alleged price-cutting practices of West Kentucky Coal Company and Nashville Coal Company were not only illegal per se, but were un-
3480 reasonable in that the principal source of the coal alleged to have been put on the market in the price-cutting practice was coal from the Uniontown mine of Nashville Coal Company; that the coal from this mine was allocated to shipment to Tampa Electric Company under a long term contract; that this long term contract

was rejected by West Kentucky Coal Company and Nashville Coal Company under the alleged sham contention that it was in violation of the Sherman and Clayton Acts; that the coal was then diverted to the TVA market and offered in amounts of 60,000 tons upon the spot market of TVA at low and dropping prices in the period of 1957 and 1958.

It is claimed that the alleged price-cutting practices, particularly with respect to Uniontown mined coal from West Kentucky Coal Company and Nashville Coal Company, was a willful and intentional effort to divert coal to dump upon the TVA spot coal market for the purposes of damaging local producers and driving them out of that market. It is insisted that the elimination of local producers has been of great assistance to West Kentucky Coal Company, Nashville Coal Company and Peabody Coal Company in securing large contracts for many millions of tons in the period since the local producers were driven out and that the supplying of coal to TVA in the period of 1959 to 1961 has largely fallen into the hands of those three companies.

3481 Phillips Brothers contends that the alleged depression of the TVA market for coal by reason of the foregoing practices has damaged it in its business or property.

3482 Phillips Brothers has offered proof that its average price of steam coal in 1956 was $3.92, and in 1957 it was $3.20, and in 1958 it was $3.13. It contends that these reductions in price in 1957 and 1958 were the result of the alleged price-cutting practices of the alleged co-conspirators, which Phillips Brothers contends were carried on throughout 1956, 1957, and 1958. It claims that the coal in the East Tennessee seams from which it mined its coal was of an extraordinary, high quality and should have commanded a better price than the average coal on the markets of the country. It contends that its prices for 1956, 1957, and 1958 for steam coal under all of these con-

ditions should have been at least the national average price. That it should be allowed to recover the difference in the price it would have received on a national average basis and the prices that it actually received in the years 1956, 1957, and 1958. That the difference in the prices it received for coal during these years and the national average price for bituminous coal for the same years amounted to around $93,000.00.

The national average prices should not be considered as a basis for determining damages, unless the jury finds that the coal sold by Phillips Brothers, f.o.b. the mines, was at least equal in grade and quality and contained substantially the same BTU content as the coal
3483 considered in the average national sales price, f.o.b. mine; the cost of transporting the coal from Phillips Brothers coal mine to its available market was comparable to the transportation cost of coal included in the national market price; and, purchasers of coal in the utility market to which Phillips Brothers sold the coal required that coal purchased by them be of types and grades substantially equal to those required by coal purchasers in the average national market.

If the jury finds that there was the alleged price-cutting practices by the alleged co-conspirators pursuant to the alleged conspiracy, the question of the amount of damages suffered by Phillips Brothers Coal Company, if any, is solely for the jury to decide.

The jury may "consider as an element of damages the difference between the prices actually received and what would have been received" but for the alleged unlawful conspiracy.

Provided you find for Phillips Brothers on the question of conspiracy and find that Phillips Brothers was damaged by the conspiracy in its business or property, cross-plaintiff would be entitled to such compensation as would put it in as good position as it would have been in had the injury not occurred. In other words, it can only be

compensated for such injuries as it actually sus-
3484 stained in its coal mining business and in its property.

In assessing the amount of damages, you are not to take into consideration or be influenced in any way by the fact that such a verdict as you bring in for Phillips Brothers Coal Company will, under the anti-trust law, be trebled. You do not first find the amount of actual damage and then treble it and then report the treble amount as your verdict. Whatever you find, if any, will be the actual, or to use another word, the single damage. The actual damage is trebled by the Court as a matter of law. Nor will you allow interest or attorneys' fees as a part of the damage. These matters also are for the Court as provided for in the statute.

You cannot make any findings on damages in this case which is based on speculation and conjecture rather than on competent evidence and the inferences to be reasonably drawn therefrom.

The fact that the Court has instructed you upon the rule governing the measure of damages is not to be taken by you as an indication on the part of the Court that the Court believes or does not believe that Phillips Brothers Coal Company is entitled to recover damages. Such instructions are given to you solely to guide you in arriving at the amount of damages under the rules of law, should

you find that there is liability in the case. If you
3485 find there is no liability in the case, either to the Trustees because you find there was a conspiracy in which the Trustees allegedly participated, or to Phillips Brothers Coal Company because you find there was no conspiracy, you will disregard the instructions pertaining to damages.

Now, members of the jury, we revert again, with particularity, to that phase of the case involving the Trustees. As you will recall, the Court stated in the beginning Mr. Lewis, Mr. Schmidt, and Miss Roche, as Trustees of the

United Mine Workers of America Welfare and Retirement Fund, instituted a suit, or this suit in this Court, against Phillips Brothers Coal Company, to recover $55,982.62, which represents royalties alleged to be due under the terms of a trust provision contained in a collective bargaining agreement which existed from October the 1st, 1953, to December 31, 1955, between the United Mine Workers of America and the coal operators, to which Phillips Brothers Coal Company was a party.

As previously indicated, the only defense raised by Phillips Brothers Coal Company to this action is that the collective bargaining agreement was an instrument used in an alleged conspiracy allegedly participated in by the Trustees, the Union, and certain coal companies, allegedly violative of the anti-trust laws. If the defense raised by Phillips Brothers to this claim of the Trustees is
3486 not a good defense, the parties have stipulated that the amount sued for is the correct amount which the Trustees are entitled to recover.

But if the defense of Phillips Brothers Coal Company is a good defense, you will say so by your answer to the question contained in the verdict form number one, and the Court will then decide whether or not the Trustees are entitled to recover this $55,982.62, the item which is the basis of their suit.

The Court instructs you that the United Mine Workers of America Welfare and Retirement Fund of 1950 was created by a trust instrument contained in the National Bituminous Coal Wage Agreement of 1950 pursuant to Section 302 of the Taft-Hartley Act, and that the wording of the trust agreement was in accordance with the requirements of the Taft-Hartley Act. The trust agreement provides for the payment of benefits to employees of signatory operators, of which Phillips Brothers was one.

The Trustees of this Fund, in their official capacity, had no legal right to require or not to require the bene-

ficiaries of the Fund to picket on behalf of UMW in labor matters.

The Trustees were legally obligated to collect all moneys due the Fund and to use all reasonable means to make such collection, including the bringing of lawsuits.

3487 Phillips Brothers Coal Company contends that the Trustees participated in the alleged conspiracy to violate Sections 1 and 2 of the Sherman Act and committed overt acts in furtherance of the alleged conspiracy, among which were:

(1) They paid benefits only to members of the UMW;

(2) That as a punitive measure, they brought legal actions against coal operators to recover royalties on coal produced; and

(3) That they required beneficiaries of the trust to picket or perform other acts for the UMW in order to obtain or retain pension benefits.

These alleged acts, standing alone, would not show that the Trustees were co-conspirators.

The act or acts of individuals, unless you find from the evidence that the Trustees actually participated in, or actually authorized such unlawful act, if any, or ratified such act, if any, after actual knowledge thereof, would not bind the Trustees so as to make them parties to an alleged conspiracy.

Phillips Brothers Coal Company's allegations must be judged separately as to the Union and as to the Trustees, and the position of the Union and the Trustees must be judged each on its own merits. The Union and the Trustees, therefore, are entitled to individual consideration of the particular evidence applicable to them to determine whether either the Union or the Trustees participated in the alleged conspiracy.

3488

If any expression of the Court has seemed to indicate any opinion relating to any of these matters, the Court instructs the jury to disregard it.

If the Court has made a mistake in its interpretation of the law in this case, then that is a matter that must be dealt with by our Court of Appeals. To repeat again, it is the duty of the jurors to accept the law as stated to them by the Court and to apply the law to the facts in the case.

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against any party to this lawsuit.

It is your duty to follow the law as given in these instructions and to apply it to the evidence in reaching your verdict. These instructions should be considered as a whole. You are not to single out any certain sentence or any individual point in applying them to the evidence in this case.

You are not bound to accept or to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind as against the declaration of a lesser number of witnesses or other evidence
3489 which appeals to your mind with more convincing force. In other words, you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses, but in the relative convincing force of the evidence which may be offered in support of or against any particular proposition.

In this regard, you are instructed that the testimony of one witness whom you find is entitled to full faith and credit on his oath as a witness is sufficient for the proof of any fact and can justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary, if upon the whole case, and considering the credibility of the witnesses, as will be explained to you or has been explained to you, you should decide that the weight of the entire evidence pointed to the accuracy and honesty of that one witness.

As indicated to you by the Court on various occasions during this trial, the statements and arguments of counsel

are not evidence in this case, nor are the contentions of the parties unless supported, of course, by evidence. It is your recollection alone of what the verious witnesses testified to and what the various documents and exhibits admitted into evidence contain that must guide and govern you in reaching your verdict. During the course of the trial, you
3490 have heard the attorneys representing the various parties making objections and on occasion giving the reasons for their objections. The Court made rulings on these objections. You should not be concerned with such rulings or the reasons for them. Whether offered evidence is admissible for your consideration or not is purely a question for determination by the Court and no inference should be drawn from these various rulings of the Court.

You are not to consider the number or type of
3491 objections as evidence against any party. Further, when admitting evidence to which an objection has been made, the Court, as you have so often been told, is not ruling on the weight to be given to that evidence. The question of weight is solely for the jury to determine. When the Court has sustained an objection to a question, that withdraws such question from your consideration. You should not, under any circumstances, speculate as to what the answer might have been.

You are not warranted in finding that the Trustees of the Union participated in the alleged conspiracy by performing an act in furtherance of and with knowledge of the conspiracy unless you find by the fair preponderance of evidence that such party had such knowledge and took such action prior to December 31, 1958.

Ladies and gentlemen of the jury, you are the exclusive judges of the facts in this case, the testimony of the witnesses and the weight to be given their testimony. In weighing the evidence you will look to the manner and demeanor of the witness while he was upon the witness stand, to his intelligence or lack of intelligence, to any bias or feel-

ing that may have been manifested and to his relationship or lack of relationship to any of the parties in this case, his means of knowledge of the facts upon which he testifies,
3492 the reasonableness or unreasonableness of the story that he tells. All of these things you will take into consideration in weighing the testimony, and you will give greater weight to that witness or those witnesses, who in your opinion more accurately detailed the facts of the case.

There are methods of impeaching a witness. One is to involve the witness in discrepant and untruthful statements while he is on the witness stand by close examination, either direct or cross. Discrepant statements relating to immaterial matters involved in the lawsuit do not necessarily affect the credibility of the witness unless the jury finds there is something to show that they originated in wilful falsehood.

Another method is to show that the witness, out of court, made statements as to material matters to which his testimony relates which are contrary and contradictory to the evidence given by him in court.

As to whether any of these invalidating processes have occurred in this case with respect to any of the witnesses who have testified, is for you, the jury, to determine. If a witness is impeached during his testimony, then he remains an impeached witness throughout the case and the jury may disbelieve his testimony, if it thinks that it should do so.

Now members of the jury, there have been one or more witnesses introduced in the trial of this case who
3493 testified as expert witnesses. If they were introduced as expert witnesses and the Court permitted them to testify as experts, that means that the Court believed that they were entitled to testify as expert witnesses under the law.

Now if these so-called expert witnesses testified as to

facts relating to the case, then you will weigh their testimony just exactly as you weigh the testimony of a lay witness and under the rules heretofore explained to you. But if they did not testify as to facts relating to the case but simply gave opinions, their opinions as experts about the case, then you will consider such testimony as opinion evidence and weigh it accordingly. You will scrutinize, you will weigh carefully, opinion evidence.

An expert witness is a witness ordinarily possessing knowledge which is not possessed by the ordinary lay witness. So when questions arise in a lawsuit that involve technical knowledge with which the lay witness and the lay jury is not possessed, the expert witness is permitted to give his opinion on technical matters to assist the jury in arriving at the truth in the case. The jury may attach to the opinion of the expert much or little weight.

The jury is reminded by the Court to remember that expert evidence ordinarily is opinion evidence and it should be examined with scrutiny and care by the jury.

3494 . Now, in closing, members of the jury, you will have access in your jury room, by agreement of all parties in this case, and you may refresh your recollection from, to the various exhibits which have been introduced in this case. And, as an aid to you in reaching your verdict, the Court has caused to be prepared verdict forms which you may take with you to the jury room and which you may use in arriving at your verdict.

Those forms were explained to you before the arguments were made in this case, but the Court at this time, so that there may be no misunderstanding about that, will briefly run over these forms again.

Form No. 1 contains one paragraph and is in this language:

"Did the Trustees engage in a combination or conspiracy so as to unreasonably restrain trade or commerce among the several states as alleged by the original defendant, Phillips Brothers Coal Company?"

There are places for an answer to that question. That question may be answered Yes or No by the jury, and whichever answer is made will be filled in by the jury through its foreman in one of the blank lines shown on this form. When it is filled in by the foreman then the foreman will sign the verdict and will return with it in open court and announce it in open court.

3495 Form No. 2 contains three paragraphs. The first paragraph reads as follows:

"Did the cross-defendant, U.M.W., engage in a combination or conspiracy so as to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states outside and beyond the exemption created by the anti-trust statutes to a labor organization as alleged by cross-plaintiffs, Phillips Brothers Coal Company?"

Again there are blank lines for the jury to answer this question Yes or No, and the jury will, through its foreman, fill in the answer to this question.

If your answer to Question 1—that is the question I have just read—is No, the remaining questions need not be answered.

Paragraph 2:

"If your answer to Question 1 is Yes, was cross-plaintiff, Phillips Brothers Coal Company, damaged in its business or property as a direct and proximate result of the conspiracy?"

Again you will answer that question by causing your foreman to fill in the answer Yes or No in one of the blank lines shown on the form.

If your answer to Question 2 is No, you need not answer

Question No. 3 reads as follows:

3496 "We find in favor of cross-plaintiff, Phillips Brothers Coal Company, and fix its damages in the amount of ____ dollars."

If you find for Phillips Brothers Coal Company you must go further and make the award, and you must fill in this blank space the amount of the award and then have your foreman sign the verdict form and return with it in open court and announce it through your foreman.

The jury at this time may be excused temporarily.

(The jury was excused from the courtroom and following proceedings were had in the absence of the jury.)

The Court: Now, Mr. Kramer, for the original plaintiffs and the cross-defendant, do you have any objection to any part of this charge or any further special requests?

Mr. Kramer: As your Honor realizes, the charge has taken a substantial period of time, as of course, it must have taken, and could we have a few minutes for a conference among counsel before we announce?

The Court: Well, now, Mr. Kramer—

Mr. Kramer: Just ten minutes, your Honor.

3497 The Court: I will let you consult right now. I can't recess the court. I will wait.

Mr. Kramer: Wait for a little consultation.

The Court: I don't want to hurry you. You can discuss it there among yourselves but I do not want to recess court because I have talked to you gentlemen in chambers about this charge, and I have tried to tell you exactly what I was going to charge and I acted on all the special requests before coming in here this morning and telling you gentlemen that except those that were charged—and you will note, you are bound to have noted from this charge, that many of yours, Mr. Kramer, were charged almost verbatim.

* * * * * * * * * * *

3499 Mr. Kramer: Your Honor has had before you the requests which we made for instructions, and Your Honor has passed on these requests and written your notations on the side.

Your Honor, to the failure of the Court to give a few of these requests in the language which we submitted them, there are only a few, we want to reserve exceptions.

The Court: All right, sir.

Mr. Kramer: I am referring now, Your Honor, to the revised requests, and does Your Honor want me to read the request rather than just refer to the number?

The Court: If you will just refer to the number and let the reporter take it down and copy it in, and tell me just what it pertains to, that is the subject.

Mr. Kramer: I refer first, Your Honor, as an objection to Your Honor's charge, failure to give what is our request 37 in the revised request, and it appears on page 11 and carries over on page 12 of our memorandum, Your Honor, and it deals with — starts out —

3500 (Thereupon, counsel read a portion of the requested charge which is copied in its entirety as follows:)

"In the course of collective bargaining the Union had the right to seek high wages and benefits. It had the right to bargain for such wages even though it may have realized that a high wage scale would result in greater mechanization and less employment in the mines, and this does not indicate of itself a conspiracy on the part of the Union to violate the Sherman Act. Even if the Union and the coal companies with whom it bargained collectively realized that the wage rates and benefits provided in the agreement could not economically be met by a company unable to mechanize its production, this, of itself, would constitute no violation of the anti-trust laws. (Apex Hosiery Co. v. Leader, 310 U. S. 469 [1940]."

The Court: I gave every consideration to that, and I think you will find I gave the substance of it in the charge.

Mr. Kramer: Your Honor did charge on that subject.

The Court: That's right.

Mr. Kramer: We didn't think sufficiently.

* * * * * * * * * * *

3504 Mr. Kramer: Thank you.

Our second objection, Your Honor, was failure of the Court to give what was our request forty-nine, in our revised requests, which appears on page fourteen of these

requests, and it is with reference to the so-called "union security provision."

(The request referred to is as follows:)

"I charge you that the so-called union security provision of the National Bituminous Coal Wage Agreement was not in violation of either the Taft-Hartley Act or the law of the State of Tennessee and that such provision did not constitute an effective union shop clause whereby the union dominated or controlled the employees working in the coal industry. (Fentress Coal and Coke Company v. Lewis, 264 F. 2d 134 [6th Cir.]; Quality Coal Company v. Lewis, 270 F. 2d 214 [7th Cir.]"

3505 Mr. Kramer: I will read it in full if Your Honor cares to, but Your Honor has it.

The Court: Didn't I charge on that?

Mr. Kramer: You did charge on union security, but we didn't think you quite covered it.

The Court: You need not re-read it, because the Court has read it.

Mr. Kramer: Now the third one is objection number three, which was the failure of Your Honor to give our request number fifty as expressed on page fifteen of our revised list. This deals with the picketing of members of the United Mine Workers of America — yes, picketing by people who are beneficiaries of the Welfare and Retirement Fund.

(The request referred to is as follows:)

"The fact, if it be a fact, that members of the Union who were receiving benefits from the United Mine Workers of America Welfare and Retirement Fund engaged in picketing at one or more coal mines while a labor dispute was in progress is not entitled to any consideration by the jury on the question of whether or not the Union violated the Sherman Act."

The Court: The Court is satisfied with its charge on that subject, and I am sure counsel remembers. It was very

short, but I told them in substance the Trustees
3506 didn't have any authority over the pensioners or the beneficiaries in that respect. That is what I told them.

Mr. Kramer: The way we understood your charge was that Your Honor did charge it in dealing with the effect on the Welfare and Retirement Fund, but we did not think it covered over to the defense as made by the Union, and it was on that basis that we are reserving this objection.

The Court: Well, now, you may have a point there.

Mr. Kramer: This request was — and this was in the Union request, Your Honor — (the request was then read by counsel). We thought the way Your Honor's charge was given it was limited to the Trustees.

The Court: Let me have that and read what it says.

Mr. Kramer: Yes, Your Honor.

The Court: Now this was picketing, was it?

Mr. Kramer: Yes, Your Honor.

The Court: All right.

Mr. Kramer: Our next objection, objection number four, was the failure to give our request number 63 in the revised request, which appears on page seventeen thereof.

And this I think I will read, to make my position
3507 clear. It is short.

"I also charge you that it was no violation of the anti-trust laws for the Union or the coal operators to approach the TVA to urge it to abide by the spirit and the letter of the Walsh-Healey Minimum Wage Act. Furthermore, it was no violation of the anti-trust laws for the parties openly and in their respective self interest to urge the Tennessee Valley Authority to modify its methods of buying coal."

The Court: What number is that?

Mr. Kramer: That is number fifty-three, Your Honor.

. . . . . .

Mr. Kramer: The other one, Your Honor, is the last paragraph in what was our request 53(a), and it appears—

failure to give this portion in Your Honor's charge — and it appears at the top of page 18 in these revised requests, and reads as follows:

"I charge you as a matter of law that the fact that the Union may have had a financial stake in West Kentucky Coal Company's business does not by itself indicate that
3508 they participated in that company's so-called predatory practices, if there were any, in violation of the anti-trust laws. The Union must have participated, either through being members of an overall conspiracy, one of whose ends was that West Kentucky Coal Company perform the predatory practices, or it must have specifically participated in the practices amounting to the violation, other than through its ownership or other financial interest in West Kentucky Coal Company."

The Court: Now, I remember — Mr. Rowntree, do you think I covered that?

Mr. Rowntree: Yes, sir, I think you covered that up one side and down the other.

The Court: You see, Mr. Kramer, I am going to give these in substance that you present, but you just almost wore me out with these requests.

• • • • • • • • • • •

3509 Mr. Kramer: All right. We reserve objection, your Honor.

And now the next one is the failure of your Honor to give our Request 58 in modified form, which is found on page 20 of this list, which I will read. It is brief, your Honor.

"Since November 1955, firms selling coal to the TVA by contracts calling for $10,000 or more in coal, whether on a term contract or spot contract basis, have been required by the Walsh-Healey Act to pay the prevailing wage paid to bituminous coal miners in the area as such prevailing wage was found by the Secretary of Labor. From November, 1955, through October 20, 1958, this minimum wage was $2.245 per hour; and from October 20, 1958, to date" —

and that ought to be December 31, 1958 — "to December 31, 1958 was $2.745 per hour. If you find that Phillips Brothers Coal Company did not elect to pay the prevailing wage paid to bituminous coal miners, as found by the Secretary of Labor, and if you further find that therefore Phillips Brothers Coal Company did not elect to sell coal to Federal agencies in quantities of $10,000 or more, I charge you that Phillips Brothers Coal Company is not entitled to recover for any losses it sustained thereby."

3510 The Court: Well, I am satisfied with the charge.

. . . . . .

Mr. Kramer: But I have one or two other general ones not covered by the requests.

The other one is this, Your Honor. That there is involved in this case a written contract which is a collective bargaining agreement. In discussing this the other day, we understood the substance, although I do not think we had a written request in, to the effect that your Honor would charge the jury, in substance, as follows, which we do not think was covered:

That where two constructions of a written contract are possible, preference is given to that one which does not result in a violation of law. And I don't believe your Honor gave that charge.

It reads, "Where two constructions of a written contract are possible, preference is given to that one which does not result in a violation of law."

The Court: All right.

Mr. Kramer: I have only one more, your Honor,

3511 and this deals with the question of the pricing policies of the companies that are alleged to be the co-conspirators.

With reference to those pricing policies in discussing the question of damages in your Honor's charge, we feel that undue emphasis, inadvertently, crept into Your Honor's charge with reference to the theories of the cross-plaintiffs, and that our theories with reference to these pricing pol-

icies as set forth in the theories submitted to your Honor on page 12 of our suggested theories — 12 and 13 — did not receive like emphasis.

• • • • • • • • • • • •

The Court: All right. Now remind me of this. I expect to give this when the jury comes back, your theory. Off the record —

(Remarks of the court off the record.)

The Court: I expect to give the substance of 53 and the substance of 50. If I fail to give these when the jury
3512 returns, you call it to my attention.

Mr. Kramer: The only other thing we want to say, and we have already said it, probably not necessary now, we do reserve objection to the failure of your Honor, in the questions submitted to the jury — I mean for the final determination, to fail to include one to name the alleged co-conspirators.

The Court: Mr. Kramer, let me tell you, you have made your points so gentlemanly that the Court feels almost ashamed that it can't do everything you ask it to do.

Mr. Kramer: Thank you.

The Court: All right.

Mr. Rowntree: If your Honor please, the defendants and cross-plaintiffs have no exceptions to the charge and no requests for additional charges.

• • • • • • • • • • • •

(The jury returned into open court and the following proceedings were had in the presence of the jury.)

• • • • • • • • • • • •

3513 The Court: Members of the jury, I want to supplement what I have said to you in the main charge in the following respects.

You will recall that I stated to you in some detail the theory of the Phillips Brothers Coal Company with respect to the damages it claims to have sustained by reason of the alleged wrongdoing of the alleged conspirators.

At this time I want to state to you the theory of the United Mine Workers on that subject.

U.M.W. says that it had nothing to do with the pricing policies of any company, or group of companies, to any market including the TVA. It says further that there is no evidence to show that any company or group of companies entered into an agreement between themselves to undertake to depress the TVA coal market or that they or tny of them had any intention of doing so.

In this connection U.M.W. says the evidence shows that East Tennessee mines sell to TVA eastern division steam plants but cannot, because of the cost of transportation, compete for the sale of coal for western division steam plants. Similarly, Western Kentucky mines are unable to compete with East Tennessee mines for coal business at TVA's eastern division steam plants — again because of the cost of transportation; and that the evidence shows that during none of the years in question did TVA reduce its consumption of coal in its eastern division plants by reason of purchases of coal at its western division plants.

3514

UMW says that the fluctuations in the price of the TVA market were controlled by the law of supply and demand as witnessed by the fact that in 1956 when TVA's purchases were at its highest level the price of coal was at a higher level than it was in subsequent years. In this connection UMW says that the decline in the national consumption of coal in 1958 heightened competition for all available markets and thus naturally caused a decline in price.

3515

The Court further charges you that the fact, if it be a fact, that members of the Union who were receiving benefits from the United Mine Workers of America Welfare and Retirement Fund engaged in picketing at one or more coal mines while a labor dispute was in progress is not entitled to any consideration by the jury on the question of whether or not the Union violated the Sherman Act, unless

the jury finds from the evidence that such picketing was a part of an alleged conspiracy entered into by the UMW and one or more of the alleged coal operators named in the complaint, and that it was a part of the conspiracy and so picketing to drive the small operators out of business in order that the larger operators might have the business.

The Court further charges you that it was no violation of the anti-trust laws for the Union or the coal operators to approach the TVA to urge it to abide by the spirit
3516 and the letter of the Walsh-Healey Minimum Wage Act. Furthermore, it was no violation of the anti-trust laws for the parties openly and in their respective self interest to urge the Tennessee Valley Authority to modify its methods of buying coal, unless the parties so urged the TVA to modify its policies in buying coal for the purpose of driving the small operators out of business. In other words, the approach by these parties to the TVA to get it to change its policies with respect to coal buying standing alone was in no respect a violation of law and should not be considered by the jury as a violation of law standing alone as the parties had the legal rights to approach the TVA in an effort to get the TVA to change its policies with respect to coal buying.

The Court further charges you that where two reasonable constructions of a written contract can be made, preference is given to that construction of such contract that does not result in a violation of law.

Now that simply means that where a contract on its face is ambiguous, and if it is ambiguous and the parties can't agree on the meaning of it, then they are entitled to go into a court and have it construed. And if the Court can, in construing that contract, reach a result so as to make the contract comply with the law, then the Court will reach that result. In other words, the Court will not construe
3517 a contract to violate the law, if it can by reasonable construction construe it to come within the purview of the law.

3527 (After a short wait counsel appeared and the following proceedings were had.)

The Court: Mr. Foreman, have you reached your verdicts?

The Foreman: We have, your Honor.

The Court: All right. Would you please stand and read your verdicts.

The Foreman: You wish me to read the verdict forms?

The Court: Yes, sir, and read the answers to those forms so we can all hear you.

The Foreman: Verdict Form No. 1.

Did the Trustees engage in a combination or conspiracy so as to unreasonably restrain trade or monopolize commerce among the several states as alleged by the original defendants, Phillips Brothers Coal Company?"

3528 Answer: Yes.

The Court: Is that the verdict of all the jurors; if so, hold up your hands?

(The jurors indicated in the affirmative.)

The Court: All right.

The Foreman: Verdict Form No. 2:

"Did the cross-defendant, U.M.W., engage in a combination or conspiracy so as to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states outside and beyond the exemption created by the anti-trust statutes to a labor organization as alleged by cross-plaintiff Phillips Brothers Coal Company?"

Answer: Yes.

The Court: Is that the verdict of the jury? Hold up your hands if it is.

(The jurors indicated in the affirmative.)

The Court: All right. Go ahead.

The Foreman: "If your answer to Question 1 is 'yes', was cross-plaintiff, Phillips Brothers Coal Company, dam-

aged in its business or property as a direct and proximate result of the conspiracy?"

The answer is: Yes.

The Court: Is that the verdict of all of you? Hold
3529 up your hands.

(The jurors indicated in the affirmative.)

The Court: All right.

The Foreman: "We find in favor of cross-plaintiff, Phillips Brothers Coal Company, and fix its damages in the amount of $90,000.00."

The Court: Is that the verdict of the jury, so say you all?

(The jurors indicated in the affirmative.)

VOLUME IV
EXHIBITS

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1964

No. [redacted] 48

UNITED MINE WORKERS OF AMERICA,
PETITIONER,

vs.

JAMES M. PENNINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 17, 1964
CERTIORARI GRANTED MAY 18, 1964

Joint Appendix

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 14,809

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admrx. of the Estate of Burse Phillips, deceased,
Cross-Plaintiffs-Appellees,

v.

UNITED MINE WORKERS OF AMERICA,
Cross-Defendant-Appellant.

No. 14,810

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, as Trustees of the UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND,
Plaintiffs-Appellees,

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admrx. of the Estate of Burse Phillips, deceased,
Defendants-Appellants.

Appeals from Judgments and Orders of the United States District Court for the Eastern District of Tennessee, Northern Division

---

VOLUME IV
Pages 1591a-1733a
EXHIBITS

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

TABLE OF CONTENTS OF APPENDIX

	Page
Caption in District Court	1a
Relevant Docket Entries	2a
Complaint	9a
Answer of Defendants	11a
Counterclaim	18a
Cross-Claim against Plaintiffs and United Mine Workers of America	19a
Order, February 19, 1958	21a
Amendment to Answer	21a
Motion of Cross-Defendant, United Mine Workers of America, to Dismiss Action	23a
Motion to Vacate Order Granted Under Rule 13(h) and to Dismiss Cross-Claim as to Plaintiff Trustees	25a
Answer to Counter-Claim	25a
Motion to Amend Answer, Counter-Claim and Cross-Claim filed by Defendants	26a
Motion to Add a Party Plaintiff	28a
Order, August 11, 1958	29a
Additional Motion to Amend Answer, Counter-Claim and Cross-Claim filed by Defendants	30a
Memorandum (Delivered from the Bench), July 1, 1959	34a
Order, July 2, 1959	36a
Answer of United Mine Workers of America to Amended Cross-Claim filed Against It and Others	38a
Motion of Cross-Plaintiffs to Amend the Cross-Claim or Counter-Claim to Specify Period of Time Encompassed by the Cross-Claim or Counter-Claim	40a

Order of Substitution of Parties, September 30, 1960 41a

Order, November 25, 1960 42a

Amended Answer to Counter-Claim 42a

Order, January 16, 1961 44a

Motion of Defendants and Cross-Plaintiffs for Order Consolidating Claims for Trial and Dismissing Claim of Cross-Plaintiffs Against Cross-Defendants 44a

Response of United Mine Workers of America to Motion of Defendants and Cross-Plaintiffs to Consolidated Claims and Motion to Dismiss 46a

Order, April 10, 1961 47a

Order Pursuant to Pre-Trial, April 10, 1961 48a

Motion of United Mine Workers of America for Judgment in Accordance with Motions for Directed Verdict or in the Alternative Motion For a New Trial 64a

Motion of Trustees for Judgment in Accordance with Motions for Directed Verdict or in the Alternative Motion For a New Trial 73a

Judgement, August 2, 1961 82a

Opinion Rendered From the Bench, July 31, 1961 85a

Notice of Appeal filed by Cross-Defendant 100a

Notice of Appeal filed by Defendants 101a

Order, August 28, 1961 101a

Order, October 2, 1961 102a

TRANSCRIPT OF PROCEEDINGS

Caption in District Court ---------- 103a

Court's Statement of Case ---------- 104a

Defendants' Opening Statement ---------- 108a

Stipulation ---------- 117a

Defendants' and Cross-Plaintiffs' Evidence

Jack Shattuck
- Direct Examination ---------- 118a
- Cross Examination ---------- 129a
- Redirect Examination ---------- 130a

Andrew Frost
- Direct Examination ---------- 130a
- Cross Examination ---------- 137a

H. B. Wicks
- Direct Examination ---------- 138a
- Cross Examination ---------- 145a
- Redirect Examination ---------- 146a

Will Hood Wender
- Direct Examination ---------- 146a
- Cross Examination ---------- 152a
- Redirect Examination ---------- 154a

Alonzo Cox
- Direct Examination ---------- 155a
- Cross Examination ---------- 159a
- Redirect Examination ---------- 163a
- Recross Examination ---------- 164a

John Van Huss
- Direct Examination ---------- 164a
- Cross Examination ---------- 169a

Raymond E. Phillips
- Direct Examination ---------- 173a
- Cross Examination ---------- 211a

James M. Pennington
Direct Examination 220a
Cross Examination 225a

Albert Pass
Direct Examination 231a
Cross Examination 242a
Redirect Examination 243a

United Mine Workers of America
Interrogatories 244a

John L. Lewis (Deposition)
Direct Examination 251a
Cross Examination 493a

United Mine Workers of America
Interrogatories (resumed) 495a

Judge Charles I. Dawson (Deposition)
Direct Examination 518a
Cross Examination 527a

George H. Love (Deposition)
Direct Examination 530a

Robert L. Kaiser (Deposition)
Direct Examination 550a

Cyrus S. Eaton (Deposition)
Direct Examination 556a

Mark Eastin (Deposition)
Direct Examination 586a
Cross Examination 613a
Redirect Examination 619a

Barnum L. Colton (Deposition)
Direct Examination 623a

James W. Haley (Deposition)
Direct Examination 646a

William B. Sturgill (Deposition)
Direct Examination 656a

Albert B. Hill (Deposition)
Direct Examination ---- 667a
Cross Examination ---- 686a

J. S. Routh, Jr.
Interrogatories ---- 689a

R. H. Hughes
Interrogatories ---- 696a

Herbert C. McCollum (Deposition)
Direct Examination ---- 699a
Cross Examination ---- 710a
Redirect Examination ---- 710a

Merle C. Kelce (Deposition)
Direct Examination ---- 711a
Cross Examination ---- 746a
Redirect Examination ---- 751a

R. J. Snider (Deposition)
Direct Examination ---- 753a

Raymond Dupee (Deposition).
Direct Examination ---- 757a

Dino Fratiglioni (Deposition)
Direct Examination ---- 764a

George Schmidt (Deposition)
Direct Examination ---- 766a
Cross Examination ---- 770a

Frank Kreitner (Deposition)
Direct Examination ---- 770a

J. L. Hamilton
Interrogatories ---- 774a

H. D. Waters
Interrogatories ---- 777a
Cross Interrogatories ---- 779a

Michael F. Widman, Jr. (Deposition)
Direct Examination ---- 780a

Elmer C. Hill (Deposition)
Direct Examination 787a
Cross Examination 806a
Redirect Examination 830a

Martin Hochdorf (Deposition)
Direct Examination 834a
Cross Examination 838a
Redirect Examination 839a

Taylor Maddox, Sr. (Deposition)
Direct Examination 841a
Cross Examination 844a
Redirect Examination 855a

I. E. Schmidt
Direct Examination 856a
Cross Examination 888a

John H. Amos
Direct Examination 907a

Leon Day
Direct Examination 964a
Cross Examination 970a

Arlow Hutson
Direct Examination 971a

Richard A. Hutson
Direct Examination 975a

Ralph Phillips
Direct Examination 980a
Cross Examination 983a

John H. Amos (testimony resumed)
Cross Examination 984a
Redirect Examination 990a
Recross Examination 993a

Plaintiffs' and Cross-Defendants' Evidence

Josephine Roche
Direct Examination ---- 1005a
Cross Examination ---- 1045a

H. G. Schmidt
Direct Examination ---- 1048a
Cross Examination ---- 1061a
Redirect Examination ---- 1066a

Val J. Mitch
Direct Examination ---- 1066a
Cross Examination ---- 1083a
Redirect Examination ---- 1092a
Recross Examination ---- 1093a

John L. Lewis
Direct Examination ---- 1093a
Cross Examination ---- 1140a
Redirect Examination ---- 1175a

John Owens
Direct Examination ---- 1178a
Cross Examination ---- 1225a

S. L. Jewell
Direct Examination ---- 1249a
Cross Examination ---- 1270a

T. Reed Scollon
Direct Examination ---- 1280a
Cross Examination ---- 1310a

Patrick B. C. Smith
Direct Examination ---- 1318a
Cross Examination ---- 1349a
Redirect Examination ---- 1377a
Recross Examination ---- 1381a

T. J. Hoffman
Direct Examination ---- 1382a
Cross Examination ---- 1406a

Albert Pass
Direct Examination 1415a
Cross Examination 1420a
Redirect Examination 1421a

Mark E. Eastin
Direct Examination 1422a
Cross Examination 1446a

R. E. Phillips (Deposition)
Cross Examination 1466a

Elliott D. Adams
Direct Examination 1467a
Cross Examination 1471a

Welly K. Hopkins
Direct Examination 1472a
Cross Examination 1501a
Redirect Examination 1505a
Recross Examination 1507a

Statements of Counsel 552a

Statements of Counsel 697a

Statements of Counsel 994a

Trustees' Motion for Directed Verdict 1003a

UMW's Motion for Directed Verdict 1004a

TVA Annual Reports 1508a

Rebuttal Evidence 1513a

Trustees' Renewal Motion for Directed Verdict 1523a

UMW's Renewal Motion for Directed Verdict 1524a

Arguments on Motions 1525a

Motions for Mistrial 1532a

Arguments on Motions ----------1533a
Trustees' Renewal Motion for Directed Verdict ----------1535a
Closing Arguments ----------1535a
Court's Charge to the Jury ----------1537a
Forms of Verdict ----------1577a
Objections to Court's Charge ----------1579a
Court's Further Charge to the Jury ----------1585a
Verdict of the Jury ----------1588a

EXHIBITS

No.		Page
13-21	Resume of Phillips Brothers Coal Company income tax returns for the years 1953-1958 (composite of Exhibits Nos. 13 thru 21)	1591a
22	Profit or loss, rail tons, etc., years 1955-1958	1592a
23	Check Letter of Advice, Phillips Bros. Coal Co., 11-12-53	1593a
24	Check Letter of Advice, Phillips Bros. Coal Co., 1-5-54	1594a
25	Check Letter of Advice, Phillips Brothers Coal Co., July 29, 1955	1595a
26	Check Letter of Advice, Phillips Brothers Coal Co., 12-17-55	1596a
27	Check Letter of Advice, Phillips Brothers Coal Co., August 4, 1956	1597a
34	Application Forms for Fund Benefits	1598a
39	List of cases brought by Trustees	1607a
40	List of Coal Companies	1619a
41	Walsh-Healey Act, Minimum Wage Determinations	1620a
42	United Mine Workers Journal, February 15, 1955	1625a
44	United Mine Workers Journal, February 15, 1958	1634a
48	Interests of United Mine Workers of America in West Kentucky Coal Company and Nashville Coal Company	1639a
72	Statement of Condition, The National Bank of Washington, October 3, 1960	1640a

EXHIBITS

No.		Page
73	Interest of United Mine Workers of America in National Bank of Washington	1642a
92	Table, "FACTS ABOUT TVA STEAM PLANTS"	1643a
98	Phillips Bros. Coal Co., TVA bids, 1956-1958	1644a
99	Average BTU Cost, 1956-1958 (Eastern plants & TVA system)	1645a
100	Total Tons purchased, 1956-1958 (Eastern & Western plants)	1646a
101	Pittsburgh-Midway Mines and Peabody Mines, table, 1956-1958	1647a
102	Table, West Kentucky & Nashville Coal Co., 1956-1958	1652a
103	Table, Debardeleben Coal Corp. & Traux-Traer Coal Co., 1956-1958	1656a
104	Table, Term Contract Awards, 1956-1959	1658a
107	Table, TVA Weighted Averages 1954-1958	1659a
110	Purchase Order from Tampa Electric Co. to Love & Amos Coal Co., December 23, 1957	1660a
111	Table, Love & Amos shipments to Tampa Electric Co., 1959-1961	1661a
115	Summary charts, "Tons of Coal For Steam—Electric Utilities" (United States, Tennessee, Virginia and Top Six States)	1662a
117	Summary chart showing National Average Price of coal, and Phillips' Average Price, 1956, 1957 and 1958	1663a
118	"Thickness of Bituminous Coal and Lignite Seams"	1664a

EXHIBITS

No.		Page
119	"Summary of method of haulage", etc.	1665a
120	"Number and production of bituminous coal and lignite strip mines", etc.	1666a
121	Chart, "Tennessee Mines Number and Production by Class", 1955 and 1959	1667a
123	"Supplementary Summary Chart" showing State, Delivered Price and Utility Tonnage	1668a
138	Excerpts from UMW Welfare & Retirement Fund File, re: Clem Terreo	1669a
139	Excerpts from UMW Welfare & Retirement Fund File, re: Steve Molnar	1678a
140	Excerpts from UMW Welfare & Retirement Fund File, re: John Shenkarik	1684a
141	Excerpts from UMW Welfare & Retirement Fund File, re: Rico Boggio	1694a
142	Excerpts from UMW Welfare & Retirement Fund File, re: Robert Taylor	1699a
143	Excerpts from UMW Welfare & Retirement Fund File, re: Thomas Liddle	1708a
145	Map of TVA	1713a
146A	Table 1, "UNITED STATES CONSUMPTION OF ENERGY FUELS", etc.	1714a
147A	Table 2, "UNITED STATES CONSUMPTION OF BITUMINOUS COAL", etc.	1715a
148A	Table 3, "TRENDS IN BITUMINOUS COAL PRODUCTION", etc.	1716a

EXHIBITS

No.		Page
149A	Table 4, "UNITED STATES TOTAL PRODUCTION OF BITUMINOUS COAL", etc. (by size of annual output)	1717a
150A	Table 5, "TENNESSEE TOTAL PRODUCTION OF BITUMINOUS COAL", etc. (by size of annual output)	1718a
151A	Table 6, "NUMBER OF BITUMINOUS COAL MINES", etc. (in United States)	1719a
152A	Table 7, "NUMBER OF BITUMINOUS COAL MINES", etc. (in Tennessee)	1720a
153A	Table 8, "UNITED STATES TOTAL PRODUCTION OF BITUMINOUS COAL", etc. (by method of mining)	1721a
154A	Table 9, "TENNESSEE TOTAL PRODUCTION OF BITUMINOUS COAL", etc (by method of mining)	1722a
155A	Table A, "UNITED STATES EXPORTS OF BITUMINOUS COAL"	1723a
156A	Table B, "SALIENT STATISTICS ON BITUMINOUS COAL IN THE UNITED STATES"	1724a
157A	Table C, "SALIENT STATISTICS ON BITUMINOUS COAL IN TENNESSEE"	1725a
165	Table, "AVERAGE PRICE F.O.B. MINE"	1726a
166	Chart, TVA "ANNUAL CONSUMPTION OF COAL IN TONS", 6-30-56 thru 6-30-59	1727a
167	"COAL—BITUMINOUS AND LIGNITE, PRICES"	1728a
168	Table, "COAL SHIPPED TO T.V.A. FROM WEST KENTUCKY & NASHVILLE", etc.	1729a

EXHIBITS

No.		Page
169	"BIDS ON COAL TO TVA FROM UNIONTOWN MINE", West Kentucky and Nashville, Table	1730a
170	Table, "BARGE LOADINGS AT UNIONTOWN 1958"	1731a
171	Table, "COMPARISON OF TOTAL COAL PRODUCTION" (West Kentucky, Nashville and Total National production)	1732a
173	Table showing Phillips' tonnage shipped by rail, etc.	1733a

RESUME OF PHILLIPS BROS. COAL CO. INCOME TAX RETURNS FOR THE YEARS 1953-1958

(Exhibits 13 through 21)

	1953	1954	1955	Amended 1955	1956	Amended 1956	1957	Amended 1957	1958
GROSS INCOME									
Gross Receipts	38,581.62	82,502.83	104,423.94		107,179.95		86,322.96		119,387.47
DEDUCTIONS									
Merchandise Purchased for Manufacture or Sale		230.06	2,069.30				76.93		86.37
Cost of Labor, Supplies	11,675.27	24,628.43	27,744.04		17,366.88		20,319.85		27,161.08
Material and Supplies							2,003.20		1,906.93
Salaries and Wages	8,909.78	16,377.54	20,973.64		15,185.60		17,288.21		29,551.76
Rent (and Royalty Payments)	5,704.34	8,121.62	10,136.16		6,376.43		6,723.19		10,298.38
Interest on Indebtedness	1,893.95	1,938.71	1,902.19		2,448.03		116.14		647.50
Taxes	167.41	388.67	403.13		829.07		2,304.28		1,496.95
Depreciation	7,230.06	14,752.89	14,592.54		22,506.62		20,157.14		26,758.37
Depletion			7,342.01		8,861.80				
Repairs	1,632.54	1,712.07	1,282.58		9,142.31		4,844.10		5,467.54
Other Authorized Deductions	3,806.31	4,798.75	10,464.06		12,088.96		18,202.77		28,293.87
Total Deductions	41,019.66	72,948.74	96,903.65		94,805.70		93,035.81*		131,688.75
Addition to Income Shown in Prior Return (by Amendment)				28,278.55		4,951.54		9,507.12	
Excluded from Income Shown in Prior Return (by Amendment)								18,269.47	
Ordinary Net Income or Loss to Three Partners	(2,438.04)	9,554.09	7,520.33*	35,798.88	12,374.25	17,325.79	(16,712.85)*	(20,385.20)	(12,311.28)

*All figures are as shown on the returns and arithmetical errors in certain computations are as the returns were filed.

Exhibit Nos. 13-21

1591a

Exhibit No. 22

Profit or Loss	Rail Tons	Amt. Rec. Rail Tons	Average Price Rail Coal	
$28,542.19	23,985.15	$79,954.87	$3.37 1/2	1955
$17,325.79	14,128.70	$55,376.08	$3.92	1956
($17,741.97) Loss.	19,717.67	$63,167.54	$3.20 1/3	1957
($12,311.28) Loss	25,603.03	$80,223.39	$3.13 1/3	1958

Exhibit No. 23

CHECK LETTER OF ADVICE TO

UNITED MINE WORKERS OF AMERICA
WELFARE AND RETIREMENT FUND OF 1950
900 Fifteenth Street, N. W.
WASHINGTON 5, D. C.

DATE 11-12-53

NAME OF REPORTING COMPANY Phillips Bros Coal Co

MAILING ADDRESS OF PRODUCER _____ (Street) Fremont (City) Iowa (State)

SIR PLEASE FIND ENCLOSED CHECK NUMBER 517 DATED 11-12-53 IN THE AMOUNT OF $321.17 FOR DEPOSIT TO THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950, REPRESENTING PAYMENT TO THE FUND FOR COAL PRODUCED AS FOLLOWS. PLEASE LIST EACH MINE SEPARATELY

PERIOD COVERED FROM	PERIOD COVERED TO	NAME OF MINE	COUNTY	STATE	POST OFFICE	TONS PRODUCED TOTAL	AMOUNT
10/1/53	10/31	Phillips Bros	Campbell	Iowa	Fremont	107.25	321 17
							321 17

IMPORTANT

TO BE FILLED IN BY OPERATOR WHEN MAKING REMITTANCE ➡

If you opened, purchased or reactivated a new mine following

Mine Name _____

Date mine started or reopened _____

Name and address of former operator

_____

_____

Former mine name _____

Date of last operation _____

TO: UNITED MINE WORKERS OF AMERICA
WELFARE AND RETIREMENT FUND OF 1950
907 FIFTEENTH STREET, N. W.
WASHINGTON 5, D. C.

AMOUNT PREVIOUSLY PAID (Not including this remittance)	$
AMOUNT OF THIS PAYMENT	$ 321.17
TOTAL	$ 321.17

The number of tons of coal purchased for use and for sale, as shown above, represents, to my best knowledge and belief, the total amount of coal produced for use and for sale by this concern for the period specified.

R. E. Phillips
AUTHORIZED SIGNATURE

Partner
TITLE

Exhibit No. 24

CHECK LETTER OF ADVICE TO

UNITED MINE WORKERS OF AMERICA
WELFARE AND RETIREMENT FUND OF 1950
907 Fifteenth Street, N. W.
WASHINGTON 5, D. C.

DATE 1-5-54

NAME OF REPORTING COMPANY Phillips Bros Coal Co

MAILING ADDRESS OF PRODUCER Pioneer Tenn
(No.) (City) (State)

MR. PLEASE FIND ENCLOSED CHECK NUMBER 640 DATED 1-5-54 IN THE AMOUNT OF $ 193.02 FOR DEPOSIT TO THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950, REPRESENTING PAYMENT TO THE FUND FOR COAL PRODUCED AS FOLLOWS. PLEASE LIST EACH MINE SEPARATELY.

PERIOD COVERED FROM	PERIOD COVERED TO	NAME OF MINE	COUNTY	STATE	POST OFFICE	TONS PRODUCED TOTAL	AMOUNT
Nov 1	Nov 30	Phillips Bros	Campbell	Tenn	Pioneer	482 Tons	193.02
						✓	✓

IMPORTANT

TO BE FILLED IN BY OPERATOR WHEN MAKING REMITTANCE

If not operated, purchased or contracted to any other individual:

Name of Mine _____

Date mine started or reopened _____

Name and address of former operator _____

_____

Reason for change _____

Date of last operation _____

TO: UNITED MINE WORKERS OF AMERICA
WELFARE AND RETIREMENT FUND OF 1950
907 FIFTEENTH STREET, N. W.
WASHINGTON 5, D. C.

AMOUNT PREVIOUSLY PAID (Not including this remittance)	$
AMOUNT THIS PAYMENT	$ 193.02
TOTAL	$ 193.02

514.19 ~~2.00~~

The number of tons of coal produced for use and for sale, or for other disposition, by my best knowledge and belief, the total amount of coal produced for payment for sale by this company for the period specified.

K E Phillips
AUTHORIZED SIGNATURE

Partner
TITLE

Exhibit No. 25

CHECK LETTER OF ADVICE TO

UNITED MINE WORKERS OF AMERICA
WELFARE AND RETIREMENT FUND OF 1950
907 Fifteenth Street, N. W.
WASHINGTON 5, D. C.

DATE July 29 1955

NAME OF REPORTING COMPANY Phillips Brothers Coal Co.

MAILING ADDRESS OF PRODUCER _____ (Street) Bubbins (City) Tenn. (State)

SIR:

PLEASE FIND ENCLOSED CHECK NUMBER 1741 DATED July 29 1955 IN THE AMOUNT OF $ 312.16 FOR DEPOSIT TO THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950, REPRESENTING PAYMENT TO THIS FUND FOR COAL PRODUCED AS FOLLOWS. PLEASE LIST EACH MINE SEPARATELY:

PERIOD REPORTED FROM	TO	NAME OF MINE	COUNTY	STATE	POST OFFICE	TONS PRODUCED TOTAL	AMOUNT
Dec.	1-31 1953	Phillips Bros.	Campbell	Tenn	Pioneer	No Production	
Jan.	1-31 1954	Phillips Bros.	Campbell	Tenn	Pioneer	No Production	
Feb.	1-28 1954	Phillips Bros.	Campbell	Tenn	Pioneer	No Production	
Mar	1-31 1954	Phillips Bros.	Campbell	Tenn.	Pioneer	No Production	
April	1-30 1954	Phillips Bros.	Campbell	Tenn.	Pioneer	No Production	
May	1-31 1954	Phillips Bros.	Campbell	Tenn.	Pioneer	No Production	
June	1-30 1954	Phillips Bros.	Campbell	Tenn.	Pioneer	No Production	
July	1-31 1954	Phillips Bros.	Campbell	Tenn	Pioneer	389.40	$156.96
Aug.	1-31 1954	Phillips Bros.	Campbell	Tenn	Pioneer	391.00	$156.40
Sept.	1-30 1954	Phillips Bros.	Campbell	Tenn.	Pioneer	No Production	

780 40 $312.16

IMPORTANT

TO BE FILLED IN BY OPERATOR WHEN MAKING REMITTANCE

If you opened, purchased or contracted [illegible]

Mine Name _____

Date mine started or reopened _____

Name and address of former operator _____

Former mine name _____

Date of last operation _____

TO: UNITED MINE WORKERS OF AMERICA
WELFARE AND RETIREMENT FUND OF 1950
907 FIFTEENTH STREET, N. W.
WASHINGTON 5, D. C.

NOTED:

AMOUNT PREVIOUSLY PAID (Month) $ _____

(This Month) $ 312.16

TOTAL $ 312.16

826.35

The number of tons of coal produced for use and for sale, or shown above, represents, to my best knowledge and belief, the total amount of coal produced for use and for sale by the concern by the period specified.

R. E. Phillips
(Authorized Signature)

Partner
(Title)

1596a

Exhibit No. 26

CHECK LETTER OF ADVICE TO
UNITED MINE WORKERS OF AMERICA
WELFARE AND RETIREMENT FUND OF 1950
907 Fifteenth Street, N. W.
WASHINGTON 5, D. C.

DATE 12-17- 1955

NAME OF REPORTING COMPANY Phillips Bros. Coal Co.

MAILING ADDRESS OF PRODUCER (Street) Robbins (City) Tenn. (State)

SIR
PLEASE FIND ENCLOSED CHECK NUMBER 2005 DATED 12-17-55 IN THE AMOUNT OF
$ 769.63 FOR DEPOSIT TO THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT
FUND OF 1950, REPRESENTING PAYMENT TO THE FUND FOR COAL PRODUCED AS FOLLOWS. PLEASE LIST EACH MINE SEPARATELY.

PAY ON COAL PRODUCED FROM	TO	NAME OF MINE	COUNTY	STATE	POST OFFICE	TONS PRODUCED TOTAL	AMOUNT
Oct. 1	31-	Phillips Bros.	Campbell	Tenn	Pioneer	No Production	
Nov. 1-	30-	Phillips Bros.	Campbell	Tenn	Pioneer	No Production	
Dec. 1-	31-	Phillips Bros.	Campbell	Tenn	Pioneer	No Production	
Jan. 1-	31-	Phillips Bros.	Campbell	Tenn	Pioneer	No Production	
Feb. 1-	28-	Phillips Bros.	Campbell	Tenn	Pioneer	No Production	
Mar. 1-	31-	Phillips Bros.	Campbell	Tenn	Pioneer	No Production	
April 1-	30-	Phillips Bros.	Campbell	Tenn	Pioneer	No Production	
May 1-	31-	Phillips Bros.	Campbell	Tenn	Pioneer	936.67	$374.67
June 1-	30-	Phillips Bros.	Campbell	Tenn	Pioneer	987.40	$394.96
							$769.63

NOTED
OFFICE
R H 12-19-55

IMPORTANT
TO BE FILLED IN BY OPERATOR WHEN MAKING RESIGNATION

If you opened, purchased or contracted a new mine indicate
Mine Name
Date mine started or reopened
Name and address of former operator

Former mine name
Date of last operation

TO: UNITED MINE WORKERS OF AMERICA
WELFARE AND RETIREMENT FUND OF 1950
907 FIFTEENTH STREET, N. W.
WASHINGTON 5, D. C.

AMOUNT PREVIOUSLY PAID (Total [illegible]) $
AMOUNT THIS PAYMENT $ 769.63
TOTAL $ 769.63

1595.98

The number of tons of coal produced for use and for sale, or otherwise disposed of, as shown above, represents, to my best knowledge and belief, the total amount of coal produced for use and for sale by this company for the period specified.

R. E. Phillips
(Signature of Operator)

Partner
TITLE

Exhibit No. 27

CHECK LETTER OF ADVICE TO
UNITED MINE WORKERS OF AMERICA
WELFARE AND RETIREMENT FUND OF 1950
907 Fifteenth Street, N. W.
WASHINGTON 5, D. C.

DATE August 4 1956

NAME OF REPORTING COMPANY Phillips Brothers Coal Co.

MAILING ADDRESS OF PRODUCER (Street) Robbins, (City) Tenn. (State)

SIR: PLEASE FIND ENCLOSED CHECK NUMBER 2417 DATED August 4 1956 IN THE AMOUNT OF $ 631.72 FOR DEPOSIT TO THE UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND OF 1950, REPRESENTING PAYMENT TO THE FUND FOR COAL PRODUCED AS FOLLOWS. PLEASE LIST EACH MINE SEPARATELY

PERIOD COVERED FROM	PERIOD COVERED TO	NAME OF MINE	COUNTY	STATE	MINE OFFICE	TONS PRODUCED TO ALL	AMOUNT
7-1-55	7-31-55	Pioneer	Campbell	Tenn	Pioneer	322.47	128.98
8-1-55	8-31-55					321.73	128.69
9-1-55	9-30-55					326.96	130.78
10-1-55	10-31-55					332.37	133.04
11-1-55	11-30-55					275.83	110.33
12-1-55	12-31-55	No Production					
							631.72

NOTED
DISTRICT OFFICE OK

IMPORTANT
TO BE FILLED IN BY OPERATOR WHEN MAKING REMITTANCE

If you opened, produced or contracted a new mine indicate:
Mine Name
Date mine started or reopened
Name and address of former operator
Former mine name
Date of last operation

TO: UNITED MINE WORKERS OF AMERICA
WELFARE AND RETIREMENT FUND OF 1950
907 FIFTEENTH STREET, N. W.
WASHINGTON 5, D. C.

AMOUNT PREVIOUSLY PAID (Not including this remittance)	$
AMOUNT THIS PAYMENT	$ 631.72
TOTAL	$ 631.72

2 551

The number of tons of coal produced for use and for sale or transfer by me, to my best knowledge and belief, the total amount of coal produced for use and for sale by this company for the period specified.

R. E. Phillips
Authorized Signature

Partner
Title

Exhibit No. 34

Detach this page and keep for future reference in connection with your application.

INFORMATION WITH REGARD TO APPLYING FOR PENSION

Each applicant for pension must submit with his application, (1) Documentary proof of age and, (2) proof of service in the coal industry.

PROOF OF AGE.—Documents of recent issue or recorded on a recent date are not acceptable. Provided there is no material alteration or erasure, satisfactory evidence of age may be in the form of:

- Census Bureau Records (Taken Before 1950)
- World War I Draft Registration
- Original Marriage Certificate
- Military Records
- Insurance Records
- Passport
- Immigration Records
- Naturalization Certificate
- Registration Card Under Alien Registration Act of 1940

Census Bureau Records can be secured by writing to: Bureau of Census, Department of Commerce, Washington 25, D. C.

Army and Air Force records can be secured by writing to: Department of Army, 9700 Page Boulevard, St. Louis, Missouri.

World War I Draft Registration can be secured by writing to: General Services Administration, Region No. 4, Federal Records Center, 221 St. Joseph Street, East Point, Georgia.

Selective Service Records (Draft Registration Cards) for World War II can be secured by writing to State Headquarters, Selective Service System in the State Capital of the State in which you registered.

The Immigration Records, Naturalization Certificate, and the Registration Card under Alien Registration Act of 1940 may be obtained by writing to: Immigration and Naturalization Service, Central Office Building X, 19th and East Capitol Streets, Washington 25, D. C.

NOTE: Birth records will not be accepted unless the date that the information was recorded in the records of the issuing agency is shown. If document does not list a space for this information, applicant should request the issuing agency to note the date the information was originally recorded.

PROOF OF SERVICE.—Instructions regarding proof of applicant's service in the coal industry which must be submitted to the Fund with this application are outlined on the reverse side of the enclosed Forms 14-P.

The trust fund has full and final responsibility for determining whether or not any information or statement submitted by an applicant can be accepted as satisfactory proof. The Fund makes this determination after thorough review and consideration not only of the data submitted by the applicant but also of all other information obtained by the Fund directly, or submitted from other sources.

Exhibit No. 34—(Continued)

UNITED MINE WORKERS OF AMERICA
WELFARE AND RETIREMENT FUND
900 FIFTEENTH STREET, N. W. WASHINGTON 5, D. C.

Application for Pension

By filing this application, no rights accrue to the applicant until the benefit is authorized for payment. The burden of proving eligibility for this benefit is on the applicant.

ALL QUESTIONS MUST BE ANSWERED—FAILURE TO DO SO WILL DELAY PROCESSING

1. District No. _____ Local Union No. _____ Date _____

2. Name (Print) _____
First Middle Last

3. Social Security Number | | | | | | | | | |

4. Address _____
Street and Number City State

5. Date of Birth _____ Place of Birth _____
Month Day Year

*Proof of age must be attached to this application. See attached information sheet for type of proof required.

6. Name of Father _____ Place of Birth _____
First Last

7. Name of Mother _____ Place of Birth _____
First (Maiden) Last

8. Name of Wife, if living _____ Age _____
First Middle Last

9. Number of Children under 18 years of age _____

10. Have you ceased working in the coal industry? _____ If "yes", what date _____
(Yes) (No) Month, Day, Year
and reason for retirement _____ I have worked in the mines _____ years.

11. Were you ever connected with the management or operation of any of the coal companies where you have been employed or did you ever have any financial interest in any company?
Yes _____ No _____

12. If "yes", indicate below the name of the company or companies and the period involved.

NAME OF COMPANY	FROM (month, year)	TO (month, year)

Form 2-P (Rev. 11-30-57)

WHEN FILLED OUT PLEASE SEND YELLOW AND WHITE COPIES TO U.M.W.A. DISTRICT OFFICE

Exhibit No. 34—(Continued)

13.

EMPLOYMENT RECORD

List separately year-by-year in the space provided below all employment in the coal industry for the past thirty years. Start with your first employment in the coal industry in this period and list all employers up to and including the last. Your employment for each year must be listed on a separate line. If you had more than one employer during any year list the period of employment with each on a separate line. Include any period of service in the Armed Forces.

Applicants who wish credit for service in the Armed Forces should attach copy of discharge.

Applicants who were off work due to compensable mine injury or occupational disease should attach copy of workmen's compensation award.

Year	From Mo.	To Mo.	Name of Coal Company	Location of Coal Company Town	Location of Coal Company State	Mine No.	Local Union No.	Type Work

Exhibit No. 34—(Continued)

CERTIFICATION BY APPLICANT

Any person who knowingly and willfully falsifies any records or makes any false representations or statements or withholds any information in order to secure for himself or for any other person a Fund benefit, shall be barred from receiving any benefits from the Fund; and in any case where payment has been made as a result of such false statements or omission of such information, the recipient of benefits will be required to reimburse the Fund in the amount received from the Fund.

(If signature is made by mark (X) two witnesses who know the applicant must sign.)

_____
(Witness)

_____
(Witness)

I certify that the statements made by me in this application are true and correct and that I have listed all of my employment in the coal industry during the past 30 years.

Applicant sign here _____
DO NOT print or stamp

CERTIFICATE OF LOCAL UNION

This is to certify that the above applicant is currently a member of Local Union No. _____ and has been a member of this Local Union since _____
Month Day Year

LOCAL UNION SEAL

_____ _____
Signature of L. U. Officer Date

_____ _____
Signature of L. U. Officer Date

CERTIFICATE OF DISTRICT

This is to certify that applicant is a member of District No. _____, United Mine Workers of America

_____ _____
Date Authorized District Signature

AUTHORIZATION TO SECURE SOCIAL SECURITY ADMINISTRATION RECORDS.

Your Social Security Account Number _____

Print Your Name _____ _____ _____
(First) (Middle) (Last)

State Date of Your Birth _____ _____ _____
(Month) (Day) (Year)

I hereby authorize the Social Security Administration to make available to the United Mine Workers of America Welfare and Retirement Fund any information contained in my Social Security Account File.

Applicant Sign Here _____
(Sign your name in ink—DO NOT PRINT OR STAMP)

(DO NOT WRITE IN THIS SPACE)

Social Security Administration:
Please furnish a copy of the wage record and the month and year of birth of the above named individual.

_____
United Mine Workers of America Welfare and Retirement Fund

United Mine Workers of America Welfare and Retirement Fund
907 Fifteenth Street, N. W., Washington 5, D. C.

Age for the above stated in accordance with Social Security Records _____ _____ of birth
(Month) (Year)

A copy of the wage record is attached.

_____
(Social Security Administration)

NOTE: Exhibit 34 contains four forms marked "Application for Pension", which are substantially identical. The first, which is printed herein, is a yellow form; the second, not herein printed, colored white, recites, "This Copy is For District Office"; the third, not herein printed, colored blue, recites "This copy is For the Local Union"; and the fourth, not herein printed, colored pink, recites, "This Copy is To Be Retained by the Applicant".

Exhibit No. 34—(Continued)

CERTIFICATION OF EMPLOYMENT

To Be Filled Out Only by a Miner Who Worked at the Same Mine as Applicant During the Time Shown Below

Name of Applicant (Print) _____ Address _____

I certify that the above named applicant worked in the coal industry as listed below:

List Applicant's Employment for Each Year on a Separate Line

Year	From Mo.	To Mo.	Name of Coal Company	Location of Coal Company Town State	Mine Number or Name	Type Work

I certify that the foregoing statements regarding applicant's employment were made by me and are true and correct to the best of my knowledge and that I worked at the same mine as applicant during the periods listed.

I am aware that any person making a false statement in order to secure a Fund benefit for another person shall be barred from receiving any benefits from the Fund.

_____ (Witness)

_____ (Witness)

_____ Date _____
(Signature of person making this statement)

_____ (Address)

_____ Date of Birth

_____ Social Security Account Number

(If signature is made by mark (x) two witnesses who know the person must sign.)

If receiving a pension list file number _____

Form 10-P (Revised 11-20-57)

See Instructions On Reverse Side

Exhibit No. 34—(Continued)

INSTRUCTIONS GOVERNING PROOF OF EMPLOYMENT

The Trust Fund has full and final responsibility for determining whether or not any information or statement submitted by an applicant can be accepted as satisfactory proof. The Fund makes this determination after thorough review and consideration not only of the data submitted by the applicant, but also of all other information obtained by the Fund directly, or submitted from other sources.

Applicant is required to obtain, if possible, a statement from each company with which he claims employment during the 30-year period preceding his application. The statement should outline the dates of applicant's employment and the type of work performed. To be acceptable, it must be written on official company stationery and signed by a responsible representative of the company. If employer statements are not obtainable, applicant must submit a statement to that effect.

In the absence of acceptable company statements each separate period of employment must be certified to by at least 2 miners who worked at the same mine as applicant during the period or periods to which they certify. Forms 14-P are to be used for this purpose. Several Forms 14-P are enclosed with the application; additional forms may be obtained at applicant's Local Union or District office or by writing to the UMWA Welfare and Retirement Fund, 907 Fifteenth Street, N. W., Washington 5, D. C. In submitting Forms 14-P the applicant must keep clearly in mind:

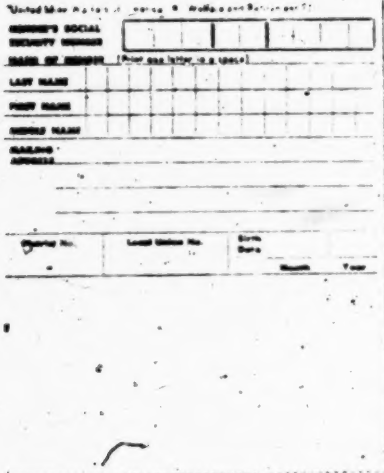
(1) His sending in these statements to the Fund does not in itself establish the required proof of his employment.

(2) No statement can be accepted as satisfactory proof until the Fund has reviewed and considered its information in relation to all other information in Fund files, and has found the statement to meet all Fund requirements for satisfactory proof.

(3) For any statement to receive any preliminary review and consideration by the Fund the statement must list in full detail all the information required in the columns and spaces provided on the form.

NOTE: When an applicant has failed to establish proof satisfactory to the Fund, the Fund will notify applicant of this fact and suggest, whenever possible, other information which might be obtained by applicant for consideration by the Fund.

Exhibit No. 34—(Continued)



NAME OF WIFE (Print in clear letters)

Relationship to Miner

Date of Birth Month Year Sex

A List Full Names of Dependent Unmarried Children Under 18

Member's Signature

Widow's Signature

Not Valid for a Widow or Her Children 60 Days After the Death of the Member

FORM 81-HS Revised 2-10-54

APPLICATION FOR FORM BS-HS

1. ARE YOU EMPLOYED IN THE COAL INDUSTRY? YES ☐ NO ☐

IF YES — Name of Company — Location

MINE NUMBER? CHECK-OFF NUMBER

2. ARE YOU PRESENTLY EMPLOYED IN AN OCCUPATION OUTSIDE THE COAL INDUSTRY? YES ☐ NO ☐

IF YES — Name of Company — Location

3. LIST BELOW ALL WORK YOU HAVE DONE SINCE JANUARY 1946 INCLUDING OTHER EMPLOYMENT IN THE COAL INDUSTRY AND ALL EMPLOYMENT OUTSIDE THE COAL INDUSTRY. INCLUDE FARMING OR ANY OTHER SELF-EMPLOYMENT.

From — Month — Year — To — Month — Year — Name of Employer — Location

(If more space is required attach a separate list)

4. IS YOU WERE FORCED TO LEAVE THE COAL INDUSTRY BECAUSE OF AN OCCUPATIONAL DISEASE OR INJURY FOR WHICH YOU RECEIVED COMPENSATION, PLEASE ATTACH A COPY OF YOUR WORKMEN'S COMPENSATION AWARD.

5. BE SURE TO COMPLETE AND SIGN THE ATTACHED AUTHORIZATION TO SECURE SOCIAL SECURITY ADMINISTRATION RECORDS.

Any person who knowingly and willfully falsifies any records or writes any false statements or withholds any information to secure for himself or for any other person a Fund benefit shall be barred from receiving any benefits from the Fund, and in any case where payment has been made as a result of such false statements or omission of information the recipient of benefits will be required to reimburse the Fund in the amount received from the Fund.

Date of Making This Application — Signature of Applicant

This is an application only. No monthly or hospital bills will be paid for the applicant unless the Fund's Form BS-HS is issued. The burden of proving eligibility is on the applicant.

The benefit if authorized is subject to suspension or termination at any time by the Trustees of the Fund for any matter, cause or thing of which they shall be the sole judge and without assignment of reason therefor.

WHITE COPY AND THE YELLOW COPY IS FOR THE WASHINGTON OFFICE

Exhibit No. 34—(Continued)

LOCAL UNION CERTIFICATION

This is to certify that we the undersigned officers of Local Union No. _____ located at _____ have examined the above application and have knowledge that the applicant has answered questions 1, 2 and 3 regarding employment correctly and is a member in good standing. He has been a member of this Local Union since _____ (Day) (Month) (Year)

_____
President Local Union No. _____

_____
Vice President

LOCAL UNION SEAL

_____
Recording Secretary

_____
Attorney

THE FOLLOWING TO BE COMPLETED BY DISTRICT OFFICIAL

Is the applicant's present employer a signatory to the National Bituminous Coal Wage Agreement of 1950 and to the National Bituminous Coal Wage Agreement as amended in 1952? Yes ☐ No ☐

This is to certify that the above miner is a member in good standing of the United Mine Workers of America.

DATED THIS _____ DAY OF _____ 19__. _____
Authorized District Signature

18. **AUTHORIZATION TO SECURE SOCIAL SECURITY ADMINISTRATION RECORDS**

YOUR SOCIAL SECURITY ACCOUNT NUMBER _____

PRINT YOUR NAME _____ (First) (Last)

STATE DATE OF YOUR BIRTH _____ (Month) (Day) (Year)

I hereby authorize the Social Security Administration to make available to the United Mine Workers of America Welfare and Retirement Fund any information contained in my Social Security Account No.

Applicant sign here _____ (Do Not Print or Stamp)

(DO NOT WRITE IN THIS SPACE)

Social Security Administration

Please furnish a copy of the wage record and the month and year of birth of the above-named individual

_____
United Mine Workers of America Welfare and Retirement Fund

UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND
1809 Fifteenth Street N. W., Washington 5, D. C.

Wage for the above stated in accordance with Social Security Records _____ (Month) (Year) _____ all items

Address of the wage record submitted

_____
Signature

NOTE: Exhibit 34 includes two forms marked "Application for Form 85-HS", one of which recites "This Copy and the Yellow Copy is For the Washington Office", while the second recites, "This Copy is for the Local Union Union". Because these forms are identical, only one is printed herein.

Exhibit No. 34—(Continued)

UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND

REQUEST FOR CHANGES ON FORM 85-HS

Name: Local Union _____ District _____ Date _____

MEMBER'S IDENTIFICATION:

Social Security Number

Name _____

Address _____ (IF PRESENT COMPLETE MAILING ADDRESS)

City _____ State _____

1. SEND ANOTHER COPY OF FORM 85-HS ___

Form Lost [ ] Other reason _____

INFORMATION ABOUT MINER:

2. Member died on _____ (DATE) 3. Left the Coal Industry on _____ (DATE)

4. Miner is no longer a member of UMWA _____

5. Member has married or remarried since filing Form 85-HS: Date _____

Add or change name of wife to:

(FIRST NAME OF WIFE) (MAIDEN NAME) (WIFE'S SIGNATURE)

(MONTH) (YEAR)

6. Member transferred out of Local Union _____ District _____ OR _____ (DATE)

7. Member transferred into Local Union _____ District _____ OR _____ (DATE)

INFORMATION ABOUT WIDOW:

8. Remarried _____ Date _____ 9. Died _____ Date _____

INFORMATION ABOUT DEPENDENTS:

10. Addition of Dependents under 18 years of age:

(FIRST)	(MIDDLE)	(LAST)	SEX M	SEX F	BIRTH DATE (MONTH)	BIRTH DATE (YEAR)	RELATION TO MINER

11. The following are no longer dependent:

(NAME)	SEX M	SEX F	BIRTH DATE (MONTH)	BIRTH DATE (YEAR)	REASON	DATE DEPENDENCY CEASED

DEPENDENTS OVER 18 MAY BE ADDED ONLY BY COMPLETING FORM 121-HS, APPLICATION FOR HOSPITAL AND MEDICAL CARE FOR ADULT DEPENDENTS OF MINERS

Recording Section

District	Washington

(LOCAL UNION USE)

(LOCAL UNION OFFICER)

Form 1964B (Revised 1-1-63) MAIL THIS FORM TO YOUR DISTRICT OFFICE

Exhibit No. 39

List of Suits Instituted in Various Courts by Trustees of the United Mine Workers of America Welfare and Retirement Fund Between January 1, 1954 and December 1, 1960

STATE OF TENNESSEE
COUNTY OF KNOX

Personally appeared before me, the undersigned authority, Harold H. Bacon, whose Post Office address is 4100 Dewmar Court, Kensington, Maryland, who made oath in due form of law that he is Assistant to the Counsel to the Trustees of the United Mine Workers of America Welfare and Retirement Fund and has held this position since prior to January 1, 1954.

Affiant further states that in the course of and fulfillment of the duties of his position he assists in the preparation for the trial and in the trial of the various suits instituted by the Trustees of the Welfare and Retirement Fund for the collection of past due and unpaid royalties from various bituminous coal operators who are parties to the National Bituminous Coal Wage Agreement of 1950 as amended and that in connection with his said work he keeps track of the various cases filed by said Trustees and the results thereof.

Affiant further states that to the best of his knowledge the foregoing list of cases is a full, true and correct list of the suits instituted by the Trustees of said Fund between January 1, 1954 and December 1, 1960 and that the date of filing of such cases and the disposition thereof as shown on said list hereto attached are true and correct.

Harold H. Bacon

Sworn to and subscribed before me
on this 8th day of December, 1960.
Dorothy C. Bradley
Notary Public
My Commission expires: July 6, 1963

Exhibit No. 39—(Continued)

District Court	Trustees v. Name of Company	Date Filed	Disposition
Alabama			
N.D. Alabama	The Bowen Construction Co.	2/12/1954	Consent Judgment
N.D. Alabama	Anderson Boyd Coal Company	12/21/1954	Judgment
N.D. Alabama	Cleen Boyd Coal Company	12/21/1954	Judgment
N.D. Alabama	North Alabama Coal Company and Glenn Allen Coal Company	4/16/1956	Judgment
N.D. Alabama	W. M. Franklin Coal Company	2/18/1957	Judgment
N.D. Alabama	McCoy Coal Company	9/30/1957	Consent Judgment
N.D. Alabama	A. S. Bowen Contracting Co. Inc.	5/27/1958	Judgment
N.D. Alabama	McClinton Coal Company, Inc.	10/20/1958	Consent Judgment
N.D. Alabama	Brookwood Contracting Co.	11/ 7/1958	Consent Judgment
N.D. Alabama	Pate Coal Company	11/17/1958	Consent Judgment
N.D. Alabama	Musgrove Coal Company	1/ 9/1959	Consent Judgment
N.D. Alabama	Center Coal Company, Inc.	2/16/1959	Consent Judgment
N.D. Alabama	Peterson Construction Co. Inc.	3/19/1959	Judgment
N.D. Alabama	Abston Coal Company	5/ 7/1959	Judgment
N.D. Alabama	Texey and Hesmer Coal Co., Inc.	5/26/1959	Judgment
Middle D. Alabama	G. & R. Coal Company	6/ 8/1959	Pending
Arkansas			
W.D. Arkansas	E. H. Blackard Coal Company	4/ 1/1958	Judgment
W.D. Arkansas	Hixon Coal Company	3/22/1958	Judgment
W.D. Arkansas	Hixon Coal Company, Inc.	3/22/1958	Judgment
W.D. Arkansas	Jewel Mining Company, Inc.	4/18/1958	Judgment
W.D. Arkansas	Boyd Excelsior Fuel Co., Inc.	3/18/1958	Judgment
Indiana			

Indiana

District Court	Trustees v. Name of Company	Date Filed	Disposition
S.D. Indiana	Quality Mining Company	7/26/1954	Judgment
S.D. Indiana	Rose Hill Mining Co., Inc.	7/26/1954	Judgment
S.D. Indiana	Shaw Mining Company	7/26/1954	Judgment
S.D. Indiana	Three Coal Company	7/26/1954	Judgment
S.D. Indiana	Wangler Coal Company	7/26/1954	Consent Judgment
S.D. Indiana	Houston Coal Corporation	12/ 2/1955	Judgment
S.D. Indiana	Quality Coal Corporation	1/ 6/1958	Judgment
S.D. Indiana	Tri-K Mining Company	3/24/1958	Judgment
Kentucky			
W.D. Kentucky	Wice Truck Mine	7/ 1/1954	Judgment
W.D. Kentucky	Wice Brothers Coal Company	7/ 1/1954	Judgment
E.D. Kentucky	Mountain States Coal Corp.	2/15/1955	Judgment
E.D. Kentucky	Buchanan Coal Company	10/ 5/1955	Consent Judgment
E.D. Kentucky	Darb Fork Coal Company, Inc.	12/28/1955	Consent Judgment
E.D. Kentucky	Glo Elkhorn Coal Company	4/23/1956	Judgment
E.D. Kentucky	Glo Elkhorn Mining Co., Inc.	4/23/1956	Dismissed
W.D. Kentucky	Black Diamond Coal Company, Inc.	7/31/1956	Default Judgment
E.D. Kentucky	Hale Coal Company, Inc.	7/31/1956	Consent Judgment
E.D. Kentucky	Sandlick Coal Company, Inc.	7/31/1956	Consent Judgment
E.D. Kentucky	Eblen Coal Company	8/ 2/1956	Consent Judgment
E.D. Kentucky	Blue Ridge Mining Co., Inc.	8/16/1956	Consent Judgment
E.D. Kentucky	Margo Coal Mining Company	7/ 9/1957	Judgment
E.D. Kentucky	Five A Coal Company	8/ 6/1957	Judgment
W.D. Kentucky	Ellis Coal Company	8/ 7/1957	Consent Judgment

Exhibit No. 39—(Continued)

District Court	Trustees v. Name of Company	Date Filed	Disposition
W.D. Kentucky	Central Coal Company	10/ 1/1957	Consent Judgment
E.D. Kentucky	Harlan Central Coal Company	10/19/1957	Judgment
E.D. Kentucky	Cline & Chambers Coal Company	12/ 7/1957	Consent Judgment
E.D. Kentucky	Empire Coal Company	12/ 7/1957	Judgment
E.D. Kentucky	S. & K. Coal Company	12/ 7/1957	Consent Judgment
E.D. Kentucky	Best Yet Coal Company and the Quillen Coal Company	12/23/1957	Default Judgment
E.D. Kentucky	Cove Fork Coal Co., Inc.	1/31/1958	Consent Judgment
E.D. Kentucky	Fred T. Orr Coal Company	2/ 5/1958	Judgment
E.D. Kentucky	Lost Creek Mining Company	3/25/1958	Default Judgment
E.D. Kentucky	Nancy Ann Coal Company	4/ 3/1958	Judgment
E.D. Kentucky	Mill Ridge Coal Company, Inc.	5/14/1958	Judgment
E.D. Kentucky	Premium Coals, Inc.	5/14/1958	Judgment
E.D. Kentucky	Yocum Creek Coal Company	5/14/1958	Judgment
E.D. Kentucky	Harlan Everglow Coals, Inc.	5/15/1958	Judgment
E.D. Kentucky	Imperial Harlan Coals, Inc.	5/15/1958	Judgment
E.D. Kentucky	Clear Fork Mining Company, Inc.	6/12/1958	Dismissed
W.D. Kentucky	Young & Perkins Coal Co., Inc.	6/16/1958	Judgment
E.D. Kentucky	A. & P. Coal Company	6/25/1958	Judgment
E.D. Kentucky	Walters Coal Company	6/30/1958	Judgment
E.D. Kentucky	Hale Coal Company, Inc.	11/ 6/1958	Judgment
E.D. Kentucky	Day Coal Company	11/17/1958	Default Judgment
E.D. Kentucky	Lotts Creek Coal Company	11/24/1958	Judgment
E.D. Kentucky	Lowery Coal Company	11/25/1958	Dismissed
E.D. Kentucky	Crown Elkhorn Coal Company	12/19/1958	Dismissed
E.D. Kentucky	L. D. Smith Construction Company	12/22/1958	Judgment
E.D. Kentucky	Dixie Coal Corporation	12/30/1958	Dismissed

District Court	Trustees v. Name of Company	Date Filed	Disposition

Exhibit No. 39—(Continued)

District Court	Trustees v. Name of Company	Date Filed	Disposition
E.D. Kentucky	Fred Collett Coal Company	1/29/1959	Pending
E.D. Kentucky	Pigeon Roost Coal Company	2/20/1959	Default Judgment
E.D. Kentucky	Cox Coal Company, Inc.	2/27/1959	Judgment
W.D. Kentucky	Morehead & Wester Coal Company	3/ 6/1959	Judgment
E.D. Kentucky	Kentucky Clintwood Coal Co.	3/29/1959	Pending
W.D. Kentucky	Jessup Coal Company	5/ 9/1959	Judgment
E.D. Kentucky	Lynn Mining Company	4/ 5/1960	Pending
E.D. Kentucky	Sol Fork Coal Company	6/13/1960	Pending
E.D. Kentucky	Green Mountain Coal Company	6/20/1960	Pending
W.D. Kentucky	Needmore Coal Company	8/16/1960	Pending
E.D. Kentucky	Rainbow Coal Corporation	9/23/1960	Pending
Missouri			
W.D. Missouri	Windsor Coal Company, Inc.	1/20/1956	Dismissed
Montana			
Dist. of Montana	Bair-Collins Coal Company, Inc.	8/27/1954	Dismissed
Dist. of Montana	Surmi Mines, Inc.	3/19/1956	Default Judgment
New Mexico			
State of New Mexico	Albuquerque & Cerrillos Coal Co.	6/10/1954	Dismissed
Ohio			
S.D. Ohio	Angle Mining Company	8/ 7/1956	Pending
S.D. Ohio	Godaway Coal Company	10/ 3/1956	Judgment

Exhibit No. 39—(Continued)

District Court	Trustees v. Name of Company	Date Filed	Disposition
S.D. Ohio	Moss Run Coal Company, Inc.	10/ 3/1956	Judgment
S.D. Ohio	Bellaire Coal Company, Inc.	10/22/1956	Default Judgment
N.D. Ohio	Dindo Coal Company, Inc.	10/23/1956	Dismissed
S.D. Ohio	Roman Coal Company	11/15/1957	Judgment
S.D. Ohio	Red Arrow Coal Company	1/29/1958	Consent Judgment
Oklahoma			
E.D. Oklahoma	McGinnis & Grafe, Inc.	9/21/1956	Judgment
Pennsylvania			
M.D. Pennsylvania	Clarence Coal Mining Co., Inc.	2/12/1954	Consent Judgment
W.D. Pennsylvania	Coal River Mining Company	2/12/1954	Dismissed
W.D. Pennsylvania	Glen Fisher Coal Company	2/12/1954	Judgment
M.D. Pennsylvania	Jordan Coal Company	2/12/1954	Judgment
W.D. Pennsylvania	Paul Kerlin Construction Co., Inc.	2/12/1954	Dismissed
W.D. Pennsylvania	Charles J. Margiotti	2/15/1954	Dismissed
W.D. Pennsylvania	Hess and Hess Coal Company	6/ 7/1954	Judgment
W.D. Pennsylvania	V. R. Paul Coal Company	6/ 7/1954	Judgment
W.D. Pennsylvania	Wanchisn Coal Company	6/ 7/1954	Judgment
M.D. Pennsylvania	Correale Mining Corporation	6/10/1954	Dismissed
W.D. Pennsylvania	Pina Coal Company	7/16/1954	Consent Judgment
W.D. Pennsylvania	Flick Coal Company	12/ 8/1954	Judgment
W.D. Pennsylvania	Hudson Coal Company	12/ 8/1954	Default Judgment
W.D. Pennsylvania	Williams Coal Mining Company	12/ 8/1954	Judgment
M.D. Pennsylvania	Necho Coal Company, Inc.	12/20/1954	Consent Judgment
W.D. Pennsylvania	Dubena Coal Company, Inc.	3/ 8/1955	Default Judgment

District Court	Trustees v. Name of Company	Date Filed	Disposition

District Court	Trustees v. Name of Company	Date Filed	Disposition
W.D. Pennsylvania	Natali Coal Company	3/11/1955	Consent Judgment
W.D. Pennsylvania	Leslie C. Thurstin Coal Co.	3/18/1955	Default Judgment
W.D. Pennsylvania	Hays Coal Company, Inc.	3/24/1955	Default Judgment
W.D. Pennsylvania	Heald Coal Company, Inc.	3/24/1955	Dismissed
W.D. Pennsylvania	Chickaree Hill Coal Company	4/ 9/1955	Judgment
W.D. Pennsylvania	Superior Smokeless Coal Co.	4/19/1955	Default Judgment
W.D. Pennsylvania	McClafferty Coal Company	6/20/1955	Default Judgment
W.D. Pennsylvania	Heshbon Coal Company, Inc.	3/12/1956	Dismissed
W.D. Pennsylvania	Sixtus Campdon	7/18/1956	Consent Judgment
W.D. Pennsylvania	Ewing and Rosenberger Coal Co.	7/23/1956	Judgment
W.D. Pennsylvania	Charles E. Campbell Coal Co.	7/23/1956	Judgment
W.D. Pennsylvania	Red Hot Coal Company	7/23/1956	Judgment
W.D. Pennsylvania	Sarver Coal Company, Inc.	7/23/1956	Judgment
W.D. Pennsylvania	Rofrichter Coal	7/27/1956	Judgment
W.D. Pennsylvania	Lewis Coal Company	7/27/1956	Default Judgment
W.D. Pennsylvania	Toth Construction Company	7/27/1956	Judgment
W.D. Pennsylvania	Hickman Coal Company	7/30/1956	Default Judgment
W.D. Pennsylvania	Marco Coal Company, Inc.	7/30/1956	Judgment
W.D. Pennsylvania	E. & S. Coal Company	8/22/1956	Dismissed
W.D. Pennsylvania	Mateer Coal Company, Inc.	8/22/1956	Pending
W.D. Pennsylvania	C. B. & R. Coal Company, Inc.	9/ 6/1956	Default Judgment
W.D. Pennsylvania	Haxuzs Mining Company	9/ 6/1956	Consent Judgment
W.D. Pennsylvania	Labor Coal Company	9/ 6/1956	Judgment
W.D. Pennsylvania	Kutsch Coal Mine	9/21/1956	Judgment
W.D. Pennsylvania	Oakland Coal Company	10/17/1956	Dismissed
W.D. Pennsylvania	Smith Coal Company	10/17/1956	Judgment

Exhibit No. 39—(Continued)

District Court	Trustees v. Name of Company	Date Filed	Disposition
W.D. Pennsylvania	Buhl A. Black Coal Company	10/19/1956	Consent Judgment
W.D. Pennsylvania	Pearl Caruso Coal Company	10/24/1956	Default Judgment
W.D. Pennsylvania	Sugar Creek Coal Company	10/24/1956	Default Judgment
W.D. Pennsylvania	Rathgeb and Gorr	12/19/1956	Consent Judgment
W.D. Pennsylvania	Mears Coal Company	12/19/1956	Pending
W.D. Pennsylvania	J. & K. Coal Company	12/28/1956	Pending
W.D. Pennsylvania	Indiana Smokeless Coal Company	12/31/1956	Judgment
W.D. Pennsylvania	Kay's Coal Company	5/10/1957	Judgment
W.D. Pennsylvania	Mar-Dee Coal Sales, Inc.	5/27/1957	Consent Judgment
W.D. Pennsylvania	Perry and Van Slander Coal Co.	1/ 8/1958	Judgment
W.D. Pennsylvania	Fetterolf Coal Company, Inc.	1/17/1958	Judgment
W.D. Pennsylvania	Cable Coal & Construction Co., Inc.	1/27/1958	Dismissed
W.D. Pennsylvania	Heckman Coal Company	1/27/1958	Judgment
W.D. Pennsylvania	Lawrence Woelfel Mine	2/ 4/1958	Dismissed
W.D. Pennsylvania	Yanity Brothers Coal Company	3/ 7/1958	Dismissed
W.D. Pennsylvania	Davis Coal Company	3/12/1958	Judgment
W.D. Pennsylvania	Beitsinger Coal Company	3/12/1958	Default Judgment
W.D. Pennsylvania	Venturini Brothers Coal Co.	4/18/1958	Consent Judgment
W.D. Pennsylvania	Andrew Balbo Coal Company	4/23/1958	Default Judgment
W.D. Pennsylvania	Evans Coal Company	8/ 5/1958	Judgment
W.D. Pennsylvania	Crichton Coal & Coke Company	11/ 2/1959	Consent Judgment
W.D. Pennsylvania	Krolick Coal Company	7/28/1960	Pending
W.D. Pennsylvania	Charles E. Brown Coal Company	11/25/1960	Pending
Tennessee			
E.D. Tennessee	The Benedict Coal Corporation	5/27/1954	Judgment
E.D. Tennessee	The Harvey Coal Corporation	7/15/1954	Dismissed

Trustees v. Date

District Court	Trustees v. Name of Company	Date Filed	Disposition
Middle D. Tenn	Fentress Coal & Coke Company	7/31/1956	Judgment
E.D. Tennessee	E. Dick Burrow Coal Company	1/ 2/1958	Pending
E.D. Tennessee	Fesler Coal Company	1/ 6/1958	Pending
E.D. Tennessee	Phillips Brothers Coal Company	1/ 6/1958	Pending
E.D. Tennessee	Stansberry Coal Company	1/ 6/1958	Pending
E.D. Tennessee	E. A. Worley Coal Company	1/15/1958	Default Judgment
E.D. Tennessee	Arnold Strip Mining Company	1/29/1958	Pending
E.D. Tennessee	Paul Gibbs Coal Company	3/ 6/1958	Pending
E.D. Tennessee	Tennco, Incorporated	3/13/1958	Pending
E.D. Tennessee	Geo. A. Bryant & Sons Coal Co.	4/17/1958	Pending
E.D. Tennessee	J. H. Graham Coal Company	4/17/1958	Pending
E.D. Tennessee	Patrick & Hampton Coal Company	4/21/1958	Pending
E.D. Tennessee	Goforth Coal Company	5/15/1958	Pending
E.D. Tennessee	W. R. Parten Coal Company	6/13/1958	Pending
E.D. Tennessee	McPherson Coal Company	6/30/1958	Pending
E.D. Tennessee	H. A. Daffron Coal Company	7/22/1958	Pending
E.D. Tennessee	M. & T. Coal Company	7/22/1958	Pending
E.D. Tennessee	W. T. Morrison Coal Company	7/22/1958	Pending
E.D. Tennessee	F. W. Pryor Coal Company	7/22/1958	Pending
E.D. Tennessee	Earl Patton Coal Company	10/ 6/1958	Pending
E.D. Tennessee	Hampton E. Patton Coal Company	10/ 6/1958	Pending
E.D. Tennessee	M. T. Dixon Coal Company	10/28/1958	Pending
E.D. Tennessee	Willis Flynn Coal Company	10/28/1958	Pending
E.D. Tennessee	R. B. Ivey Coal Company	10/28/1958	Pending
E.D. Tennessee	Roy Land Coal Company	10/28/1958	Pending
E.D. Tennessee	Marshall Meeks Coal Company	10/28/1958	Pending
E.D. Tennessee	Hershel Myers Coal Company	10/28/1958	Pending

Exhibit No. 39—(Continued)

District Court	Trustees v. Name of Company	Date Filed	Disposition
E.D. Tennessee	Waldo Myers Coal Company	10/28/1958	Pending
E.D. Tennessee	Leon Nunley Coal Company	10/28/1958	Pending
E.D. Tennessee	Horace J. Scissom Coal Company	10/28/1958	Pending
E.D. Tennessee	Stephenson & Stephenson Coal Co.	10/28/1958	Pending
E.D. Tennessee	M. H. Wideman Coal Company	10/28/1958	Pending
E.D. Tennessee	Will Land Coal Company	10/31/1958	Pending
E.D. Tennessee	Elder Lockhart Coal Company	10/31/1958	Pending
E.D. Tennessee	Aaron Presnell Coal Company	10/31/1958	Pending
E.D. Tennessee	Howard Higgins Coal Company	11/10/1958	Pending
E.D. Tennessee	Ramsey Coal Company	11/10/1958	Pending
E.D. Tennessee	J. W. Sanders Coal Company	11/10/1958	Pending
E.D. Tennessee	James Patton Coal Company	12/ 9/1958	Pending
E.D. Tennessee	Dewey Trussell Coal Company	12/ 9/1958	Pending
E.D. Tennessee	Huntsville Branch Coal Co., Inc.	1/29/1959	Dismissed
E.D. Tennessee	Charlie Martin Coal Company	1/30/1959	Pending
E.D. Tennessee	Edward Nunley Coal Company	30/1959	Pending
E.D. Tennessee	S. T. Smith Coal Company	2/ 4/1959	Default Judgment
E.D. Tennessee	Sam R. Griffith Coal Co. and/or Soft Rock Coal Company	2/17/1959	Default Judgment
E.D. Tennessee	Cordell Coal & Construction Co. J. A. Cordell Coal Company	3/19/1959	Pending
E.D. Tennessee	Howard Coal & Mining Company	3/23/1959	Consent Judgment
E.D. Tennessee	Tennessee Consolidated Coal Co.	3/31/1960	Pending
Virginia			
W.D. Virginia	Benvir Coal Company, Inc.	9/14/1956	Default Judgment

District Court	Trustees v. Name of Company	Date Filed	Disposition
W.D. Virginia	Premium Darby Coal Corporation	6/28/1958	Judgment
W.D. Virginia	Lowery Coal Company	2/16/1959	Judgment
West Virginia			
N.D. West Virginia	Petitto Brothers	2/12/1954	Consent Judgment
N.D. West Virginia	Enrico Coal Company	8/12/1954	Consent Judgment
S.D. West Virginia	Lambert Coal Company	10/ 6/1954	Judgment
N.D. West Virginia	Davies Coal Company, Inc.	10/ 8/1954	Default Judgment
S.D. West Virginia	George H. Siems & Co.	8/12/1954	Default Judgment
S.D. West Virginia	Bee Branch Coal Company	5/23/1955	Consent Judgment
S.D. West Virginia	Alma Coal Company	11/10/1955	Default Judgment
S.D. West Virginia	Cedar Grove Coal Company	11/10/1955	Default Judgment
N.D. West Virginia	Bretz Fuel Company, Inc.	12/ 5/1955	Consent Judgment
S.D. West Virginia	Wyborn Coal Company	11/ 1/1956	Judgment
S.D. West Virginia	Leas Coal Company, Inc.	1/18/1957	Judgment
N.D. West Virginia	I. & M. Coal Company, Inc.	2/24/1957	Pending
N.D. West Virginia	McCandlish Coal Corporation	4/ 4/1957	Judgment
S.D. West Virginia	Jerry Fork Coal & Coke Corp.	5/31/1957	Judgment
N.D. West Virginia	Junior Goal Company	5/20/1957	Judgment
N.D. West Virginia	McCandlish Coal Company	6/ 6/1957	Judgment
N.D. West Virginia	Garrett & Weil Coal Company	9/23/1957	Dismissed
N.D. West Virginia	Taylor & McMillen Coal Co., Inc.	9/24/1957	Judgment
N.D. West Virginia	W. & P. Coal Company	10/ 7/1957	Default Judgment
N.D. West Virginia	L. & W. Coal Company, Inc.	1/16/1958	Judgment
S.D. West Virginia	Bolt Mining Company, Inc.	3/31/1958	Pending
N.D. West Virginia	Thomas Engineering Corporation	7/10/1958	Judgment

Exhibit No. 39—(Continued)

District Court	Trustees v. Name of Company	Date Filed	Disposition
S.D. West Virginia	J. F. Coal Corporation	8/28/1958	Default Judgment
S.D. West Virginia	Little Beaver Mining Corp.	12/22/1958	Default Judgment
S.D. West Virginia	Gay Coal & Coke Company, Inc.	2/20/1959	Pending
N.D. West Virginia	Barnes Contracting Company	2/24/1959	Judgment
N.D. West Virginia	Cedar Creek Coal Company	7/23/1959	Default Judgment
S.D. West Virginia	S. B. & O. Coal Company	4/19/1960	Dismissed
N.D. West Virginia	Morris Coal Company	5/20/1960	Consent Judgment
N.D. West Virginia.	Morris Coal Company	6/16/1960	Consent Judgment

Exhibit No. 40

CONSOLIDATION COAL CO.
ISLAND CREEK COAL CO.
WEST KENTUCKY COAL CO.
NASHVILLE COAL CO.
PEABODY COAL CO.
THE PITTSTON CO.
PITTSBURG-MIDWAY COAL CO.

Exhibit No. 41

Walsh-Healey Act

MINIMUM WAGE DETERMINATIONS

INDUSTRY INDEX

Name of Industry	Minimum Wage Rate
Accounting supplies—specialties[1]	$1.00
Aircraft	1.05
Apprentices	.75
Ammunition, explosives and related products (see Small arms ammunition, explosives and related products)	
Aviation textile products[1]	1.00
Batteries[1]	
Dry primary	1.08
Lead-acid storage	1.35
Other	1.34
Bituminous coal (see Coal, bituminous)	
Carpets and rugs—wool[1]	1.00
Cement[1]	1.00
Chemicals and related products[1]	
Bone black, carbon black and lamp black[2]	$1.40
Cleaning and polishing preparations, insecticides, fungicides, and miscellaneous chemicals	1.00
Industrial and refined basic chemical products	
Ala., Ark., D. of C., Fla., Ga., Md., Miss., N. C., S. C., Tenn., Va.	1.00
All other states[2]	1.15
Clay products—structural[1]	1.00
Clothing (see Uniforms and clothing)	
Coal, bituminous	
District 1. Eastern Pennsylvania	2.745
2. Western Pennsylvania	2.745
3. Northern West Virginia	2.745
4. Ohio	2.745

[1]Payment of subminimum wage rates to learners in accordance with FLSA regulations is authorized for this industry.

[2]Beginners may be employed for 320 hours at a rate of not more than 5 cents below the minimum wage established for the particular branch of the industry.

Exhibit No. 41—(Continued)

5. Michigan (no determination)	
6. Panhandle	2.745
7. Southern Numbered 1	2.745
8. Southern Numbered 2	2.745
9. West Kentucky	2.59
10. Illinois	2.745
11. Indiana	2.78
12. Iowa	1.40
13. Southeastern	2.515
14. Arkansas-Oklahoma	2.59
15. Southwestern	2.59
16. Northern Colorado	2.796
17. Southern Colorado	2.796
18. New Mexico	2.796
19. Wyoming	2.82
20. Utah	2.82
21 North Dakota-South Dakota	2.226
22. Montana	2.846
23. Washington	2.735
Cotton garment and allied industries	1.00
Dental goods and equipment	1.00
Die casting	1.00
Dimension granite (see Granite—dimension)	
Drugs and medicines	1.20
Electric lamps	1.26
Beginners—3 months	1.20
Envelopes	1.08
Beginners—480 hours	1.02
Evaporated milk (see Milk—evaporated)	
Fertilizers	1.00
Fireworks	1.00
Flint glass (see Glass and glassware)	
Flour and related products	1.30
Glass and glassware	1.00
Furniture	
Metal hospital and household	$1.00
Public seating	1.00
Wood	1.00

[1] Payment of subminimum wage rates to learners in accordance with FLSA regulations is authorized for this industry.

Exhibit No. 41—(Continued)

Gloves and mittens[1]	1.00
Granite—dimension[1]	1.00
Handkerchiefs[1]	1.00
Hats and caps—men's[1]	1.00
Heavy outerwear (see Uniforms and clothing)	
Hosiery—seamless[1]	1.00
Instruments and apparatus, surgical	1.25
Beginners—320 hours	1.15
Instruments, scientific, industrial and laboratory	1.20
Beginners—3 months	1.15
Iron and steel	
Ala., Ark., Fla., Ga., La., Miss., N. Car., Okla., S. C., Tenn., Tex., Va.	1.08½
Auxiliary workers	1.04
Apprentices—6 months	1.04
Ill. (E. St. Louis area), Iowa, Kans., Minn., Mo., Nebr., N. Dak., S. Dak.	1.19
Auxiliary workers	1.14½
Apprentices—6 months	1.14½
All other states and D. of C.	1.23
Auxiliary workers	1.18½
Apprentices—6 months	1.18½
Knitting, knitwear and woven underwear[1]	1.00
Leather[1]	1.00
Luggage, leather goods, belts, and women's handbags[1]	1.00
Men's hats and caps (see Hats and caps)	
Men's neckwear (see Neckwear—men's)	
Metal business furniture and storage equipment	1.10
Apprentices	.90
Beginners or probationary workers—6 weeks or 240 hours	1.00
Metal hospital and household furniture (see Furniture—metal)	
Milk—evaporated	1.68
Probationary workers	1.63
Neckwear—men's[1]	1.00
Office machines	1.10
Apprentices—for tolerances see text of determination	

[1] Payment of submission wage rates to learners in accordance with FLSA regulations is authorized for this industry.

Exhibit No. 41—(Continued)

Paint and varnish	1.50
Probationary employees—480 hours	1.40
Paper and pulp	
Other than bags	1.115
Beginners or probationary workers—160 hours	1.065
Bags[1]	1.00
Photographic and blueprinting equipment and supplies	1.18
Apprentices—for tolerances, see text of determination	
Pressed and blown glass and glassware (see Glass and glassware)	
Pressed felt (see Woolen and worsted industry and pressed felt)	
Public seating (see Furniture—public seating)	
Rainwear	$1.00
Scientific, industrial and laboratory instruments (see Instruments, scientific, industrial and laboratory)	
Shoe manufacturing and allied industries[1]	1.00
Small arms ammunition, explosives and related products	
Small arms ammunition	1.05
Beginners	1.01
Apprentices	.75
Explosives	1.20
Beginners	1.15
Apprentices	1.00
Blasting and detonating caps	1.12
Beginners	1.06
Apprentices	.75
Soap and related products	1.50
Specialty accounting supplies (see Accounting supplies—specialties)	
Steel (see Iron and steel)	
Structural clay products (see Clay products—structural)	
Suits and coats (see Uniforms and clothing)	
Surgical instruments and apparatus (see Instruments and apparatus, surgical)	
Tags	1.00

[1] Payment of subminimum wage rates to learners in accordance with FLSA regulations is authorized for this industry.

Exhibit No. 41—(Continued)

Textiles[1]	
Cotton, silk, and synthetic textile branch	1.00
Learners—240 hours	.92[3]
Other products	1.00
Tires and related products	1.77
Beginners or probationary workers—160 hours	1.67
Tobacco[1]	1.00
Toilet preparations and cosmetics	1.00
Uniforms and clothing[1]	1.00
Vitreous or vitrified china[1]	1.00
Wood furniture (see Furniture—wood)	
Wool carpets and rugs (see Carpets and rugs—wool)	
Wool trousers (see Uniforms and clothing)	
Woolen and worsted industry[1]	
Broad-woven goods, yarn, and thread branch and pressed felt	1.20
Learners and beginners—320 hours	1.05[3]
Other products	1.05
Learners and beginners—320 hours	.90[3]
Work gloves (see Gloves and mittens)	

[1] Payment of subminimum wage rates to learners in accordance with FLSA regulations is authorized for this industry.

[3] In case experienced workers are paid on a piece-rate basis, learners must be paid the same piece rates if earnings, based upon those piece rates, are in excess of the applicable hourly rate for learners.

Exhibit No. 42

February 15, 1955

UNITED MINE WORKERS JOURNAL

Vol. LXVI Twice a Month No. 4

LEWIS CALLS FOR HALT TO U. S. PURCHASE OF "DOG-HOLE" COAL; ASKS MINIMUM WAGE

Lewis Statement On Prevailing Wage

Following is the complete text of the statement by President John L. Lewis of the UMWA in support of the proposed prevailing minimum wage declaration by the Secretary of Labor for the bituminous coal industry. Such a declaration, under provisions of the Walsh-Healey Public Contracts Act, would make it illegal for government agencies to buy coal at "cut rates" from "dog-hole" operators who do not pay the prevailing wage. The statement was made February 1 at a hearing in the auditorium of the National Museum of Natural History before Clifford Grant, Labor Department hearing examiner:

"I appear in behalf of a petition, properly filed, as a representative of the United Mine Workers of America, duly authorized. In that capacity I emphasize the request of the United Mine Workers of America for an affirmative finding by the Secretary of Labor, on the petition to promulgate a prevailing minimum wage under the provisions of the Walsh-Healey Public Contracts Act.

"During the 18 years, more or less, since this statute was enacted, the coal industry while entirely familiar with its provisions, has not sought to avail itself of the privileges and the protection of the act in any formal way until this time.

"It is entirely probable that there would be no petition pending here today except for the growing tendency of governmental agencies using large quantities of coal and purchasing that coal throughout the country, increasingly to pay lesser and lesser amounts for that coal, using the tremendous influence of their purchases in magnitude, over a long period of time to decrease the living standards of the men who are employed in the industry and to decrease the return upon the stable investments of the industry. Adverting to the magnitude

Exhibit No. 42—(Continued)

of those purchases, I quote from a statement issued December 17, 1954, by the Secretary of Labor in which he says: 'In 1952, some 335,000 workers were employed in the bituminous industry, mining over 465 million tons of soft coal. During fiscal 1954, the federal government let 714 contracts calling for delivery of $95,693,000 worth of soft coal and coke. During the first quarter of fiscal 1955, the government purchased $25,443,000 of coal and coke under 347 contracts.'

"Thus it will be recognized that the purchase of these enormous tonnages of coal for the growing and expanding facilities of the government and for use in its ramified and diversified usages is of growing concern to the men employed in the coal industry and necessarily exercises a very material influence on the prices paid for coal, the wages paid in the industry, and the living standards of the employes in the industry.

"This effect is contrary to the declared purpose of the act and its stipulated provisions, runs contrary to the intent of Congress, and is in opposition to the purpose of the act as declared by at least two decisions of the Supreme Court of the United States. As to the intent of Congress in S. R. 11, line 3, 74th Congress, 1st Session, the report accompanying the Senate bill, the basic purposes of the act were made exceedingly plain when it said the legislation sought to end 'the paradoxical and unfair situation in which the government, on the one hand, urges employers to maintain and uphold fair wage standards and, on the other hand, gives vast orders for supplies and construction to the lowest bidder, often a contractor or manufacturer who does not sympathize with and fights hardest against labor and social welfare policies.'

"In the Endicott Johnson Corporation against Perkins, 317 U. S. 501, etc., 1943, the Supreme Court of the United States, speaking through Justice Jackson, said, 'The act directs the Secretary to administer its provisions. It is not an act of general applicability to industry. It applies only to contractors who voluntarily enter into competition to obtain government business on terms of which they are fairly forewarned by inclusion in the contract. Its purpose is to use the leverage of the government's immense purchasing power to raise labor standards.'

Exhibit No. 42—(Continued)

"In the case of Perkins against Lukens Steel Co., 310 U. S. 1940, the Supreme Court of the United States, speaking through Justice Black, said, 'This act's purpose was to impose obligations upon those favored with government business and to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment. As stated in the report of the House Committee on Judiciary on the bill, "the object of the bill is to require persons having contracts with the government to conform to certain labor conduct in the performance of the contracts and thus to eliminate the practice under which the government is compelled to deal with sweatshops'."

"The petitioners feel, in requesting this affirmative action by the Secretary of Labor, endowed with authority under the statute, that they are in harmony with the declared intent of the law as uttered by the Congress and that they are in harmony with the conclusive findings of the Supreme Court of the United States as to what the act was intended to do and the effective administration of its provisions. One governmental agency, to wit, the Tennessee Valley Authority, has been a tremendous offender against the declared purposes of the Act and in the purchasing of the coal requirements for that great enterpris has consistently violated the spirit of the act in all their business transactions.

"The board of directors of TVA could say legalistically that there has been no legal promulgation of a prevailing minimum wage under the provisions of the statute in the bituminous coal industry. However, there has been no estoppel against the Tennessee Valley Authority putting into practice the standards set forth in the act as affirmed by Congress and interpreted by the Supreme Court without the necessity of awaiting a promulgation of a minimum wage by the Secretary of Labor.

"The TVA, which purchased something more than eight million tons of coal in fiscal 1954, has done so at starvation prices. They have used the vast influence of their heavy purchases to beat down small isolated producing units to a starvation wage, ignoring safety standards and health conditions, taxes, compensation obligations, etc., and after having estab-

Exhibit No. 42—(Continued)

lished such standards, based on starvation, they have asked the stable investment of the industry, operating modern mines under standard conditions with collective bargaining in the American way, to meet the intolerable and unjustifiable, prices in order that TVA, a government agency, presumably bound by the law as well as every other natural citizen and artificial citizen, might make a better showing on its financial records in competition with free enterprise industries producing electrical power in the United States.

"That agency has ignored every humane consideration, every standard of ethics, and the provisions of every paragraph of the Walsh-Healey statute in carrying out its push-cart policy of providing itself with coal. They seek to turn the economic structure of the United States back to the push-cart days.

"In Siam and Cambodia, I am told, with a dense population and poor access between the population—no roads or modern vehicles in the larger sense—the population depends upon goods brought to them in the jungles and in the vast interior by a horde of push-cart merchants who push these carts through the jungle trails through long leagues of distance by manpower, to take the produce to the inhabitants and push it back to where it might find a market in the same laborious uneconomic way.

"We would have a push-cart economy if all competitive industry in the United States followed the lesson of TVA. And the United Mine Workers of America does not believe that our Republic can achieve its destiny by returning to a push-cart, dog-eat-dog standard of living and economy.

"I stress the action of the TVA because of its demoralizing and compulsive influence upon the price realization of the industry and its indirect effect upon the standards of living in the various communities of the industry.

"Other great electrical power producing companies and public utilities have found it necessary to follow to some degree the same procedures of destructive buying of coal as the TVA. We find now great electrical combines in the country who have been successfully able to operate certain of their producing units where they refuse to buy any coal from modern mines,

Exhibit No. 42—(Continued)

at modern prices, with modern investment represented in those mines and with standard wages being paid in those mines, because the self-same power companies find themselves continuously at a disadvantage in computing the production costs per kilowatt hour in contra-distinction to the kilowatt cost of TVA coal bearing from 65 to 70 percent of the overall cost of producing a kilowatt hour of electricity. TVA has had other advantages in addition to its starvation coal costs, advantages that in the ordinary sense of the word would be sufficient for them to operate a modern enterprise in competition with private investment providing they were able to operate a modern enterprise and to compete with the skill superinduced and developed in our great industrial establishments of the country.

"So, the United Mine Workers of America, conscious of the growth and expansion of this disturbing influence in the competitive coal industry is asking the Secretary of Labor, under provisions of the statute, to make a plan that will compel the TVA to pay at least a price for their coal that covers the prevailing minimum wage in the localities where they buy it.

"The areas set forth in the petition carrying the various differentials affecting the minimum wages per hour are set forth because they are the natural areas of the bituminous coal industry and because they reflect the mature and considered judgment born of experience of men who have considered these problems in the industry for many years—and that is a lot—and who in their joint associations have found that these were the natural competitive areas existing at the present time. Those areas change as conditions change, as populations shift, as enterprises are built, as our economy expands, as prices fluctuate, as modern techniques are developed; those areas shift, but the areas suggested for the defining localities of the Secretary's order represent the best judgment of men in the industry on the investment and management side and on the labor side.

Competition Delicately Balanced

"I doubt that there is any industry in our country where the influences of competition are so delicately balanced and so ravaging and destructive in their effect when that balance is

Exhibit No. 42—(Continued)

disturbed. There are the natural factors of competition; there are local factors of competition. There is intense competition between the producers in the coal market of the country in a given producing area or in one of the areas defined in this action. There is a competition between areas, much like the ebb and flow of the tides. You might call it a competitive basin with the wash going this way or that way as indicated by convulsive conditions whether it be war or peace, economic depression or full volume production, the development of new techniques and modern methods, increased productivity, new formulas in industry. All of those things affect that competition.

"A reduction of 25 cents a ton in the sales price of the coal commodity to a large consumer will immediately affect the stability of the price structure in the area where that mine is located, whether that area be ten miles away or 50 miles away. A mine similarly situated, having the same substantial costs, the same geological factors and problems, the same mining conditions substantially, and all other mines adjacent and contiguous to that mine that would thus reduce its costs, would find it necessary to adjust their price or else they will find that their market is leaving them and going to the competitor operating at a lower price.

"So the adjustment takes place. And as it is adjusted locally, it is adjusted areawide; and as it is adjusted areawide it sweeps the coal industry wherever located in the United States.

"From the Warrior fields of Alabama, across the Great Plains, the Rocky Mountains, to the crest of the Cascades in Washington, the price cut goes on, because a push-cart coal operator without responsibility and without assets, through a broker who has a telephone and a broken-down truck, is able to make a contract with TVA at a price at which no citizen could produce coal and pay a reasonable wage, maintain standard conditions, or give protection to the men who mine coal in the dog hole in the hills.

"The United Mine Workers wants these government agencies, which also include Navy Procurement and other agencies government, to be estopped from continuing those practices in America.

Exhibit No. 42—(Continued)

"In a report, which will be entered in testimony here by my associates, it is shown there are 5,368 operations in the United States during the year 1953 which were signatory to the National Bituminous Wage Agreement and which, of course, pay the wages and maintain the wage structure upon which this minimum wage structure for the area is predicated.

"It might interest you to know, in passing, Mr. Examiner, that 408 of those 5,368 operations represent 74.3 percent of the total amount produced under that contract in 1953. The rest of them, amounting to about 4,800 or 4,900 more or less, were able to produce 36 million tons or six percent of that production. I suppose it is mines of this type that will largely be represented here in this hearing as dissenters and objectors to the promulgation of a minimum wage.

"When I hear someone say he represents 300 coal mines, I naturally know that he does not represent 300 coal mines in the modern sense, but represents possibly 300 holes in the ground manned by from one to two to ten to 15 men, where a miserable wage is paid, where no safety conditions exist, where the Federal Mining Code does not run, where ventilation does not exist, and where they live on corn meal and fat hog meat because they cannot live any better than that under those conditions. So, there will be those who wish to perpetuate that situation, but they are of insufficient consequence to affect the proper finding under this statute.

"The statute is compulsive upon the Secretary of Labor. The only questions at stake are the facts, unless perchance someone can file a legal action that will cause the Supreme Court to invalidate the act in the years to come. The only questions at issue are the facts: What is the prevailing wage in the industry now? Can the figures set forth in the petitioner's application as being the prevailing wage be justified by evidence to the Secretary of Labor? If so, he will be compelled to promulgate a minimum wage finding.

"That finding does not establish a minimum wage in the industry; it merely establishes a minimum wage as covering those contractors who sell coal to the government or the government's agencies.

Exhibit No. 42—(Continued)

"It does not affect the question of union or non-union mines. One who operates a non-union mine can certainly sell coal to the government providing he can make the necessary arrangements with the government agencies. This is not a device for the United Mine Workers of America to increase its membership as I suspect some of the representatives of these dog-hole operators are going to come in here and assert. The United Mine Workers are not concerned with the question of membership, and they do not look to the government to induce men to become a member of the United Mine Workers of America. The United Mine Workers is a voluntary form of organization. A man may elect to become a member or he may elect not to be a member. He may do so in association with his fellows.

"The question of whether or not there will be a minimum wage promulgated in the bituminous industry has no bearing on this issue in this hearing and the motives of the petitioner cannot be said merely to be a device to add more members to the United Mine Workers of America.

"Any coal producer, large or small, is free to contract with the government or deliver the government coal or not to as they may elect. There is no compulsion. Every coal producing unit in the country will be the same free agent and have the same rights and privileges with respect to organization or non-organization in the event that the minimum wage becomes effective in the industry.

"The petitioners further suggest that the bituminous coal industry be defined as that industry which produces or furnishes all coal except Pennsylvania anthracite which we think to be a fair and logical suggestion. Lignite is bituminous coal which is like new wine—it hasn't aged enough, but will be old wine when it gets old enough—but it is bituminous coal. The other small variation of bituminous products such as the so-called blacksmithing coal, cannel coal, or other kinds of coal are all bituminous. As a matter of fact, the logical, practical and recognized difference of bituminous coal is that coal that is not anthracite. We recommend it to the examiner, and the Wage and Hour Division of the Secretary's department.

"The exhibits of the United Mine Workers, which will be

Exhibit No. 42—(Continued)

later presented and identified for the year 1953, will show a tonnage of 377,643,840 tons produced by signatories to the standard wage agreement of the industry, which are paying the wages indicated. Total tonnage for 1953 will be shown as 447,487,020 tons. The percentage of the national production produced by signatories to the industry contract and by those who are not signatories who pay the same wages or in excess thereof is 84.39 percent of the total national production, a compelling figure.

"Mr. W. A. Boyle, when he later follows me, will break down those tonnages into the various areas, ten in number, giving the tonnage of each area, the total tonnage of the areas, the amount produced by signatories and the percentage in that area. I will leave largely to him and Mr. John Owens, Secretary-Treasurer of the United Mine Workers of America, any technical analyses of these provisions and a full explanation on any point upon which information is desired.

"Mr. Examiner, with every appreciation of your courtesy and with every desire to expedite this hearing I have been trying to avoid making any fulsome comments or drawing any analogies, and I think now with your permission I will yield to some of my technical assistants here, but before I do so I will be glad to try to answer any question that may be directed to me by you, or the government representatives, or anyone qualified."

Exhibit No. 44

February 15, 1958 United Mine Workers Journal Page 5

UMWA, Industry Seek Prevailing Wage Hike

LABOR DEP'T HOLDS WALSH-HEALEY HEARING

The UMWA, Pittsburgh Consolidation Coal Co. and other coal producing companies made their formal plea to the U. S. Department of Labor for increased minimum wages in the bituminous coal industry under provisions of the Walsh-Healey Act. That Act requires that coal operators selling to agencies of the U. S. Government under contracts in excess of $10,000 must pay prescribed minimum wages laid down by the Labor Department for the geographical area in which their mines are located.

The UMWA and the operators stated their case at a hearing on February 3-5 presided over by Hearing Examiner Clifford Grant, the same man who heard an earlier case which resulted in a minimum wage determination by Secretary of Labor James P. Mitchell in 1955.

The hearing was scheduled as a result of a petition late last year in which the Union and the operators asked that the minimum wages be redetermined to take into account the two wage increases negotiated by the UMWA since Mitchell's 1955 determination. Each of the two National Bituminous Coal Wage Agreements signed in 1955 and 1956 called for pay boosts of $2 a day—a total of $4 a day, or 50 cents an hour.

Spokesman for the UMWA—and the man who presented the weightiest evidence in the case—was W. A. (Tony) Boyle, International Board Member for District 27 and special assistant to President John L. Lewis.

Senior Counsel Welly K. Hopkins and Associate Counsel Harrison Combs handled the legal end of the case for the UMWA.

Boyle presented three exhibits for the record. The first consisted of copies of the last five National Bituminous Agreements merely to show what the UMWA contract rate of pay is today.

His second exhibit—a massive document—listed all of the

Exhibit No. 44—(Continued)

coal companies under contract with the UMWA as of the end of 1956, together with the number of employes and tonnage produced by each company or mine. He used state mining reports for his figures when available and other sources, such as Bureau of Mines reports and Keystone Coal Buyers' Manual, when state figures were not to be had.

Boyle's figures proved that the vast preponderance of coal produced in the United States is from mines under contract with the UMWA. This, in turn, proved that the prevailing wage in the nation's bituminous coal industry is the Union Wage, Boyle testified.

Boyle's list of mines was divided geographically into the 23 coal producing districts set up under the Guffey Coal Act. These districts were used as bases for determining prevailing wages in 1955.

In the Appalachian districts, and some others, the 1955 prevailing wage as determined by the Secretary of Labor was $2.245 an hour or $17.96 a day. The UMWA and the operators asked that the wage in those districts be raised to $2.745 an hour or $21.96 a day. The boost sought is 50 cents an hour or $4 a day, the exact amount of the increased wages negotiated by the UMWA in 1955 and 1956.

Wages in other Guffey coal producing districts vary slightly, but the same increase over 1955 asked in all of them, 50 cents an hour or $4 a day.

On direct examination by UMWA Counsel Hopkins, Boyle presented details to buttress his written testimony and explained that 1956 figures were used because they were the latest official, trustworthy statistical data available.

Chief witness for the Unionized coal industry was George A. Lamb, manager of business surveys, Pittsburgh Consolidation Coal Co. He was quizzed on direct examination by Frank R. Amos, retired general counsel of Pitt Consol, who represented Pitt Consol during the 1955 wage determination, both in the Labor Department and in its long haul through Federal courts, and acted as the chief legal spokesman for the operators.

Lamb, who was also a key witness in 1955, backed up Boyle's testimony. He also stated that in 1957 his company produced

Exhibit No. 44—(Continued)

about 40 million tons of coal, of which only 310,000 tons were sold directly to the Federal government. He blamed this on the wage advantage of at least 50 cents an hour enjoyed by non-Union operators and added: "The greater part of the bituminous coal industry will be damaged" if the higher prevailing wages are not put into effect.

He said that Pitt Consol produces coal in six Guffey districts —2 (Western Pennsylvania); 3 (Northern West Virginia); 4 (Ohio); 6 (Panhandle); 7 (Southern No. 1); and 8 (Southern No. 2). In all six states, the present minimum wage rate as determined by the Secretary of Labor in 1955 is $2.245 an hour. Lamb recommended that it be raised to $2.745 an hour, and added that the Union wage was the prevailing wage in each of the districts where Pitt Consol operates.

Among the other operators witnesses who favored the increased wage rates was Frank J. Foresman, director of industrial relations, Pittsburg and Midway Coal Mining Co. (Kans.), who preceded UMWA Safety Director Charles Ferguson as head of the Coal Mines Section of the National Safety Council.

He testified that in 1956 his company produced about three million tons and sold only 120,700 tons to the Federal government. Foresman said his company operates in five Guffey districts—9 (West Kentucky), 10 (Illinois); 14 (Arkansas and Oklahoma); 15 (Kansas, Missouri, Oklahoma and Texas); and 17 (Southern Colorado). He said that the UMWA pay scale was the prevailing wage in each of those districts.

Another operator witness was G. M. Davidson of Island Creek Coal Co. He said that Island Creek operates 19 mines, 6 located in Guffey District 7 (Southern No. 1) and 13 in Guffey District 8 (Southern No. 2). In 1956, Davidson testified, Island Creek produced 14,792,405 tons of coal of which only 272,008 tons were sold to the U. S. Government. None was sold to the Tennessee Valley Authority although Island Creek operates in TVA territory.

Davidson said the lack of government business was due to the wage advantage enjoyed by non-Union operators and added that it was his conviction that the UMWA wage scale was the prevailing wage in Guffey Districts 7 and 8.

Exhibit No. 44—(Continued)

The fourth operator witness was J. J. Richardson, president of two companies, one located at Harman, Va., the other in Pike County, Ky. He said that in 1956 his two mines produced 1,228,900 tons of coal, nine of which was sold to the U. S. Government because of the unfair competitive advantage enjoyed by non-Union operators paying sub-standard wages. He said that the prevailing wage scale in the area in which he operates is the UMWA contract rate.

Also a proponent at the hearing was the Rochester and Pittsburg Coal Co., ably represented by Attorney Arnold Levy.

The Labor Department's exhibits were presented by August F. Cantfil, assistant director of the Public Contracts Division of the Labor Department. Cantfil presented 11 exhibits. Most were concerned with background information and with formal written evidence on the UMWA petition, hearing notice by the Secretary, etc.

Cantfil also presented a compilation of Federal government contracts for bituminous coal in excess of $10,000 and a publication of the U. S. Bureau of Mines, Coal Production Statistics of 1956. Cantfil testified that the Bureau's figures were the latest available.

Lawyers for the Labor Department were John Babe, assistant solicitor, and William Lowe and Howard Jenkins, assistants to Babe. Lowe did most of the direct and cross examination at the hearing.

Federal government departments which purchase coal and presented testimony were the TVA, Department of Defense and the Veterans Administration.

Elmer C. Hill, TVA procurement officer, reported that his agency had used $91,464,000 worth of bituminous coal during fiscal year 1957.

Ben Bedwell, procurement officer for the Navy, reported purchases of $31,942,000 worth of coal during the same period.

Andrew J. Pappandreau, purchasing agent, marketing division for fuel, Veterans Administration, said his agency used $4,367,000 worth during fiscal '57.

Tonnage figures for all government agencies were submitted by George Lamb and are shown in an insert to this story.

Exhibit No. 44—(Continued)

No testimony in opposition to the proposed prevailing wages was presented. Two parties filed and appeared in opposition. One of them was Wallace Cohen, who said he represented Ruth Elkhorn Coals, Inc. He "withdrew" the first day after presenting several motions to dismiss or postpone the proceedings. Another was Charles Richards, who said he was executive secretary of the Kentucky Truck Operators Association (26 small mines) and spoke for 15 operators in Lee County, Va. He did not appear on the last day of the hearing.

U. S. Gov't. Bought 27.5 Million Tons

The importance of Federal government purchases to the bituminous coal industry was graphically illustrated in an exhibit filed by George A. Lamb at the February 3-5 Walsh-Healey hearing at the Labor Department. The exhibit, which is reprinted below, shows that government coal purchases have more than doubled since the last prevailing wages were determined by Secretary of Labor James P. Mitchell.

Bituminous Coal Sales To U. S. Government

Agencies	1954 F/Y[1] tons	1957 F/Y tons
TVA	8,549,000[2]	20,374,877[4]
Defense Department	3,215,000	3,869,984
Atomic Energy Commission	100,000[3]	2,109,484[5/6]
Veterans Administration	695,000	507,155[6]
Post Office Department	160,000	150,000[7]
General Services	648,000	500,000[8]
TOTAL	13,367,000[2]	27,511,500[9]

[1]1954 F/Y data listed as given in George A. Lamb's testimony, February 3, 1955, (Pages 289-290 of the Walsh-Healey hearings record).

[2]"Contract and Spot purchases".

[3]Not including an additional 1,795,000 tons purchased by power companies having contracts to supply electric energy to AEC.

[4]Tons of coal received in fiscal year ending June 30, 1957.

[5]Consumption for the production of steam and electric generation.

[6]Estimated total of purchase contracts made during period April 1, 1957, March 31, 1958.

[7]Estimated total of contracts in F/Y ended June 30, 1957.

[8]Purchasing agents estimate of total contracts placed in F/Y ended June 30, 1957.

[9]Not including coal consumed by electric utilities suppliers. In calendar year 1956, Electric Energy, Inc., consumed 3,097,736 tons. Ohio Valley Electric Corp. and Indiana and Kentucky Electric Corp. consumed 6,988,630 tons.

Source: 1957 fiscal year data obtained from particular government agencies.

Exhibit No. 48

INTERESTS OF UMWA IN WEST KENTUCKY COAL CO. AND NASHVILLE COAL CO.

In Nashville Coal Co.:		
25,000 shs. (Chertsey Loan Collateral)	$ 2,625,000.00	
10,000 shs. (Sagamore Loan Collateral)	1,050,000.00	
10,000 shs. (Tower Loan Collateral)	1,050,000.00	
		$ 4,725,000.00
In West Kentucky Coal Co.:		
85,400 Common Shs. Owned	2,354,522.04	
50,000 Preferred Shs. Owned	2,500,000.00	
Pledge of Assets on Bank Loan	5,200,000.00	
90,600 shs. (Cyrus Eaton Loan Collateral)	2,513,895.18	
84,560 shs. (Chertsey Loan Collateral)	2,153,279.50	
84,912 shs (Sagamore Loan Collateral)	2,287,809.32	
25,300 shs. (Tower Loan Collateral)	443,223.90	
5,200 shs. (Tower Loan Collateral)	77,938.32	
1,300 shs. (Tower Loan Collateral)	18,847.04	
8,128 shs. (Tower Loan Collateral)	176,461.07	
20,000 shs. (Tower Loan Collateral)	491,430.00	
50,000 shs. (Colton Loan Collateral)	1,506,875.00	
25,000 shs. (Combs Loan Collateral)	1,006,875.00	
		20,731,156.37
TOTAL IN BOTH COMPANIES		25,456,156.37

Exhibit No. 72

STATEMENT OF CONDITION
OCTOBER 3, 1960

Washington's Oldest Bank
Organized 1809

THE NATIONAL BANK OF WASHINGTON

District of Columbia

Main Office, 14th and G Streets, N. W.
Washington, D.C.

Member Federal Reserve System
Member Federal Deposit Insurance Corporation

ADVISORY BOARD

JOSHUA EVANS, JR.
Chairman

JAMES W. ANDERSON
Retired

J. SCOTT APPLEBY
President, Plas-Tex Corporation

WILLIAM A. BARBER
Owner-Operator, Barber's Esso Station

DR. WALTER A. BLOEDORN
Physician

HERBERT C. BLUNCK
General Manager, The Statler-Hilton

EMORY H. BOGLEY
Attorney at Law

THOMAS P. BROWN
Real Estate

A. BRITTON BROWNE
Vice President
Randall H. Hagner & Company

CHARLES DELMAR
Vice Chairman of the Board
State Loan & Finance Corporation

WILLIAM H. DYER
Executive Vice President
Perpetual Building Association

HOWARD P. FOLEY
Chairman,
Howard P. Foley Company

LEOPOLD V. FREUDBERG
Insurance

WEBB C. HAYES, III
Attorney at Law

JOSEPH A. KAUFMANN
Attorney at Law

ROWLAND S. MARSHALL
President,
M. M. Parker Co., Inc.

ROBERT S. NASH
President, Metropolitan Warehouse Company

WILFRED B. PUTMAN
Retired

JOSEPH A. RAFFERTY
Attorney at Law

THOMAS E. RYAN, JR.
Comptroller, United Mine Workers of America Welfare and Retirement Fund

HORACE G. SMITHY
Retired

WALDO J. TASTET
President, Fries, Beall & Sharp Company

THOMAS K. TAYLOR
Vice President,
Trans World Airlines

JOHN J. WILSON
Attorney at Law

Exhibit No. 72—(Continued)

BOARD OF DIRECTORS

WILMER J. WALLER
Chairman

EDWARD C. BALTZ
President, Perpetual Building Association

CROSBY N. BOYD
Vice President and Treasurer The Evening Star Newspaper Company

CLARK M. CLIFFORD
Attorney at Law

BARNUM L. COLTON
President

EDWARD COSTIGAN
President, Corson and Gruman Company

RUTHERFORD J. DOOLEY
Senior Vice President

W. CARLTON EVANS
President, Washington Tobacco Company

NORMAN B. FROST
Attorney at Law

V. MANNING HOFFMAN
President, Firemen's Insurance Company

WELLY K. HOPKINS
Attorney at Law

ROBERT E. L. JOHNSON
Chairman of the Board, Woodward and Lothrop

A. D. LEWIS
Executive, United Mine Workers of America

DR. JOHN L. LEWIS
Physician

CHARLES H. MURCHISON
Attorney at Law

H. GABRIEL MURPHY
President, H. Gabriel Murphy Co., Inc., Insurance—Bonds

WILLIAM A. ROGERS, 2nd
President, Addison Chevrolet Sales, Inc. and Barry-Pate Motor Company, Inc

BENJAMIN T. ROME
President, George Hyman Construction Company

ROBERT P. SMITH
Attorney at Law

LEONARD P. STEUART
L. P. Steuart, Inc. and Imperial Investment Company

DR. J. LAWN THOMPSON, JR.
Physician

LEO A. WALSHE
President, P. J. Walshe, Inc., Real Estate

ROGER J. WHITEFORD
Attorney at Law

WASH B. WILLIAMS
President, American Sales Company

Exhibit No. 73

INTEREST OF UMWA IN NATIONAL BANK OF WASHINGTON, D. C. AS OF DATE OF COLTON DEPOSITION

Number of Shares		Dollar Amount Invested	
287,884	1. Shares Owned by UMWA (July 1, 1958)		$ 9,067,984.62
	2. Shares Held As Collateral Under Notes By Barnum L. Colton:		
30,000	a. Note Dated March 15, 1954	$ 1,306,919.00	
153,607	b. Note Dated April 26, 1954	8,367,217.99	
91,803	c. Note Dated Sept. 15, 1955	2,754,105.00	
275,410	3. Total Shares Held As Collateral		12,428,241.99
563,294	4. Total Shares Owned Or Held As Collateral		$ 21,496,226.61
725,000	5. Total Bank of Washington Shares Outstanding		

Exhibit No. 92

Facts About TVA Steam Plants

Name	Location	Built By	Number of Units	Generator Rated Capacity Per Unit Kw.	Total Rated Capacity Kw.	Generator Capability Per Unit Kw.	Total Capability Kw.	Steam Gage Pressure Pounds Per Sq. Inch at Throttle	Steam Temperature Degrees Fahrenheit at Throttle	Boiler Capacity Pounds of Steam Per Hour Each	Estimated Annual Coal Use (Tons) at 80% Plant Load Factor[5]	Pounds of Coal Needed to Generate One Kwh. Basis: 12,000 BTU Per Lb. Net	Condensing Water Gallons Per Minute Total Plant	Construction Started	First Unit in Commercial Operation	Last Unit in Commercial Operation or Scheduled	Cost[1] Including Switchyard	Cost Per
Colbert	On Pickwick Lake, 12 mi. S.W. of Wilson Dam, Ala.	TVA	5	4 @ 180,000 1 @ 500,000[2]	1,220,000	4 @ 200,000 1 @ 500,000	1,300,000	4 @ 1800 1 @ 2400	5 @ 1050	4 @ 1,280,000 1 @ 3,900,000	3,600,000	4 @ 0.77 1 @ [3]	865,000	10-15-51	1-18-55	10-62	$174,104,000	
Gallatin	On Cumberland River, 5 mi. S.E. of Gallatin, Tenn.	TVA	4	2 @ 250,000 2 @ 275,000	1,050,000	2 @ 250,000 2 @ 275,000	1,050,000	2000	1050	2 @ 1,650,000 2 @ 1,960,000	3,000,000	Units 1- 2—0.77 Units 3- 4—0.76	582,400	5-11-53	11- 8-56	8- 9-59	139,408,000	
John Sevier	On Holston River 3 mi. S.E. of Rogersville, Tenn.	TVA	4	180,000	720,000	200,000	800,000	1800	1050	4 @ 1,280,000	2,900,000	0.77	454,800	10-14-52	7-12-55	10-31-57	105,953,000	
Johnsonville	On Kentucky Lake 12 mi. W. of Waverly, Tenn.	TVA	10	6 @ 112,500 4 @ 150,000	1,275,000	6 @ 125,000 4 @ 150,000	1,350,000	6 @ 1450 4 @ 2000	6 @ 1000 4 @ 1050	6 @ 1,000,000 4 @ 1,100,000	4,000,000	Units 1- 6—0.85 Units 7-10—0.77	1,029,800	5-12-49	10-27-51	8-20-59	170,032,000	
Kingston	On Watts Bar Lake, 2 mi. N.E. of Kingston, Tenn.	TVA	9	4 @ 135,000 5 @ 180,000	1,440,000	4 @ 150,000 5 @ 200,000	1,600,000	1800	@ 1000	4 @ 1,000,000 5 @ 1,280,000	4,300,000	Units 1- 4—0.78 Units 5- 9—0.77	967,000	4-30-51	2- 8-54	12- 2-55	193,446,000	
Paradise	On Green River near Paradise, Ky.	TVA	2	650,000[2]	1,300,000	700,000[4]	1,400,000	2400	1050	4,900,000	4,300,000	[3]	452,400	11- 2-59	9-62	7-63	182,000,000	
Shawnee	On Ohio River 10 mi. N.W. of Paducah, Ky.	TVA	10	135,000	1,350,000	150,000	1,500,000	1800	1000	10 @ 1,000,000	4,100,000	0.78	1,076,000	1- 6-51	1- 9-53	10-12-56	213,536,000	
Watts Bar	2/3 mi. Below Watts Bar Dam, 7 mi. S.E. Spring City, Tenn.	TVA	4	60,000	240,000	66,667	266,667	850	900	4 @ 600,000	730,000	0.95	280,000	8- 8-40	3-16-42	4- 8-45	19,821,000	
Widows Creek	On Guntersville Lake, 5 mi. S.W. Bridgeport, Ala.	TVA	7	6 @ 112,500 1 @ 500,000[2]	1,175,000	6 @ 125,000 1 @ 500,000	1,250,000	4 @ 1450 2 @ 1800 1 @ 2400	6 @ 1000 1 @ 1050	4 @ 1,000,000 2 @ 850,000 1 @ 3,850,000	3,600,000	Units 1- 4—0.84 Units 5- 6—0.79 Unit 7—0.75	842,400	3-28-50	7- 1-52	10-60	175,879,000	
Acquired																	**Excluding Switchyard**	
Hales Bar	At Hales Bar Dam, 5 mi. S.E. of Jasper, Tenn.	Acquired from TEP	2	20,000	40,000	21,000	42,000	365	725	3 @ 115,000 2 @ 170,000	184,000	1.25	80,000	——	1924	1924	3,512,000	
Wilson	In Nashville, Tenn.	TEP	6	1 @ 12,500 2 @ 3,000 1 @ 6,500 1 @ 3,000 1 @ 20,000	48,000	1 @ 15,625 2 @ 4,000 1 @ 8,125 1 @ 4,000 1 @ 23,600	59,350	175-200	485-550	12 @ 36,000 2 @ 160,000	388,000	2.00	95,000	——	1903	1926	3,073,000	
Nashville	Near Wilson Dam, 3 mi. from Sheffield, Ala.	War Dept.	5	3 (Aux.) @ 20,000 2 (Aux.) @ 2,000	64,000	——	65,000	55-275	310-584	12 @ 65,416	399,000	1.75	176,000	About 3- 1-18	1919	1919	772,000 (Rehabilitation and Additions	

[1]Actual or estimated as shown in the budget program submitted to the Congress in January 1960 except: Paradise figure is latest estimate excluding interest during construction. Watts Bar is actual cost of completed plant, and acquired plant figures are 6-30-59 book values before depreciation and excluding switchyards.

[2]Under Construction.
[3]Not yet available.
[4]740,000 Kw. for peaking purposes.
[5]Based on coal specified in boiler specifications.

Exhibit No. 92

Facts About TVA Steam Plants

Name	Built By	Number of Units	Generator Rated Capacity Per Unit Kw.	Total Rated Capacity Kw.	Generator Capability Per Unit Kw.	Total Capability Kw.	Steam Gage Pressure Pounds Per Sq. Inch at Throttle	Steam Temperature Degrees Fahrenheit at Throttle	Boiler Capacity Pounds of Steam Per Hour Each	Estimated Annual Coal Use (Tons) at 80% Plant Load Factor[5]	Pounds of Coal Needed to Generate One Kwh. Basis: 12,000 BTU Per Lb. Net	Condensing Water Gallons Per Minute Total Plant	Construction Started	First Unit in Commercial Operation	Last Unit in Commercial Operation or Scheduled	Cost[1] Including Switchyard	Cost Per Kilowatt Basis: Total Capability	Name
Major Steam Plants Built by TVA																		
ick Lake, W. of am, Ala.	TVA	5	4 @ 180,000 1 @ 500,000[2]	1,220,000	4 @ 200,000 1 @ 500,000	1,300,000	4 @ 1800 1 @ 2400	5 @ 1050	4 @ 1,280,000 1 @ 3,900,000	3,600,000	4 @ 0.77 1 @ [3]	865,600	10-15-51	1-18-55	10-62	$174,104,000	$134	Colbert
erland mi. S.E. of Tenn.	TVA	4	2 @ 250,000 2 @ 275,000	1,050,000	2 @ 250,000 2 @ 275,000	1,050,000	2000	1050	2 @ 1,650,000 2 @ 1,960,000	3,000,000	Units 1- 2—0.77 Units 3- 4—0.76	592,400	5-11-53	11- 8-56	8- 9-59	139,408,000	133	Gallatin
n River of e, Tenn.	TVA	4	180,000	720,000	200,000	800,000	1800	1050	4 @ 1,280,000	2,000,000	0.77	454,600	10-14-52	7-12-55	10-31-57	105,953,000	132	John Sevier
cky Lake of Tenn.	TVA	10	6 @ 112,500 4 @ 150,000	1,275,000	6 @ 125,000 4 @ 150,000	1,350,000	6 @ 1450 4 @ 2000	6 @ 1000 4 @ 1050	6 @ 1,000,000 4 @ 1,100,000	4,000,000	Units 1- 6—0.85 Units 7-10—0.77	1,029,600	5-12-49	10-27-51	8-20-59	170,032,000	126	Johnsonville
Bar - N.E. n, Tenn.	TVA	9	4 @ 135,000 5 @ 180,000	1,440,000	4 @ 150,000 5 @ 200,000	1,600,000	1800	@ 1000	4 @ 1,000,000 5 @ 1,280,000	4,300,000	Units 1- 4—0.78 Units 5- 9—0.77	967,000	4-30-51	2- 8-54	12- 2-55	198,446,000	124	Kingston
Ky.	TVA	2	650,000[2]	1,300,000	700,000[4]	1,400,000	2400	1050	4,900,000	4,300,000	[3]	452,400	11- 2-50	9-62	7-63	182,000,000	130	Paradise
River of Ky.	TVA	10	135,000	1,350,000	150,000	1,500,000	1800	1000	10 @ 1,000,000	4,100,000	0.78	1,076,000	1- 6-51	1- 9-53	10-12-56	213,536,000	142	Shawnee
low Watts 7 mi. S.E. y, Tenn.	TVA	4	60,000	240,000	66,667	266,667	850	900	4 @ 600,000	730,000	0.95	280,000	8- 8-40	3-16-42	4- 8-45	19,821,000	74	Watts Bar
sville .. S.W. ., Ala.	TVA	7	6 @ 112,500 1 @ 500,000[2]	1,175,000	6 @ 125,000 1 @ 500,000	1,250,000	4 @ 1450 2 @ 1800 1 @ 2400	6 @ 1000 1 @ 1050	4 @ 1,000,000 2 @ 850,000 1 @ 3,850,000	3,600,000	Units 1- 4—0.84 Units 5- 6—0.79 Unit 7—0.75	842,400	3-28-50	7- 1-52	10-60	175,879,000	141	Widows Creek
																Excluding Switchyard		Acquired
Bar Dam, of nn.	Acquired from TEP	2	20,000	40,000	21,000	42,000	365	725	3 @ 115,000 2 @ 170,000	184,000	1.25	80,000	——	1924	1924	3,512,000	——	Hales Bar
le, Tenn.	TEP	6	1 @ 12,500 2 @ 3,000 1 @ 6,500 1 @ 3,000 1 @ 20,000	48,000	1 @ 15,625 2 @ 4,000 1 @ 8,125 1 @ 4,000 1 @ 23,800	59,350	175-200	485-550	12 @ 36,000 2 @ 160,000	388,000	2.00	95,000	——	1903	1925	3,073,000	——	Nashville
n Dam, Ala.	War Dept.	5	3 (Aux.) @ 20,000 2 (Aux.) @ 2,000	64,000	——	65,000	55-275	310-584	12 @ 65,416	399,000	1.75	176,000	About 3- 1-18	1919	1919	772,000 (Rehabilitations and Additions)	——	Wilson

May 1960

n in the budget program submitted to the Congress
radise figure is latest estimate excluding interest
Bar is actual cost of completed plant, and acquired
k values before depreciation and excluding switch-

[2]Under Construction.
[3]Not yet available.
[4]740,000 Kw. for peaking purposes.
[5]Based on coal specified in boiler specifications.

Exhibit No. 92

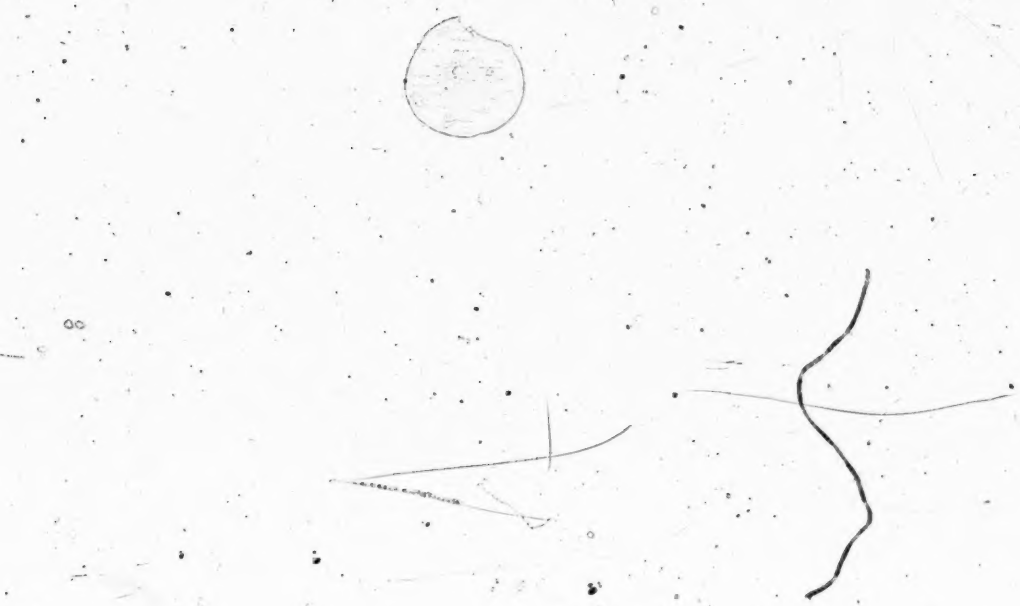


Exhibit No. 98

Phillips Bros. Coal Company

	Contract Number	Bid Price	Sales Commission	Net Price	Kingston Tons	Kingston Cost	John Sevier Tons	John Sevier Cost	Kingston Av. BTU Cost All Awards	John Sevier Av. BTU Cost All Awards
1956									.2153	.2105
Jan.									.2208	.2112
Feb.									.2203	.2135
Mar.	S172	4.49	.34	4.15	600	.2349			.2343	.2165
Apr.	S286	4.49	.34	4.15	1000	.2349			.2335	.2188
May	S441	4.49	.34	4.15	1500	.2349			.2152	.2165
June	S527	4.30	.25	4.05	1500	.2273				
	S562	3.85	.20	3.65	1500	.2084			.2049	.2108
July	S67	3.72	.20	3.52	1500	.2042			.2006	.2097
Aug.	S121	3.60	.15	3.45	1500	.1954			.1950	.2031
Sept.	S226	3.52	.15	3.37	1000	.1902			.1944	.2005
Oct.					1000	.1917			.1954	.2009
Nov.	S344	3.62	.15	3.47	1000	.1947			.1943	.2033
Dec.	S420	3.52	.15	3.37	1000	.1952				
1957					1000	.1940		.2021	.1955	.2030
Jan.									.1961	.2029
Feb.						.1962	1000	.2043	.1904	.2022
Mar.	S152	3.57	.15	3.42	1000	.1962		.2043		
					450	.1849		.1930	.1870	.1986
Apr.	S272	3.25	—	3.25	1500	.1851		.1933		
	S272	3.25	—	3.25		.1851	1500	.1933	.1898	.1968
May	S330	3.25	—	3.25		.1892	1500	.1932		
	S330	3.30	—	3.30		.1892	1500	.1932	.1917	.1962
June	S432	3.30	—	3.30		.1949	1500	.1980	.1923	.1973
July	S40	3.44	—	3.44		.1872	1500	.1912	.1850	.1920
Aug.	S84	3.25	—	3.25		.1770			.1796	.1848
Sept.	S251	3.00	—	3.00	500	.1790			.1792	.1857
Oct.	S284	3.05	.15	2.90		.1762	1500	.1831	.1790	.1851
Nov.	S355	2.98	.15	2.83			1500	.1905		
	S355	2.95	.15	2.80	1400	.1750		.1790		
Dec.	S474	3.07	.15	2.92	1000	.1798		.1839	.1825	.1863
1958									.1871	.1900
Jan.					620	.1897			.1881	.1922
Feb.	S100				1000	.1874		.1915	.1891	.1917
Mar.	S167	3.18	.15	3.03	1500	.1874		.1915		
	S167	3.18	.15	3.03	720	.1897				
	S219				1500	.1882		.1923	.1893	.1922
Apr.	S308	3.20	.15	3.05	1000	.1894			.1902	.1933
	S329				1000	.1917				
May	S501	3.19	.15	3.04	2000	.1906				
					800	.1917			.1895	.1903
					750	.1914		.1955		
June	S505	3.19	.15	3.04	750	.1898		.1940		
	S294	3.15	.15	3.00	2000	.1922		.1923	.1864	.1883
July	S294	3.44	.29	3.15	750	.1847		.1886		
Aug.									.1839	.1866
Sept.									.1855	.1862
Oct.									.1845	.1849
Nov.									.1804	.1851
Dec.									.1831	.1878

[NOTE: Underscoring indicates award on bid.]

Exhibit No. 99

	Av. BTU Cost Per Month Eastern Plts.	Av. BTU Cost Per Month TVA System	Av. BTU Cost Per Year Eastern Plts.	Av. BTU Cost Per Year TVA System
Jan.	$.2718	$.1960		
Feb.	.2164	.1994		
Mar.	.2717	.2038		
Apr.	.2242	.2064		
May	.2245	.2055		
June	.2173	.2005		
July	.2099	.1967		
Aug.	.2054	.1945		
Sept.	.2000	.1921		
Oct.	.1973	.1897		
Nov.	.1965	.1897		
Dec.	.1988	.1913		
			$.2103	$.1971
Jan.	$.1993	$.1888		
Feb.	.1995	.1888		
Mar.	.1963	.1866		
Apr.	.1928	.1855		
May	.1933	.1863		
June	.1940	.1875		
July	.1948	.1879		
Aug.	.1885	.1833		
Sept.	.1822	.1803		
Oct.	.1825	.1807		
Nov.	.1821	.1804		
Dec.	.1844	.1812		
			$.1908	$.1848
Jan.	$.1886	$.1823		
Feb.	.1902	.1812		
Mar.	.1904	.1812		
Apr.	.1908	.1809		
May	.1918	.1811		
June	.1899	.1783		
July	.1874	.1767		
Aug.	.1853	.1754		
Sept.	.1859	.1746		
Oct.	.1847	.1733		
Nov.	.1828	.1736		
Dec.	.1855	.1767		
			$.1878	$.1779

Exhibit No. 100

	Total Tons Per Year Eastern Plts.	Total Tons Per Year Western Plts.
1956	2074061	1906490
1957	1605384	2549001
1958	1478651	2506588

Exhibit No. 101

PITTSBURG - MIDWAY MINES

PARADISE MINE

	Shawnee		Johnsonville		Colbert		Gallatin	
1956	Tons	Cost	Tons	Cost	Tons	Cost	Tons	Cost
Jan.			10000	.1786				.1825
Feb.			12000	.1799				.1838
Mar.								
Apr.								
May								
June								
July								
Aug.								
Sept.								
Oct.								
Nov.								
Dec.								
1957								.1840
Jan.			15000	.1782				.1830
Feb.	15000			.1770				.1796
			15000	.1735				
Mar.								
Apr.								
May								
June								.1856
July			12000	.1795			12000	.1820
Aug.				.1759			15000	.1820
Sept.				.1759			15000	.1824
Oct.				.1763				.1824
Nov.			15000	.1763			20000	.1820
Dec.				.1759				
1958								.1798
Jan.	20000			.1759			20000	.1798
				.1759			20000	.1763
Feb.				.1724				.1755
Mar.	20000			.1715			20000	.1746
				.1707				
Apr.								
May								
June								
July								
Aug.								
Sept.								
Oct.								
Nov.				.1673			15000	.1690
Dec.								

[NOTE: Underscoring indicates award on bid.]

Exhibit No. 101—(Continued)

PITTSBURG - MIDWAY MINES

	Shawnee		COLONIAL MINE					
			Johnsonville		Colbert		Gallatin	
1956	Tons	Cost	Tons	Cost	Tons	Cost	Tons	Cost
Jan.								
Feb.								
Mar.								
Apr.								
May								
June								
July								
Aug.								
Sept.								
Oct.								
Nov.								
Dec.								
1957								
Jan.								
Feb.								
Mar.								
Apr.								
May								
June								
July								
Aug.								
Sept.								
Oct.								
Nov.								
Dec.		.1574		.1729	10000	.1876		
1958								
Jan.		.1595		.1987	10000	.1918		
Feb.	10000	.1543		.1720		.1870		
	10000	.1544		.1716		.1866		
	10000	.1544		.1716		.1866		
	10000	.1531		.1703		.1833		
Mar.		.1518		.1990	10000	.1840		
Apr.								
May								
June								
July								
Aug.								
Sept.								
Oct.								
Nov.								
Dec.								

[NOTE: Underscoring indicates award on bid.]

Exhibit No. 101—(Continued)

PEABODY MINES

VOGUE MINE

1956	Shawnee Tons	Shawnee Cost	Johnsonville Tons	Johnsonville Cost	Colbert Tons	Colbert Cost	Gallatin Tons	Gallatin Cost
Jan.								
Feb.								
Mar.								
Apr.								
May								
June								
July								
Aug.								
Sept.		.1693		.1780	10000	.1894		.1890
Oct.		.1688	12000	.1776		.1890		.1885
Nov.								
Dec.								
1957								
Jan.		.1665		.1770	10000	.1883		.1840
	10000	.1818		.1923		.2037		.1993
Feb.	12000	.1665		.1770		.1883		.1940
Mar.	10000	.1665		.1770		.1883		.1840
	10000	.1665		.1770		.1883		.1840
Apr.								
May								
June								
July								
Aug.								
Sept.								
Oct.								
Nov.								
Dec.								
1958								
Jan.								
Feb.								
Mar.								
Apr.								
May								
June								
July								
Aug.								
Sept.								
Oct.								
Nov.								
Dec.								

[NOTE: Underscoring indicates award on bid.]

Exhibit No. 101—(Continued)

PEABODY MINES

SKIBO MINE

	Shawnee		Johnsonville		Colbert		Gallatin	
1956	Tons	Cost	Tons	Cost	Tons	Cost	Tons	Cost
Jan.								
Feb.								
Mar.								
Apr.								
May								
June								
July								
Aug.								
Sept.		.1693		.1780	10000	.1894		
Oct.								
Nov.								
Dec.								
1957								
Jan.		.1665	10000	.1770		.1883		
	10000	.1818		.1923		.2037		.1993
Feb.	10000	.1665		.1770		.1883		
Mar.								
Apr.								
May								
June								
July								
Aug.	10000	.1905		.2067		.2212		
Sept.								
Oct.								
Nov.								
Dec.								
1958								
Jan.								
Feb.								
Mar.								
Apr.								
May								
June								
July								
Aug.								
Sept.								
Oct.								
Nov.								
Dec.								

[NOTE: Underscoring indicates award on bid.]

Exhibit No. 101—(Continued)

PEABODY MINES

GRAHAM MINE

	Shawnee		Johnsonville		Colbert		Gallatin	
1956	Tons	Cost	Tons	Cost	Tons	Cost	Tons	Cost
Jan.								
Feb.								
Mar.								
Apr.								
May								
June								
July								
Aug.								
Sept.								
Oct.								
Nov.								
Dec.								
1957								
Jan.								
Feb.								
Mar.								
Apr.								
May								
June								
July	10000	.1905		.2063		.2267		
Aug.								
Sept.	10000	.1883		.2045		.2190		
Oct.								
Nov.								
Dec.								
1958								
Jan.								
Feb.								
Mar.								
Apr.								
May								
June								
July								
Aug.								
Sept.								
Oct.								
Nov.								
Dec.								

Exhibit No. 102

WEST KENTUCKY & NASHVILLE COAL COMPANY

ATKINSON MINE

	Shawnee		Johnsonville		Colbert		Gallatin	
1956	Tons	Cost	Tons	Cost	Tons	Cost	Tons	Cost
Jan.								
Feb.	10000	.1871		.1983		.2101		.2027
	10000	.1874		.1983		.2101		.2027
Mar.	15000	.1875		.1983		.2100		
	10000	.1875		.1983		.2100		.2026
Apr.	10000	.1875		.1983		.2100		.2026
	10000	.1875		.1974		.2091		.2026
May	10000	.1875		.1974		.2091		.2026
	15000	.1875		.1974		.2091		.2091
June	15000	.1875		.1974		.2091		.2026
	15000	.1853		.1953		.2069		.2048
July	10000	.1853		.1948		.2065		.2048
Aug.	10000	.1853		.1948		.2065		.2048
	10000	.1853		.1944		.2056		.2048
Sept.	10000	.1887		.1978		.2090		.2081
	10000	.1852		.1939		.2051		.2047
Oct.	15000	.1831		.1917		.2030		
	10000	.1972		.2058		.2171		.2166
Nov.	10000	.1950		.2037		.2149		.2145
	16000	.1896		.1972		.2084		.2080
Dec.	15000	.1887		.1973		.2085		.2081
	10000	.1887		.1973		.2085		.2081
1957								
Jan.	10000	.1887		.1990		.2103		.2059
Feb.	10000	.1887		.1990		.2103		.2059
	10000	.1822		.1925		.2038		.1995
	20000	.1778		.1882		.1995		.1951
Mar.	20000	.1732		.1837		.1950		.1907
	20000	.1732		.1837		.1950		.1907
	10000	.1732		.1837		.1950		.1907
Apr.	10000	.1732		.1828		.1942		.1907
	10000	.1732		.1828		.1942		.1907
	10000	.1732		.1828		.1942		.1907
May								
June								
July								
Aug.								
Sept.								
Oct.								
Nov.								
Dec.								
1958								
Jan.								
Feb.								
Mar.								
Apr.								
May								
June								

Exhibit No. 102—(Continued)

WEST KENTUCKY & NASHVILLE COAL COMPANY

HOMESTEAD MINE

	Shawnee		Johnsonville		Colbert		Gallatin	
1956	Tons	Cost	Tons	Cost	Tons	Cost	Tons	Cost
Jan.								
Feb.								
Mar.								
Apr.								
May								
June								
July	10000	.1935		.2034		.2154		.2136
Aug.								
Sept.								
Oct.								
Nov.	10000	.1966		.2055		.2172		.2167
Dec.								
1957								
Jan.								
Feb.								
Mar.								
Apr.								
May								
June								
July								
Aug.								
Sept.								
Oct.								
Nov.								
Dec.								
1958								
Jan.								
Feb.	10000	.1513		.1689		.1842		.1739
	18000	.1513		.1689		.1842		
		.1513		.1689	26000	.1842		
Mar.	26000	.1513		.1689		.1842		
Apr.		.1513	26000	.1680		.1833		
May		.1513	15000	.1680		.1833		
	10000	.1513		.1680		.1746		
	20000	.1513		.1680		.1746		.1759
June	21000	.1513		.1680		.1746		.1759
		.1481		.1648		.1714	22000	.1727

[NOTE: Underscoring indicates award on bid.]

Exhibit No. 102—(Continued)

EAST DIAMOND MINE

	Shawnee		Johnsonville		Colbert		Gallatin	
1956	Tons	Cost	Tons	Cost	Tons	Cost	Tons	Cost
Jan.	12000	.1880		.1985		.2100		.2028
Feb.								
Mar.								
Apr.								
May								
June								
July								
Aug.								
Sept.								
Oct.								
Nov.								
Dec.								
1957								
Jan.								
Feb.	10000	.1722		.1824		.1934		.1891
Mar.								
Apr.								
May								
June								
July		.1582		.1734	10000	.1874		.1814
Aug.		.1582		.1738		.1878	10000	.1814
Sept.		.1582	10000	.1738		.1878		.1814
	10000	.1582		.1738		.1878		.1814
Oct.		.1582	10000	.1734		.1874		.1814
		.1582		.1734	10000	.1874		.1814
Nov.		.1582		.1734	10000	.1874		.1814
		.1557	10000	.1709		.1852		.1814
Dec.		.1557		.1709		.1852	10000	.1814
		.1557	10000	.1726		.1369		.1783
1958								
Jan.								
		.1557		.1726		.1874	10000	.1793
Feb.	10000	.1557		.1726		.1874		.1793
	10000	.1537		.1726		.1884		.1793
		.1527		.1696		.1844	10000	.1764
Mar.	10000	.1527		.1696		.1844		.1764
		.1527	10000	.1688		.1836		.1764
Apr.	10000	.1527		.1688		.1836		.1764
May		.1527		.1688	10000	.1836		.1764
June								

[NOTE: Underscoring indicates award on bid.]

Exhibit No. 102—(Continued)

UNIONTOWN MINE

	Shawnee		Johnsonville		Colbert		Gallatin	
1956	Tons	Cost	Tons	Cost	Tons	Cost	Tons	Cost
Jan.								
Feb.								
Mar.								
Apr.								
May								
June								
July								
Aug.								
Sept.								
Oct.								
Nov.								
Dec.								
1957								
Jan.								
Feb.								
Mar.	12500					.2180		
	12500					.2180		
	12500					.2180		
	25000					.1961		
Apr.	25000					.1961		
	25000					.1961		
	25000					.1961		
May								
June								
July								
Aug.								
Sept.	60000	.1675		.1720		.1804		
	60000	.1668						
	18000	.1668						
Oct.	60000	.1668						
	60000	.1668						
	60000	.1668						
	18000	.1649						
Nov.	60000	.1651						
	60000	.1649						
	18000	.1649						
	30000	.1649						
	30000	.1649						
Dec	30000	.1649						
	30000	.1616						
	30000	.1616						
1958								
1958								
Jan.	50000	.1599						
	50000	.1599						
	50000	.1599						
	50000	.1586						
Feb.	30000	.1777						
Mar.	30000	.1777						
	50000	.1586						
Apr.								
May								
June								

[NOTE: Underscoring indicates award on bid.]

Exhibit No. 103

DEBARDELEBEN COAL CORP.

	Shawnee		Johnsonville		Colbert		Gallatin		Widows Ck.	
1956	Tons	Cost	Tons	Cost	Tons	Cost	Tons	Cost	Tons	Cost
Jan.	10000					$.3176				
	10000					.3176				
Feb.	10000					.3136				
	10000					.3176				
Mar.	10000					.3176				
	10000					.3176				
Apr.	10000					.3176				
	10000					.3176				
May	10000					.3176				
	10000					.3176				
June	10000					.3176				
	10000					.3176				
July	10000					.3176				
	10000					.3176				
Aug.	10000					.3176				
	10000					.3501				
Sept.	10000					.3501				
Oct.	10000					.3501				
	10000					.3457				
Nov.	10000					.3675				
Dec.	10000					.3676				
	10000					.3676				
Total Tons Offered	220000									
Av. B.T.U. Cost Offered						$.3299				
1957										
Jan.	10000					$.3675				
Feb.										
Mar.	10000					.3675				
Apr.	10000					.3735				
May										
June										
July										
Aug.										
Sept.										
Oct.										
Nov.										
Dec.										
Total Tons Offered	30000									
Av. B.T.U. Cost Offered						$.3695				
1958										
Jan.										
Feb.										
Mar.										
Apr.										
May										
June										
July										
Aug.										
Sept.										
Oct.										
Nov.										
Dec.										
Total Tons Offered										
Av. B.T.U. Cost Offered										

Exhibit No. 103—(Continued)

TRUAX-TRAER COAL COMPANY

	Shawnee		Johnsonville		Colbert		Gallatin		Widows Ck.	
1956	Tons	Cost	Tons	Cost	Tons	Cost	Tons	Cost	Tons	Cost
Jan.										
Feb.										
Mar.	10000	$.1997								
	10000	.1997								
Apr.	10000	.2040								
	10000	.2040								
May	10000	.2040								
	10000	.2040								
June	10000	.2040								
	10000	.2040								
July	10000	.2040								
	10000	.2040								
Aug.	10000	.2040								
	10000	.2040								
Sept.	15000	.2040								
Oct.	15000	.2040								
	15000	.2132								
Nov.	20000	.2132								
Dec.										
Total Tons Offered	185000									
Av. B.T.U. Cost Offered		$.2046								
1957										
Jan.	20000	$.2088		$.2193		$.2306				$.2488
Feb.	20000	.2038								
Mar.	20000	.2088								
	20000	.2088		.2193		.2306				.2488
Apr.	20000	.2132								
May	20000	.2023								
June	20000	.2067								
July	20000	.2067								
Aug.	20000	.2067								
Sept.	20000	.2067								
Oct.	20000	.2067								
Nov.	20000	.2067								
Dec.	30000	.2040								
Total Tons Offered	270000									
Av. B.T.U. Cost Offered		$.2073		$.2193		$.2306				$.2488
1958										
Jan.										
Feb.	20000	$.2040								
Mar.	20000	.2040								
Apr.	20000	.2040								
May	20000	.2040								
June										
July										
Aug.										
Sept.										
Oct.										
Nov.										
Dec.	10000	.2036								
Total Tons Offered	90000									
Av. B.T.U. Cost Offered		$.2039								

Exhibit No. 104

1956	Company Awarded Term Contract	Destination	Term	Tons Per Wk.	Cost Per Million BTU	Av. Spot Cost This Plant This Month
Mar. 15	Clinchfield Fuel Co.,	John Sevier	18 Mo.	5000	$.2120	$.2135
Mar. 15	Clinchfield Fuel Co.,	John Sevier	15 Mo.	3800	.2179	.2135
Mar. 15	Clinchfield Fuel Co.,	John Sevier	12 Mo.	5000	.2216	.2135
July 12	Southern Coal Co., Inc.,	Colbert	36 Mo.	1000	.2067	.1889
July 12	Southern Coal Co., Inc.,	Colbert	36 Mo.	1100	.2068	.1889
July 12	Nashville Coal Co.,	Johnsonville	36 Mo.	1500	.1954	.1776
July 12	West Kentucky Co.,	Shawnee	36 Mo.	3000	.1853	.1666
Oct. 5	Island Creek Coal Sales,	Kingston	12 Mo.	700	.2147	.1944
Dec. 31	Nashville Coal Co.,	Gallatin	12 Mo.	1500	.2036	.1860
Dec. 31	Pittsburg-Midway,	Colbert	24 Mo.	4500	.2055	.1885
Dec. 7	Inter Mountain Coals,	Kingston	12 Mo.	5000	.2188	.1943
Dec. 7	Inter Mountain Coals,	Kingston	13 Mo.	5000	.2188	.1943
1957						
Apr. 22	Island Creek Coal Co.,	John Sevier	12 Mo.	1000	.2190	.1986
Apr. 4	Pittston-Clinchfield,	John Sevier	12 Mo.	4000	.2214	.1986
July 8	Pittston-Clinchfield,	Kingston	6 Years	7500	.2099	.1923
Sept. 19	Peabody-Southern,	Johnsonville	36 Mo.	1500	.1891	.1762
Sept. 19	Peabody-Southern,	Johnsonville	36 Mo.	1500	.1891	.1762
Sept. 19	Peabody-Southern,	Johnsonville	36 Mo.	2000	.1891	.1762
Sept. 19	Peabody-Southern,	Johnsonville	36 Mo.	1500	.1886	.1762
Dec. 20	West Kentucky,	Colbert	15 Mo.	3000	.1989	.1891
Dec. 20	Nashville Coal Co.,	Johnsonville	15 Mo.	2000	.1846	.1753
Dec. 20	West Kentucky,	Shawnee	36 Mo.	1000	.1682	.1611
Dec. 20	Nashville Coal Co.,	Shawnee	36 Mo.	4000	.1682	.1611
1958						
Mar. 31	Pittsburg-Midway,	Johnsonville	36 Mo.	2500	.1808	.1680
June 20	Nashville Coal Co.,	Johnsonville	24 Mo.	6000	.1773	.1658
June 20	Island Creek,	Kingston	12 Mo.	792	.1984	.1895
Nov. 6	Pittsburg-Midway,	Johnsonville	36 Mo.	2000	.1780	.1621
1959						
Jan. 9	Island Creek,	Kingston	12 Wks.	1000	.2022	.1850
Mar. 6	Pittston-Clinchfield,	John Sevier	18 Mo.	10000	.2048	.1926
May 28	Pittston-Clinchfield,	John Sevier	18 Mo.	10000	.1993	.1946
May 28	West Kentucky,	Gallatin	18 Mo.	5000	.1895	.1746
Sept. 30	Peabody Coal Co.,	Shawnee	5 Years	20000	.1884	.1529
Sept. 17	West Kentucky,	Shawnee	15 Years	16347	.1874	.1529
Sept. 17	Inter Mountain,	Kingston	5 Years	5000	.2252	.1969
Sept. 17	Ky.-Oak Coal Co.,	Kingston	10 Years	8500	.2136	.1969
Oct. 30	Ky.-Oak Coal Co.,	Kingston	36 Mo.	4000	.2136	.1960

An award on Oct. 1, 1959 to Peabody Coal Co., calling for 65000000 tons, the largest award ever made by TVA for the proposed new steam plant at Paradise Ky. is not listed in this comparison since there has been no spot awards for this plant with which to compare this term award.

Exhibit No. 107

TVA WEIGHTED AVERAGES

	1954		1955		1956		1957		1958	
	Kingston	John Sevier	Kingston	John Sevier	Kingston	John Sevier	Kingston	John Sevier	Kingston	John Sevier
January			.1709		.2153	.2105	.1955	.2030	.1871	.1900
February	.1760		.1723		.2208	.2112	.1961	.2029	.1861	.1922
March	.1723		.1728	.1895	.2203	.2135	.1904	.2022	.1891	.1917
April	.1745		.1732	.1842	.2343	.2165	.1870	.1986	.1893	.1922
May	.1745		.1733	.1890	.2335	.2188	.1898	.1968	.1902	.1933
June	.1665		.1740	.1895	.2152	.2165	.1917	.1962	.1895	.1903
July	.1659		.1731	.1826	.2049	.2108	.1923	.1973	.1864	.1883
August	.1645		.1762	.1945	.2006	.2097	.1850	.1920	.1839	.1866
September	.1657		.1802	.2033	.1950	.2031	.1796	.1848	.1855	.1862
October	.1646		.1845	.2048	.1944	.2005	.1792	.1857	.1845	.1849
November	.1647		.1967	.2045	.1954	.2009	.1790	.1851	.1801	.1851
December	.1646		.1969	.2045	.1943	.2033	.1825	.1863	.1831	.1878

Exhibit No. 110

Purchase Order from . . .
TAMPA ELECTRIC COMPANY
December 23, 1957

To Love & Amos Coal Company
P. O. Box 1112
Nashville, Tennessee

Ship to Gannon Station
Bill to Tampa Elec. Co., Purchasing Dept.
Ship Via P. O. Box 111, Tampa 1, Florida

This replaces our Purchase Order No. 15061 dated August 29, 1957:

Coal requirements for our Gannon Station approximately as follows:

Year 1958— 350,000 tons
Year 1959— 700,000 tons
Year 1960— 700,000 tons
Year 1961—1,000,000 tons

To increase as required to about 2,250,000 tons per year. Coal to have a minimum heat value equal to your Osborne mine coal and to be suitable for firing in our B & W cyclone burners. This order is contingent on a freight rate not to exceed $4.65 per ton. Price—$4.15 per ton.

Cancellable on 12 months notice by supplier or purchaser. In the event West Kentucky Coal Company should begin to perform under our original contract with Nashville Coal Company this agreement will terminate forthwith.

Exhibit No. 111

TAMPA ELECTRIC CO.

1959		1960	
Jan.	1773440	Jan.	5226490
Feby.	2787960	Feby.	4226640
Mch.	3485665	Mch.	2266255
Apr.	4283815	Apr.	2428550
May	5791890	May	2272590
June	2650035	June	883290
July	3156980	July	978465
Aug.	3203430	Aug.	1113230
Sept.	3507915	Sept.	1225815
Oct.	4217805	Oct.	1395200
Nov.	7756905	Nov.	1381590
Dec.	4986420	Dec.	1805285
Total	47602260		25203400

1961	
Jan.	1482090
Feby.	1574340
Mch.	1806625
	4863055

Exhibit No. 115

UNITED STATES

TONS OF COAL FOR STEAM-ELECTRIC UTILITIES

1951	NA
1952	104,193,000
1953	113,017,000
1954	113,897,000
1955	136,587,000
1956	153,490,000
1957	158,449,000
1958	152,514,000

TENNESSEE

TONS OF COAL FOR STEAM-ELECTRIC UTILITIES

1951	1,103,000
1952	1,937,000
1953	3,164,000
1954	3,835,000
1955	5,821,000
1956	8,460,000
1957	9,351,000—Cost $4.81
1958	9,043,000

VIRGINIA

TONS OF COAL FOR STEAM-ELECTRIC UTILITIES

1951	3,440,000
1952	3,319,000
1953	3,310,000
1954	3,259,000
1955	3,563,000
1956	3,993,000
1957	4,361,000—Cost $8.75
1958	4,742,000

TOP SIX STATES

IN USE OF STEAM-ELECTRIC UTILITY COAL, 1957

State	Coal Produced	Utility Use	Cost
New York	———	13,038,000	9.89
Pennsylvania	85,713,456	17,562,000	6.53
Illinois	45,932,114	18,057,000	5.43
Ohio	37,869,791	19,027,000	5.56
Indiana	16,149,310	12,761,000	4.91
Tennessee	7,052,844	9,351,000	4.81

Exhibit No. 117

	National Average Price (Ton) F.O.B. Mine	Excess National Average Price Over Phillips Average Price	Phillips Rail Tons	Excess of National Average Over Phillips Price X Tons
1956	$4.82	.90	14,128.70	$12,715.83
1957	$5.08	1.87 2/3	19,717.67	$37,003.49
1958	$4.86	1.72 2/3	25,603.03	$44,207.90

Exhibit No. 118

THICKNESS OF BITUMINOUS COAL AND LIGNITE SEAMS

The Bureau of Mines compiled and published detailed data on thickness of seams for coal mines in 1955.[2] Because of the importance of seam thickness in mining, these data for 1955 follow. See also figure 1.

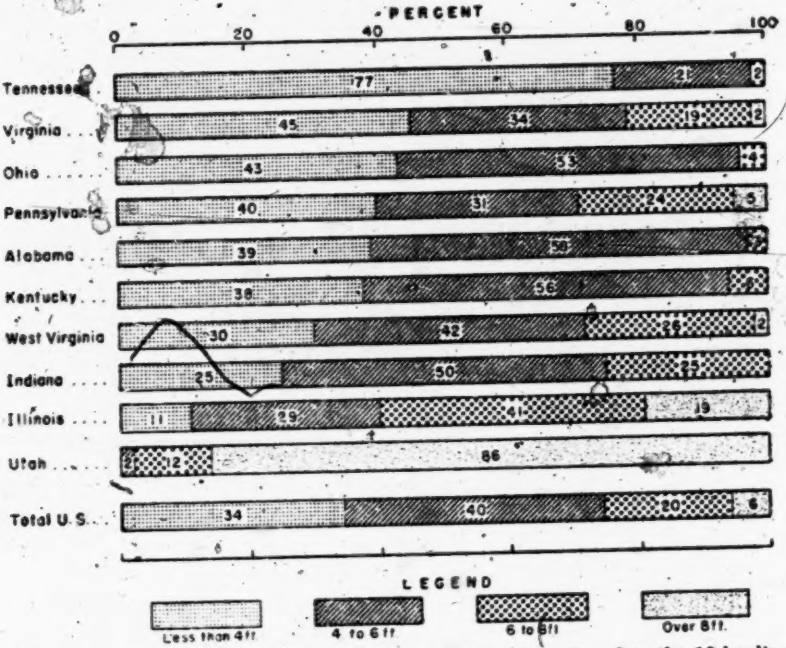


FIGURE 1.—Percentage of bituminous coal and lignite produced in the 10 leading coal-producing States and total United States, 1955, by thickness of seams mined.

[2] Young, W. H., and Anderson, R. L., Thickness of Bituminous-Coal and Lignite Seams at All Mines, and Thickness of Overburden at Strip Mines in the United States in 1955: Bureau of Mines Inf. Circ. 7812, 1957, 11 pp.

TABLE 29.—Summary of method of haulage from bituminous coal and lignite strip mines to tipple or ramp, in the United States, 1958, by States

State	Strip mines reporting method of haulage							Strip mines not reporting method of haulage—production (net tons)	Total strip production (net tons)
	Strip mines using trucks				Strip mines using rail, rail and truck, truck and train—production (net tons)	Production of strip mines reporting			
	Production (net tons)	Number of trucks	Average capacity per truck (net tons)	Average distance hauled (miles)		Quantity (net tons)	Percentage of total strip production		
Alabama	2,320,503	112	15.3	4.2		2,320,503	87.6	327,791	2,648,294
Alaska	557,836	42	14.8	3.3		557,836	100.0		557,836
Arkansas	279,345	37	7.9	3.4		279,345	100.0		279,345
Colorado	396,405	21	16.2	2.7		396,405	93.8	26,370	422,775
Illinois	19,753,672	393	25.6	3.3		19,753,672	90.3	708,309	20,521,981
Indiana	10,051,249	169	27.0	3.4		10,051,249	97.4	268,141	10,319,390
Iowa	889,051	72	9.8	4.8		889,051	95.8	38,606	927,657
Kansas	806,135	25	19.3	2.3		806,135	99.0	8,069	814,204
Kentucky	15,720,119	492	14.4	3.3		15,720,119	85.9	2,581,981	18,302,100
Maryland	311,902	42	14.2	5.9		311,902	63.4	180,409	492,311
Missouri	2,053,280	70	25.9	3.3		2,053,280	82.8	425,735	2,479,015
Montana:									
Bituminous	7,600	5	6.4	.3	19,241	26,241	100.0		26,241
Lignite	75,667	5	13.0	.7		75,667	97.0	2,319	77,986
Total Montana	82,667	10	10.0	.7	19,241	101,908	97.8	2,319	104,227
New Mexico	17,605	4	5.8	.6		17,605	100.0		17,605
North Dakota (lignite)	2,226,542	84	13.7	2.3		2,226,542	90.4	84,207	2,310,749
Ohio	17,990,567	757	15.0	6.1		17,990,567	82.7	3,768,778	21,759,345
Oklahoma	1,190,483	80	11.2	5.2		1,190,483	94.4	70,434	1,260,917
Pennsylvania	15,589,524	1,831	11.4	5.5		15,589,524	79.1	4,126,320	19,715,844
South Dakota (lignite)	19,571	3	6.0	.5		19,571	100.0		19,571
Tennessee	163,033	24	8.8	10.4		163,033	8.3	1,805,854	1,968,887
Virginia	1,385,961	103	10.9	5.3		1,385,961	79.8	351,963	1,737,924
Washington	4,880	2	10.0	1.0		4,880	100.0		4,880
West Virginia	6,166,644	745	13.5	6.4		6,166,644	74.2	2,143,774	8,310,418
Wyoming	1,245,702	27	28.3	1.9		1,245,702	98.4	19,750	1,265,452
Total	99,223,676	5,151	14.5	4.4	19,241	99,242,917	85.4	16,998,870	116,241,787

Exhibit No. 119
1665a

TABLE 25.—Number and production of bituminous coal and lignite strip mines and units of stripping and loading equipment in use in the United States, 1958, by States

State	Number of strip mines	Production (net tons)	Number of power shovels and dragline excavators											Number of carryall-scrapers	Number of bull-dozers
			By type of power					By capacity of dipper or bucket				By type of machine		Total		
			Electric	Diesel electric	Diesel	Gas	Steam	Less than 3 cubic yards	3-5 cubic yards	6-12 cubic yards	More than 12 cubic yards	Power shovels	Dragline excavators			
Alabama	35	2,648,294	14	13	61	1		62	12	12	3	69	20	89	6	87
Alaska	7	557,836			14	1		14	1			14	1	15	7	23
Arkansas	8	279,345	1	2	10			7	3	2	1	7	6	13	3	15
Colorado	7	422,775	1	1	8			6	1	2	1	5	5	10	5	11
Illinois	78	20,521,981	98	14	70	9		52	50	45	44	121	70	191	1	115
Indiana	41	10,319,390	46	10	50	19		50	37	18	20	70	55	125	6	82
Iowa	30	927,657	3		41	19		45	13	5		33	30	63	3	40
Kansas	13	814,204	6	3	10	2	1	13	4	2	3	14	11	22	1	16
Kentucky:																
Eastern	95	2,066,319	5	2	108	4		104	14	1		116	1	119	5	86
Western	70	16,235,791	35	8	99	3		70	35	23	17	104	41	145	5	109
Total Kentucky	165	18,302,100	40	10	207	7		174	49	24	17	222	42	264	5	194
Maryland	32	492,311			40	10		43	6	1		40	10	50		38
Missouri	25	2,479,015	16	4	16	7	2	20	9	5	11	30	15	45	1	23
Montana:																
Bituminous	3	26,241	3			1		1		1	2	3	1	4		2
Lignite	4	77,986	1		1	2		2	1	1		3	1	4	1	3
Total Montana	7	104,227	4		1	3		3	1	2	2	6	2	8	1	5
New Mexico	3	17,605			1	1		2				2		2		2
North Dakota (lignite)	36	2,310,809	20	4	15	15		35	8	10	1	45	9	54	22	49
Ohio	278	21,759,345	46	39	444	85		441	99	51	23	489	125	614	47	12
Oklahoma	14	1,260,917	5	5	16		1	33	6	4	4	48	9	27		533
Pennsylvania	565	19,715,844	10	119	1,109	107		1,057	200	79	9	909	376	1,345	24	1
South Dakota (lignite)	1	19,571		1	1			2	1			1	2	3	1	6
Tennessee	70	1,908,887		3	106	8		102	14	1		113	4	117	4	4
Virginia	42	1,738,924		10	44	6		50	9	1		60		60	9	4
Washington	1	4,880														
West Virginia	177	8,310,418	1	33	336	12		328	62	9	3	366	16	382	16	32
Wyoming	8	1,265,452	4	2	7	2	1	6	6	2		13	3	16	15	12
Total	1,646	116,241,787	316	273	2,607	315	8	2,507	591	275	142	2,704	811	3,515	173	2,472

Exhibit No. 121

1667a

Tennessee Mines

Number and Production By Class

Year	CLASS 1 500,000 Tons And Over	CLASS 2 200,000 To 500,000 Tons	CLASS 3 100,000 To 200,000 Tons	CLASS 4 50,000 To 100,000 Tons	CLASS 5 10,000 To 50,000 Tons	CLASS 6 Less Than 10,000 Tons	TOTAL Mines Production
1955	None	5 — 1,459,512	9 — 1,372,395	14 — 927,094	90 — 1,846,555	386 — 1,447,288	504 — 7,052,844
1959	None	5 — 1,579,617	2 — 222,596	12 — 771,766	103 — 2,036,678	358 — 1,252,067	480 — 5,912,724

Exhibit No. 123

Supplementary Summary Chart of

Exhibit No. 113

State	Delivered Price	Utility Tonnage
Tennessee	$4.81	9,351,000
Alabama	4.71	6,481,000
West Virginia	4.29	6,296,000
Kentucky	4.25	6,687,000

Exhibit No. 138

TERREO BLOCK COMPANY
Eccles, West Virginia

January 6, 1955

Bureau of Information
Washington, D. C.

Dear Sir;

Will you please inform me where that I can get information about the eligibility of requirements to receive a pension from the United Mine Workers Welfare and Retirement Fund;

I understand that there is a book of regulations on this but I do not know where to purchase it from,

Will you please advise;

/s/ Clem Terreo

* * *

January 18, 1955

Mr. Clem Terreo
Terreo Block Company
Box 134
Eccles, West Virginia

Dear Mr. Terreo:

Your letter of January 6, 1955 addressed to Bureau of Information has been referred to this office for attention.

Copies of Fund regulations are not available for public distribution. Consequently, we cannot comply with your request.

Sincerely yours,

Josephine Roche, Director
UMWA Welfare and Retirement Fund

Exhibit No. 138—(Continued)

Eccles, West Virginia
Jan. 27, 1955

Josephine Roche, Director
U.M.W.A. Welfare and Retirement Fund
907 15th Street, N. W.
Washington 5, D. C.

Dear Madam:

I have worked in the coal mines in southern West Virginia all of my life, and desire to apply for benefits from the Welfare and Retirement Fund. I last worked in June, 1946, and have not since held membership in a Local Union.

Please furnish me at once the necessary forms and instructions for application for benefits from the Fund.

Yours truly,
/s/ Clem Terreo,
Eccles, West Va.

* * *

February 4, 1955

Mr. Clem Terreo
Eccles
West Virginia

Dear Mr. Terreo:

This will acknowledge receipt of your letter of recent date requesting forms and instructions for making application for Fund benefits.

We are enclosing forms on which you can furnish us with information necessary to ascertain your eligibility for Fund benefits. Please fill out all of the blanks on Form DO-1 listing all data requested to the best of your knowledge; also complete the Previous Employment Record listing your service in the coal industry year by year beginning with 1925 and continuing until your retirement.

As certification of your service prior to 1937, you are required to obtain, if possible, a statement from each company with

Exhibit No. 138—(Continued)

whom you claim employment. These statements should outline the exact dates of your employment and give your job classification. To be acceptable, it must be written on official company stationery and signed by a responsible representative of the company. If a company statement cannot be obtained, you must explain why this is not possible. In addition to company statements, it is required that you submit at least two forms 14-P for each period of employment claimed before 1937. These forms must be completed only by persons who actually worked with you.

Please return the completed forms to this office together with documentary proof of your age. It is necessary that the Preliminary Application form be signed before a Notary Public. We shall communicate with you at a later date regarding your status.

Sincerely yours,

Josephine Roche, Director
UMWA Welfare & Retirement Fund

* * *

Exhibit No. 138—(Continued)

PRELIMINARY APPLICATION
Information About Miner

Name Clem Terreo SS # 233 12 2155
Address Eccles Raleigh County West Virginia
Date of Birth Sept. 6, 1889 Place of Birth Italy
Is miner a member of the United Mine Workers of America?
Not at present time; If "Yes" list _____ and _____
(Yes) (No) (Local Union No.) (District No.)
Is miner presently employed? No.
(Yes) (No)
If "Yes", name of company _____
Job classification _____
Place of last employment in the Coal Industry Eccles, W. Va.
Dates of last employment in the Coal Industry, from Nov. 1916 to June 12, 1946.
Job Classification Armature winder since 1924
List all employment since leaving the Coal Industry—

Place	Date Began	Date Terminated	Type Work
Eccles, W. Va.	June 13, 1946	Nov. 1, 1954	Block Plant

/s/ Clem Terreo
Signature of Miner

State of West Virginia)
) SS
County of Raleigh)

Subscribed and sworn to before me, T. R. Wilson, Jr., a Notary Public, this 8th day of February, 1955

/s/ J. R. Wilson, Jr.
Notary Public

My commission expires June 15, 1959

Exhibit No. 138—(Continued)

PREVIOUS EMPLOYMENT RECORD

Year	From Mo.	To Mo.	Name of Coal Company	Location of Coal Co. Town	State	Type Work
1916	Nov.	Dec.	New River Colleries	Eccles,	West Va.	Mechanical
1917	Jan.	Dec.	" " "	" "	"	"
1918	Jan.	Dec.	" " "	" "	"	"
1919	Jan.	June	" " "	" "	"	"
1919	June	Dec.	" " "	" "	"	Loader
1920	Sept.	Dec.	" " "	" "	"	Coil maker
1921	Jan.	Dec.	" " "	" "	"	" "
1922	Jan.	Dec.	" " "	" "	"	" "
1923	Jan.	Sept.	" " "	" "	"	" "
1923	Sept.	Dec.	Crab Orchard Imp.	Eccles,	West Va.	Coil Maker
1924	Jan.	Dec.	" " "	" "	"	Armature winder
1925	Jan.	Dec.	" " "	" "	"	" "
1926	Jan.	Dec.	" " "	" "	"	" "
1927	Jan.	Dec.	" " "	" "	"	" "
1928	Jan.	Dec.	" " "	" "	"	" "
1929	Jan.	Dec.	" " "	" "	"	" "
1930	Jan.	Dec.	" " "	" "	"	" "
1931	Jan.	Dec.	" " "	" "	"	" "
1932	Jan.	Dec.	" " "	" "	"	" "
1933	Jan.	Dec.	" " "	" "	"	" "
1934	Jan.	Dec.	" " "	" "	"	" "
1935	Jan.	Dec.	" " "	" "	"	" "
1936	Jan.	Dec.	" " "	" "	"	" "
1937	Jan.	Dec.	" " "	" "	"	" "
1938	Jan.	Dec.	" " "	" "	"	" "
1939	Jan.	Dec.	" " "	" "	"	" "
1940	Jan.	Dec.	" " "	" "	"	" "
1941	Jan.	Dec.	" " "	" "	"	" "
1942	Jan.	Dec.	" " "	" "	"	" "
1943	Jan.	Dec.	" " "	" "	"	" "
1944	Jan.	Dec.	" " "	" "	"	" "
1945	Jan.	Dec.	" " "	" "	"	" "
1946	Jan.	June	" " "	" "	"	" "

Pension Received Feb. 14, 1955

Exhibit No. 138—(Continued)

March 2, 1955

Mr. George J. Titler, President
District 29, U.M.W.A.
Chilson Avenue at Raleigh Road
Box 511
Beckley, West Virginia

Dear Mr. Titler:

Mr. Clem Terreo of Eccles, West Virginia, has inquired about his eligibility for Fund benefits. He states that he was employed by the Crab Orchard Improvement Company of Eccles, West Virginia, as an "armature winder" from 1924 to 1946.

Will you please advise if employment of this nature is classified under your District contract.

Sincerely yours,

Josephine Roche, Director
UMWA Welfare and Retirement Fund

* * *

UNITED MINE WORKERS OF AMERICA
Beckley, West Virginia

March 9, 1955

Miss Josephine Roche, Director
UMWA Welfare and Retirement Fund
907 Fifteenth St., N. W.
Washington 5, D. C.

Dear Miss Roche:

In reply to your letter of March 2, 1955, concerning the work performed by Mr. Clem Terreo of Eccles, West Virginia, between 1924 and 1946, please be advised that the classification as an "armature winder", which he was doing during this time is considered covered employment under the Contract in this District.

It is our information that Mr. Clem Terreo left the mining industry on June 12, 1946, and since that time operated a dairy, hauled mine timbers, operated a saw mill, and last operated

Exhibit No. 138—(Continued)

a cement block plant. During this time he failed to maintain his membership in the United Mine Workers of America.

Sincerely yours,

Geo. J. Titler, President
District 29, UMWA

* * *

Beckley, West Virginia
March 16, 1955

Miss Josephine Roche
U. M. W. A. Welfare & Retirement Fund
907 15th St., N. W.
Washington 5, D. C.

Dear Miss Roche:

On February 10, 1955, I sent by registered mail my application for benefits to you as Director of the Welfare and Retirement Fund, and have heard nothing from you since that time. Kindly acknowledge receipt of my application papers and advise me as to the approximate time I should hear further from you in this matter.

Since forwarding my application, I have moved to the following address, and please change your records accordingly: 322 Burgess Street, Beckley, W. Va.

Yours very truly,
/s/ Clem Terreo
322 Burgess St.
Beckley, W. Va.

* * *

Law Offices
ASHWORTH AND WILSON
Beckley, West Virginia
April 20, 1955

Miss Josephine Roche
U. M. W. A. Welfare and Retirement Fund
907 15th St., N. W.
Washington 5, D. C.

Dear Miss Roche:

We have been requested by Clem Terreo, 322 Burgess Street

Exhibit No. 138-(Continued)

of this city, to write to you concerning his application for benefits from the Welfare and Retirement Fund. He states that he forwarded his application for benefits on Feb. 10, 1955, and on March 16, 1955, he wrote again requesting your acknowledgment of receipt of the application and thus far he has heard nothing with regard to the matter.

Please advise the status of this application and the approximate time Mr. Terreo may expect to hear from you regarding this matter.

Yours very truly,
ASHWORTH & WILSON,
By /s/ T. R. Wilson Jr.

* * *

United Mine Workers of America
WELFARE AND RETIREMENT FUND
INTER-OFFICE CORRESPONDENCE

Date: May 3, 1955

To: Miss Roche
From: Val J. Mitch
Subject: Clem Terreo, Eccles, West Virginia

I have carefully reviewed the file in the above case and in my opinion Mr. Terreo meets the requirements of eligibility for pension.

* * *

United Mine Workers of America
Welfare and Retirement Fund
907 Fifteenth Street, Northwest
Washington 5, D. C.

File No. 78169
Name Clem Terreo
District No.
Local Union No.

Authorization for Pension

Notice to Comptroller, U. M. W. A. Welfare and Retirement Fund:

Exhibit No. 138—(Continued)

The following pension of one hundred ($100) dollars per month is hereby authorized, the first payment to be for the month of June, 1955.

Name of Pensioner Clem Terreo
Address 322 Burgess Street
Beckley, West Virginia

Wife (Name)

This pension is subject to suspension at any time by the Trustees for any reason stated in the rules and regulations heretofore adopted by the Trustees, and shall be subject to termination at any time by the Trustees, for any matter, cause or thing, of which they shall be the sole judges and without assignment of reason therefor.

REMARKS:

DATE:— May 4, 1955

By /s/ Donald L. McFarland
Supervisor of Review Unit, Pension Benefits

NOTICE TO PENSIONER:

Pension payments will be made the first day of each month and should reach you at your address of record shortly thereafter. If the address shown above is incorrect in any detail please notify the Comptroller of the Fund as soon as possible. Whenever your address changes, notify the Comptroller of the Fund at once to insure prompt receipt of your payments.

Exhibit No. 139

January 29, 1953.

THE TRUSTEES OF THE UMWA WELFARE AND RETIREMENT FUND, AT THEIR MEETING JANUARY 28, 1953, ADOPTED NEW REGULATIONS GOVERNING PENSIONS

Effective January 29, 1953, an applicant must meet the following eligibility requirements for a pension:

1. He must be sixty (60) years of age or over when he applies.

2. He must have retired from, or ceased work, in the coal industry after May 28, 1946.

3. He must have completed twenty (20) years of classified service in the coal industry within the twenty-five (25) years immediately preceding his application for a pension.

4. Unless he was regularly employed in the coal industry immediately prior to May 28, 1946, the twenty (20) years of required service within the ~~twenty-five (25)~~ years immediately preceding filing of application must all have been worked after May 28, 1946.

5. He must submit proof satisfactory to the Fund that he meets these eligibility requirements.

All Applications for Pension Which Had Not Been Approved for Payment by the Fund at the Close of Business January 28, 1953, Are Subject to These Regulations.

JOSEPHINE ROCHE, *Director*
UMWA Welfare and Retirement Fund

Form U.P. (1-29-53)

Steve:

Read these, I don't think under these new Rules it pays you to Belong. It seems like a waste of money, unless you can come back to the coal industry soon. Your Hospitalization is cancelled. Death Benefit is out, and you don't have a chance for a Pension unless you come back soon.

Exhibit No. 139—(Continued)

May 27, 1957

Memorandum of Office Visit

From: Steve Molnar & Son
Corres. File—SS#210-07-3147

Mr. Molnar and his son visited this office on this date to inquire into the possibility of his qualifying for pension benefits. He said that he became 60 years of age in March of this year and had worked continuously in the coal industry from 1917 to 1950, having last worked for the Johnstown Coal & Coke Co., Johnstown, Pa. Mr. Molnar said that he had been a member of the Union as long as the Union was in existence, up to 1950. After retiring from the mines he moved to Baltimore, Maryland and continued paying unemployed dues until some time in 1952 when he began working. He then paid working dues of $4 a month until approximately April 1953. He said the reason he stopped paying dues was because Matthew Jackson, 232 Highway St., Local Union 472, South Fork, Pa., had mailed him a copy of the new pension regulations adopted January 28, 1953 (20/25 years) and suggested that he stop paying dues as he was not eligible for Hospital and Medical Care Benefits or Death Benefits and that he could not qualify for a pension under the new regulations.

I explained the requirements to Mr. Molnar and his son and told them that we would mail him a Preliminary Application for pension which he could return direct to this office. I explained the procedure to be followed in completing the necessary forms. While in the office Mr. Molnar signed an Authorization to Secure Social Security Administration Records.

Mr. Molnar had with him a Hungarian Birth Certificate which he said was issued before he came to this country in 1913. I told him to submit this document with the other papers and suggested that he obtain, in addition, other documentary proof of age, such as a Census Record or a statement from the company he worked for in 1920. He said that he had a Naturalization Certificate which he would submit.

Exhibit No. 139—(Continued)

PRELIMINARY APPLICATION

Information About Miner

Name Steve John Molnar SS # 210-07-3147
Address 846 West 36th St.—Baltimore 11, Md.
Date of Birth Mar. 28, 1897 Place of Birth Szadalmasi, Hungary
Is miner a member of the United Mine Workers of America?
Yes; If "Yes", list 472 and 2
(Yes) (No) (Local Union No.) (District No.)
Is miner presently employed? Yes
(Yes) (No)
If "Yes", name of Company Maryland Casualty Co.
Job Classification Gardener
Place of last employment in the Coal Industry Johnstown Coal & Coke Co., Portage, Pa.
Dates of last employment in the Coal Industry, from Oct. 1932 to Aug. 1949
Job Classification Pick & Machine Loader
List all employment since leaving the Coal Industry—

Place	Date Began	Date Terminated
Maryland Casualty Co., Balt., Md.	July 1952	

Type Work
Gardener

/s/ Steve Molnar
Signature of Miner

State of Maryland)
) SS
City of Baltimore)

Subscribed and sworn to before me, Ada M. Thomas, a Notary Public, this 4th day of June, 1957.

/s/ Ada M. Thomas
Notary Public

My Commission expires May 4, 1959

Exhibit No. 139—(Continued)

PREVIOUS EMPLOYMENT RECORD

Year	From Mo.	To Mo.	Name of Coal Company	Location of Coal Co. Town	State	Type Work
1927	APR.	DEC.	C. A. HUGHES & Co.	CRESSON	PENNA.	COAL LOADER
1928	JAN.	DEC.	" " "	"	"	" "
1929	JAN.	DEC.	" " "	"	"	" "
1930	JAN.	APR.	" " "	"	"	" "
1930	MAY	DEC.	PENNSYLVANIA COAL CO.	PORTAGE	PENNA.	" "
1931	JAN.	DEC.	" " "	"	"	" "
1932	JAN.	SEPT.	" " "	"	"	" "
1932	OCT.	DEC.	JOHNSTOWN COAL & COKE	PORTAGE	PENNA.	" "
1933	JAN.	DEC.	" " "	"	"	" "
1934	JAN.	DEC.	" " "	"	"	" "
1935	JAN.	DEC.	" " "	"	"	" "
1936	JAN.	DEC.	" " "	"	"	" "
1937	JAN.	DEC.	" " "	"	"	" "
1938	JAN.	DEC.	" " "	"	"	" "
1939	JAN.	DEC.	" " "	"	"	" "
1940	JAN.	DEC.	" " "	"	"	" "
1941	JAN.	DEC.	" " "	"	"	" "
1942	JAN.	DEC.	" " "	"	"	" "
1943	JAN.	DEC.	" " "	"	"	" "
1944	JAN.	DEC.	" " "	"	"	" "
1945	JAN.	DEC.	" " "	"	"	" "
1946	JAN.	DEC.	" " "	"	"	" "
1947	JAN.	DEC.	" " "	"	"	" "
1948	JAN.	DEC.	" " "	"	"	" "
1949	JAN.	AUG.	" " "	"	"	" "

P-5
(rev. 3-22-54)

Exhibit No. 139—(Continued)

SUPPLEMENTAL EMPLOYMENT RECORD

Quarters Ending From	Quarters Ending To	Employer	U.M.No.	Kind of Work
6/37	6/38	Johnstown Coal & Coke	498	Loader
12/38	6/39	Johnstown Coal & Coke	498	"
6/39		Johnstown Coal & Coke	498	"
6/38	9/38	Gorman Shaft Coal	1318	"
9/38	3/39	Gorman Run Mining Co.	1318	"
9/45	12/45	Kirby Transfer Storage Co., Inc.	Not Coal Co.	Parking Car yards
12/49	9/50	Lilly Tenscreek Coal	435	"
3/51	9/51	William L. Driskill	Not Coal Co.	Farmer
9/51		Mrs. Walter Winkenevarder	Not Coal Co.	gardener
9/52	9/56	Maryland Casualty Co.	Not Coal Co.	gardener

Exhibit No. 139—(Continued)

United Mine Workers of America
Welfare and Retirement Fund
907 Fifteenth Street,
Northwest
Washington 5, D. C.

File No. 89945
Name MOLNAR, Steve
District No.
Local Union No.

Authorization of Pension

The application of Steve Molnar
Address 846 West 36th Street, Baltimore, 11, Maryland
is hereby approved. The first payment is for the month of September, 1957.
DATE: 8-29-57

By /s/ Donald L. McFarland
Review Unit, Pension Benefits

NOTICE TO PENSIONER:

This pension is subject to suspension at any time by the Trustees for any reason stated in the rules and regulations heretofore adopted by the Trustees, and shall be subject to termination at any time by the Trustees, for any matter, cause or thing, of which they shall be the sole judges and without assignment of reason therefor.

Exhibit No. 140

United Mine Workers of America
1408 First National Bank & Trust Co. Building
Lexington, Kentucky

February 15, 1956

Mr. John Shenkarik
Box 301
Olive View, California

Dear Sir:

Your correspondence of January 13, 1956, concerning pension benefits, has been referred to this office for reply.

According to the rules and regulations of the Welfare and Retirement Fund, as set up by the Trustees of the Fund, the eligibility requirements for Pension Benefits are as follows:

1. Applicant must be 60 years of age or over when he applies.
2. Applicant must have retired from or ceased work in the Bituminous Coal Industry after May 29, 1946, following regular employment in a classified job for an operator signatory to the National Bituminous Coal Wage Agreement.
3. Applicant must have been regularly employed in a classified job in the coal industry immediately prior to May 29, 1946.
4. Applicant must have completed twenty years of classified service in the coal industry within the thirty years immediately preceding the date of his application for pension.

Your application for Pension Benefits should be made direct to the Welfare and Retirement Fund. Their address is as follows:

UMWA Welfare and Retirement Fund
907 Fifteenth Street NW
Washington 5, D. C.

Yours very truly,
/s/ Sam Caddy, Jr., Secy-Treas.
District 30, UMWA

Exhibit No. 140—(Continued)

March 5, 1956

Mr. John Shenkarik
Box 301
Olive View, California

Dear Mr. Shenkarik:

Your letter of February 20, 1956 has been received.

We regret that it will not be possible to give you any definite information concerning your eligibility for miner's pension because eligibility can only be determined after a miner's application and the necessary supporting evidence is received and examined at the Fund.

To qualify for pension under current Trustee regulations an applicant must establish that he is sixty years of age, that he was regularly employed in a classified job in the coal industry immediately prior to May 29, 1946 with retirement from the coal industry on or after that date following regular employment in a classified job for an operator signatory to a National Bituminous Coal Wage Agreement. He must also establish proof of twenty years' classified service in the coal industry within the thirty year period immediately preceding the date of his application.

If you feel that you meet the requirements cited above and are a member of the United Mine Workers of America, you may obtain an application for pension from your Local Union. If you are not a member of that organization, you should direct your inquiry to this office.

We trust this information will be of some assistance to you.

Sincerely yours,
Donald L. McFarland, Supervisor
Review Unit, Pension Benefits

Exhibit No. 140—(Continued)

UNITED MINE WORKERS OF AMERICA

WELFARE AND RETIREMENT FUND

907 Fifteenth Street, N. W., Washington 5, D. C.

APPLICATION FOR PENSION

By filing this application, no rights accrue to the applicant until the benefit is authorized for payment. The burden of proving eligibility for this benefit is on the applicant.

All Questions Must Be Answered—Failure to Do So Will Delay Processing

1. District No.—30 Local Union No.—6281 Date—April 2, 1956
2. Name (Print)—John (First) (None) (Middle) Shenkarik (Last)
3. Social Security Number 4 0 1 0 1 6 2 2 5
4. Address—Olive View Sanatorium (Street and Number) — Olive View (City), California (State)
5. Date of Birth—August (Month) 29 (Day) 1890 (Year) Age—66

Proof of age must be attached to this application. Naturalization and immigration records, marriage records, civil or church records of birth, passports, census records, military records, or any other similar type of documentary evidence should be submitted.

6. Name of Father—Lazor (First) Shenkarik (Last) Place of Birth—Kieve, Ukrainia
7. Name of Mother—Mary (First) Poleshsuk (Maiden) Last Place of Birth—Kieve, Ukrainia
8. Name of Wife, if living _____ (First) (Middle) (Last) Age _____
9. Have you ever filed application for other benefits with this Fund before?— No
10. If "yes", state benefits applied for _____ I have worked in the mines 27 years.
11. Have you ceased working in the coal industry?—Yes. (Yes) (No) If "yes" list retirement date—Nov. 15, 1946 (Month, Day, Year) and reason for retirement—Doctors Suggestions, Lung Condition.
12. If still working, give name of coal company _____

If in your required 20 years of service you have lost three months or more from work during any year as a result of an accident in the coal industry for which you received Workmen's Compensation, attach a copy of your award.

13. Names and ages of Dependent Children under 18 (List only those living in your home):

2. Full Name of Child—None (First) (Last) Date of Birth (Month Day Year)

1. Full Name of Child—None (First) (Last) Date of Birth (Month Day Year)

Exhibit No. 140—(Continued)

THIS COPY IS FOR THE DISTRICT OFFICE

Instructions Governing Proof of Your Employment Before 1937 Are Enclosed
(See the enclosed Form 14P)

If you claim service in the Armed Forces attach a copy of your Discharge.

15. **Certification By Applicant**

Any person, who knowingly and willfully falsifies any records or makes any false representations or statements or withholds any information in order to secure for himself or for any other person a Fund benefit, shall be barred from receiving any benefits from the Fund; and in any case where payment has been made as a result of such false statements or omission of such information, the recipient of benefits will be required to reimburse the Fund in the amount received from the Fund.

(If signature is made by mark (X) two witnesses who know the applicant must sign.)

_____ (*Witness*)

_____ (*Witness*)

I certify that the statements made by me in this application are true and correct.

Applicant

sign here John Shenkarik
DO NOT print or stamp

16. **Certificate of Local Union**

This is to certify that the above applicant is a member of Local Union No. _____ located at _____, as of (latest date) _____, and has been a member of this Local Union since _____
Month Day Year

Dated this _____ day of _____ 19 _____

PLACE UNION SEAL HERE

_____ President, L. U. No. _____

_____ Vice-President

_____ Secretary's Address

_____ Financial Secretary

17. **Certificate of District No.** _____

This is to certify that applicant is a member in good standing of the United Mine Workers of America.

Dated this _____ day of _____, 19 _____

_____ Authorized District Signature

Exhibit No. 140—(Continued)

EMPLOYMENT RECORD

List separately year-by-year in the space provided below all employment in the coal industry for the past thirty years. Start with your first employment in the coal industry in this period list all employers up to and including the last. Your employment for each year must be listed on a separate line. If you had more than one employer during any year list the period of employment with each on a separate line. Include any period of service in the Armed Forces.

Year	From Mo.	To Mo.	Name of Coal Company	Location of Coal Company Town	State	Mine No.	Local Union No.	Type Work
1919			Wilkes-Barre Coal Co.	Plymouth	Penna.	5		Labor
1920			" " "	" "	"	"		
1921			Lehigh Valley Coal Co.	Wire Run	Penna.	"		Miner
1922			" " " "	" "	"			"
1923			" " " "	" "	"			"
1924			United Coal & Coke Supply	Lynch	Kentucky	East		"
1925			" " " "	"	"	"		"
1926			" " " "	"	"	"		"
1927			" " " "	"	"	"		"
1928			" " " "	"	"	"		"
1929			" " " "	"	"	"		"
1930								"
1931			Copper-Lake Co.	Wheelwright	Kentucky			"
1932			" " "	"	"			"
1933			Consolidation Coal Co., Inc.	McRoberts	Kentucky	213	6281	"
1934			" " "	"	"	"	6281	"
1935			" " "	"	"	"	"	"
1936			" " "	"	"	"	"	"
1937			" " "	"	"	"	"	"
1938			" " "	"	"	"	"	"
1939			" " "	"	"	"	"	"
1940			" " "	"	"	"	"	"
1941			" " "	"	"	"	"	"
1942			" " "	"	"	"	"	"
1943			" " "	"	"	"	"	"
1944			" " "	"	"	212	"	"
1945			" " "	"	"	"	"	"
1946		Nov.						

Exhibit No. 140—(Continued)

United Mine Workers of America
Welfare and Retirement Fund
907 Fifteenth Street, Northwest
Washington 5, D. C.

File No. 83111
Name SHENKARIK, John
District No. 30
Local Union No.

Denial of Pension

The application of John Shenkarik
Address 487 S. Arizona Street, Los Angeles 22, California
Is hereby denied for the following reason:

#1 APPLICANT HAS NOT ESTABLISHED PROOF OF EMPLOYMENT BY AN OPERATOR SIGNATORY TO A NATIONAL BITUMINOUS COAL WAGE AGREEMENT AT TIME OF RETIREMENT.

#2 APPLICANT HAS NOT ESTABLISHED PROOF OF TWENTY (20) YEARS' CLASSIFIED SERVICE IN THE COAL INDUSTRY, WITHIN THE THIRTY (30) YEAR PERIOD IMMEDIATELY PRECEDING THE DATE OF HIS APPLICATION—April 2, 1926 to April 2, 1956.

#3 APPLICANT HAS NOT ESTABLISHED PROOF OF AGE REQUIREMENT OF SIXTY (60) YEARS.

According to evidence in our file, applicant was last employed in the coal industry by the International Harvester Corporation. Our records further show that this company was not signatory to a National Bituminous Coal Wage Agreement at the time of applicant's retirement. Thus, he does not meet the requirement outlined in #1 above.

Applicant has not submitted any evidence relating to his employment in the coal industry from April 2, 1926 to December 31, 1936. Therefore, credit for this period cannot be given at this time. Therefore, he has not established that he meets the requirement outlined in #2 above.

The photostatic copy of Discharge from Draft dated August 10, 1918 is not sufficient to establish the applicant's date of birth because his age at the time of issue is not shown. Accordingly,

Exhibit No. 140—(Continued)

he has not established that he meets the requirement outlined in #3 above.
Date: 7-16-56

By /s/ Donald L. McFarland
Review Unit, Pension Benefits

* * *

Los Angeles, Calif.
Mar. 4, 1956

United Mine Workers of America
Welfare & Retirement Fund
Wash D.C.

File No. 83111

Dear Sirs:

In reference to your letter of February 5, 1957 I am enclosing statements from United States Steel Corp., and Consolidation Coal Company. You also request information from Copper Lake Co. I wrote to Inland Steel Inc., of which Copper Lake is a division and have not received any response as of this writing.

As per your letter you stated Mine #13 of Consolidated Coal Co., as not in operation during 1933 thru 1936. However as you can see by their letter it was in operation.

Each of these companies have returned to me the forms 14-P, Stating that they should not fill them out company wise but should be completed by actual employee also your request.

This would be impossible as most of my co-workers during my mining employment were some years my elders and I sincerely doubt they are still alive, and if they should be I wouldn't know where to contact them, and if I could I'm sure they would be much too old to hold a pen and fill out such a blank. So its impossible for me to secure the form 14-P as your request. But surely in the United Mine Workers of America files is the record of my dues which I paid during my quarter of century service and hoping that you can secure what further information you may need from those files, as for my seeking further information I have no more turns to make I've written

Exhibit No. 140—(Continued)

my ex-employers various times now for information which they have furnished favorably, but I hate to keep requesting.

So hoping this can be sufficient Ill enclose the statements of Consolidation Coal Co., and United States Steel Corp.

Very truly Yours
/s/ John Shenkarik

* * *

Los Angeles, Calif.
Mar. 25, 1957

United Mine Workers of America
Welfare & Retirement Fund
Wash. 5 D. C.
Attn Mr. Donald L. McFarland

File No. 83111

Dear Sir:

Received your letter of March 19 in which you request information as to my duties with Consolidation Coal Co. from 1934 to 1946.

My duties were coal loader or hand loader at the mine, except for the last three years when the Company used machinery to load then my duty was shock fire. This was blasting the coal for the machinery to load.

All of my time with this particular company was on these two jobs. Both were union jobs and union dues paid at all times.

Hoping this will be sufficient information and will help my claim as it will soon be a year since I started my claim, and have given you about all the information I can gather. So hoping this will bring the wanted results I remain

Very truly Yours
/s/ John Shenkarik

Exhibit No. 140—(Continued)

United Mine Workers of America
Welfare and Retirement Fund
907 Fifteenth Street, Northwest
Washington 5, D. C.

File No. 83111
Name SHENKARIK, John
District No.
Local Union No.

Authorization for Pension

Notice to Comptroller, U. M. W. A. Welfare and Retirement Fund:

The following pension of one hundred ($100) dollars per month is hereby authorized, the first payment to be for the month of May, 1957.

Name of Pensioner John Shenkarik
Address 487 S. Arizona Street, Los Angeles 22, California
Wife (Name)

This pension is subject to suspension at any time by the Trustees for any reason stated in the rules and regulations heretofore adopted by the Trustees, and shall be subject to termination at any time by the Trustees, for any matter, cause or thing, of which they shall be the sole judges and without assignment of reason therefor.

REMARKS:
DATE:—4-19-57

By /s/ Donald L. McFarland
Supervisor of Review Unit, Pension Benefits

NOTICE TO PENSIONER:

Pension payments will be made the first day of each month and should reach you at your address of record shortly thereafter. If the address shown above is incorrect in any detail please notify the Comptroller of the Fund as soon as possible. Whenever your address changes, notify the Comptroller of the Fund at once to insure prompt receipt of your payments.

Exhibit No. 140—(Continued)

Not a Member—

Continue processing if meets requirement of elig—Refer to RTB.

JR

* * *

Note:

Do not mail copies of the Autho to the District nor the Local Union.

DLM

Exhibit No. 141

Rock Springs, Wyo.
Oct. 15, 1958.

Miss Josephine Roche, Director
U.M.W.A. Welfare and Retirement Fund

Dear Madam.

I applied for the United Mine Workers pension and am inclosing the copies of the time that I worked at each mine and my Birth Certificate. Had a talk with the District President District No. 22 of Wyoming and he advised me to send these papers, and he told me you would get in contact with him.

Yours Sincerely
/s/ Rico Boggio
740 Rugby Ave.
Rock Springs, Wyoming

* * *

October 22, 1958

Mr. Rico Boggio
740 Rugby Avenue
Rock Springs, Wyoming

Corres. File

Dear Mr. Boggio:

This will acknowledge your letter of October 15, 1958 with enclosures regarding your eligibility status with respect to Pension Benefits from the Fund.

To qualify for Pension Benefits under current Trust Fund regulations, an applicant must establish that he is sixty years of age or over, that he has completed twenty years' classified service in the coal industry within the thirty years immediately preceding his application, that he retired after May 29, 1946, the date the Fund was established, following regular employment in a classified job in the mine of an operator signatory to the Contract, and that he was regularly employed in a classified job in the coal industry immediately prior to May 29, 1946.

If you wish to be considered for Pension Benefits it will be necessary for you to submit an application to the Fund for consideration. Miners who are members of the United Mine

Exhibit No. 141—(Continued)

Workers of America may obtain the necessary application forms and instructions at their Local Union. Miners who are not members of that organization should write direct to this office requesting the necessary forms.

Sincerely yours,

Josephine Roche, Director
UMWA Welfare and Retirement Fund

* * *

Rock Springs, Wyo.
Oct. 25, 1958

Josephine Roche, Director
U.M.W.A. Welfare and Retirement Fund

Dear Miss Roche.

Received your letter of Oct. 22, 1958 in answer to my request for pension.

And I am hereby asking for the applications forms and any instructions necessary.

I am not now a member of United Mine Workers union But always was a member am willing to pay all the back dues or what ever has to be payed to reinstate myself in union.

My Birth Certificate was with those papers I sent to you.

Sincerely yours
/s/ Rico Boggio
740 Rugby Ave.

* * *

PRELIMINARY APPLICATION
Information About Miner

Name Rico Boggio SS # 520-03-7189
Address 740 Rugby Ave., Rock Springs, Wyoming
Date of Birth May 13th, 1897 Place of Birth Italy
(See proof of age for location)
Is miner a member of the United Mine Workers of America?

Exhibit No. 141—(Continued)

No; If "Yes", list _____ and _____
(Yes) (No) (Local Union No.) (District No.)
Is miner presently employed? No
(Yes) (No)

If "Yes", name of company_____
Job classification_____
Place of last employment in the Coal Industry U. P. at Stansbury, Wyo.
Dates of last employment in the Coal Industry, from Mar. 1951 to Sept. 1951
Job Classification Moterman
List all employment since leaving the Coal Industry—

Place	Date Began	Date Terminated	Type Work
U. P. Railroad Green River, Wyo.	Sept. 26, 1951	Still Working	Store Helper

/s/ Rico Boggio
Signature of Miner

State of Wyoming)
) SS
County of Sweetwater)

Subscribed and sworn to before me, Paul _____, a Notary Public, this 5 day of November, 1958

_____
Notary Public

My commission expires 7-26-59

Exhibit No. 141—(Continued)

PREVIOUS EMPLOYMENT RECORD

Year	From Mo.	To Mo.	Name of Coal Company	Location of Coal Co. Town	State	Type Work
1928	Sept.	Dec.	Gunn Quealy	Quealy,	Wyo.	Driver
1929	Jan.	Dec.	" "	"	"	"
1930	Jan.	Dec.	" "	"	"	"
1931	Jan.	Dec.	" "	"	"	"
1932	Jan.	Dec.	" "	"	"	Moterman
1933	Jan.	Dec.	" "	"	"	"
1934	Jan.	Dec.	" "	"	"	"
1935	Jan.	Dec.	" "	"	"	"
1936	Jan.	Dec.	" "	"	"	"
1937	Jan.	Dec.	" "	"	"	"
1938	Jan.	Dec.	" "	"	"	"
1939	Jan.	Dec.	" "	"	"	"
1940	Jan.	Dec.	" "	"	"	"
1941	Jan.	Dec.	" "	"	"	"
1942	Jan.	Dec.	" "	"	"	"
1943	Jan.	Dec.	" "	"	"	"
1944	Jan.	Dec.	" "	"	"	Hoistman
1945	Jan.	Dec.	" "	"	"	"
1946	Jan.	Dec.	" "	"	"	"
1947	Jan.	Dec.	" "	"	"	"
1948	Jan.	Dec.	" "	"	"	"
1949	Jan.	June	" "	"	"	"
1949	July	Dec.	" "	"	"	Moterman
1950	Jan.	Dec.	" "	"	"	Hoistman
1951	Jan.	Mar.	" "	"	"	"
1951	Mar.	Sept.	U. P. Coal Co.	Stansbury,	Wyo.	Moterman

Exhibit No. 141—(Continued)

United Mine Workers of America
Welfare and Retirement Fund
907 Fifteenth Street, Northwest
Washington, D. C.

File No. 96285
Name BOGGIO, Rico
District No.
Local Union No.

Authorization of Pension

The Application of Rico Boggio
Address 740 Rugby Avenue, Rock Springs, Wyoming
is hereby approved. The first payment is for the month of January, 1959.
DATE: 12-4-58

By /s/ Donald L. MeFarland
Review Unit, Pension Benefits

NOTICE TO PENSIONER:

This pension is subject to suspension at any time by the Trustees for any reason stated in the rules and regulations heretofore adopted by the Trustees, and shall be subject to termination at any time by the Trustees, for any matter, cause or thing, of which they shall be the sole judges and without assignment of reason therefor.

Exhibit No. 142

Bluefield, West Virginia
March-19-1958
Robert Taylor

Mr. Lewis

Sir, I am writing to you on be have of My Husband there are some things that I think you can put Me Straight on. in 1954 Aug. 30th He was cut off and was told to Keep his U,M,W,A, dews payed up to date. He did this as long as we had the Money to do so with, at the Rate of a Dollar a Month what He was told too pay Because he My Husband was cut off. And we did this I will also send the papers on which he payed this Deus on. the president of the U,M,W,A. Also told him that if he had Silicosis he would not get pay for that. We ask around and went to the Hospital in Beckley, W. Va. and he had Silicosis and He also got payed for it in a lump sum. Bob My Husband is 62 years old and have Been in the Mines some 30 years are More. At Gary, W. Va. along He worked 18 years. He cant get a Job No place sence he was cut off in Gary, W. Va. He have Been to Cincinnati, Ohio.

Chicago, Ill. Columbus, Ohio, Winston-Salem, N.C. Philadelphia, Pa. I could go No and No and tell you Many More places he's Been to fine work and did'n fine any. All the people say the same things wants Men 45 and under. When the Union was first Organized and things got under way it was a lot of things told to the Men for them to Join, Now here is what I want to know. I was told that if a Man worked 20 years in the Mines he would Be Entitle to draw their U.M.W.A. pension is that still the Law are have the Law change sence 1932. He payed in the Union Deus dept even after he was cut off in 1954 Now he too have Silicosis and is unable to work In the Mines any More, he cant get a Job any where he is too Old are on a count of his Silicosis. My Husband is 62 Born in Jan. 1-1897 we have 7 children 16-11-9-7-5-3-1 all ages of the children we have and No In come of any Kind at all I work's when I can get it But I don't Make Much to feed, Cloths, shoes, 7 children and try to Send them to School. Books are High we cant even get State Books for our children. I Needs too Be under the care of a Doc. and a dentist and 5 of My Kids and Husband too. if there is any way for My Husband to get his pension please,

Exhibit No. 142—(Continued)

please see too it that I get your answer very soon Thanks Sir.
From /s/ Bartha Mae Taylor.

* * *

April 3, 1958

Mrs. Bertha Mae Taylor
910 Ridge Street
Bluefield, West Virginia

Dear Mrs. Taylor:

Your recent letter to President Lewis concerning your husband's eligibility for pension benefits has been referred to this office for reply as the Trust Fund has entire jurisdiction over Fund matters.

Under current Trustee regulations governing pensions an applicant is required to submit proof satisfactory to the Fund that he was 60 years of age or over at the time of filing his application, that he had completed twenty years of service in a classified job in the coal industry within the thirty years immediately preceding the date of his application, that he retired after May 29, 1946, following regular employment in a classified job in the mine of an operator signatory to the Agreement, and that he was regularly employed in a classified job in the coal industry immediately prior to May 29, 1946.

It is not possible to advise any individual definitely concerning his status with respect to pension benefits until he submits an application to the Fund for review in conformity with Trust Fund regulations.

Miners who are members of the United Mine Workers of America and wish to apply for pension may obtain the necessary forms and instructions at their Local Union. Miners who are not members of that organization should write direct to this office if they wish to apply.

We trust this sufficiently answers your inquiry.

Sincerely yours,
Josephine Roche, Director
UMWA Welfare & Retirement Fund

Exhibit No. 142—(Continued)

Bluefield, W. Va.
April 15th 58

Dear Madam

I Recivied your Letter on the Matter of Bob vs Pension Benefits. Bob tryed to get application from the Local 7633. He was told that He had pay $50.00 Before he could get an application Blank, and Before that he was also told that he had to pay, assessment $20.00 I dont know what it is all about But he have Paid $20.00 assessment that was Before he was cut off in 1954-Aug. 30th in 54 it would have Been only 2 years Before he would have Ben 60 years old But he was cut off Be fore he got 60.

After he was cut off the President told him he could Pay only $1.00 each Month and then when he Became 60 he could still get his pension we done the Best we could we paid $1.00 to the president of the Local in 55 his name is on this Reserved. is Dated Feb-9-1955 $3.00 for Dues Feb, & March, & April paid to Sherman Graves for Bob Taylor, I am Sending all the Dates and what was paid in the time he was cut off up to now. And also what Months is on the reserve. Feb. 3 1955 Paid 1.50 to Mrs.

Mrs. Ruth Price

April 23 1955 Paid $3.00 for March April May-55 to Louis Krajch, Secretary

July, 23 1955 Paid $1.00 to Louis Krajch Secretary

Sept. 24, 1955 pd $4.00 to Louis Krajch Secretary for July thru Oct. 55 in Dec. 19, 1955 pd. $4.00 to Sherman T. Graves pres. in Feb. 26, 1956 pd $4.00 for Nov & Dec 1955 & Jan & Feb 1956 Louis Krajch Secretary. their is no date on this one paid $4.25 on Dues Nor this one paid $4.00 for Dues to Mrs. Sherman Graves.

April. 20-56 paid 100 July Paid UMW of A $2.00 in Nov-56 Pd. $2.00 Sept. 1956, I dont know who, no name Pd. 4.00 6-30-56 to Williams in 1957 Paid to Legato 2-28-57. Paid $7.12 again 3-15-57 pd. $2.12 for UMW of A 6-15-57 pd. $4.25 7-15-57-pd. $4.25 this to Miller & Lovell 10-11-57 $4.25 this to Cardwell.

All total $60.75 Now I would Like to Know can we get application to fill out so My Husband can get his Pension so we can get some Money to help pay our Bills and feeds our 7

Exhibit No. 142—(Continued)

children with if we can get any application forms please Send them as soon as you can please so we can get our claim in at once so we can get thing going. I don't know how long it will take to receive any Money. Oh yes if I have to Send in the reserve paper's I will Be glad to do so Thank you.

From /s/ Bartha Mae Taylor.

* * *

April 18, 1958

Mr. Robert Taylor
910 Ridge Street
Bluefield, West Virginia

Dear Mr. Taylor:

We are enclosing forms upon which you may furnish us with information relating to your employment in the coal industry, as requested in a recent letter written in your behalf.

Please fill out all the blanks on the Preliminary Application listing all data requested to the best of your knowledge. Also, complete the Previous Employment Record listing your service in the coal industry year by year beginning with 1928 and continuing until retirement. The type work you performed during each period of employment must be shown. Be sure to sign the authorization to secure Social Security Administration records. You may attach further statements if you feel it would be helpful.

It is necessary that you also submit with your application decumentary proof of your age. As explained in our letter of April 3, 1958, a miner must be at least 60 years of age at the time he makes application for pension, in addition to meeting other eligibility requirements. Accordingly, proof of your age must be attached to your application when submitted to the Fund. We are enclosing Form P-25 which outlines the documents most acceptable in this respect.

When completed, please have the Preliminary Application signed before a Notary Public and return all enclosures to the Fund. We shall then advise you further of your status.

Sincerely yours,
Josephine Roche Director
UMWA Welfare & Retirement Fund

Exhibit No. 142—(Continued)

PRELIMINARY APPLICATION

Information About Miner

Name Bobbie (Bob) Taylor SS #235-07-3086

Address 910 Ridge St. Bluefield, W. Va.

Date of Birth Jan. 1, 1897 Place of Birth Columbus, Mississippi

Is miner a member of the United Mine Workers of America?

Yes; If "Yes", list 7633 and 29

(Yes) (No) (Local Union No.) (District No.)

Is miner presently employed? No

(Yes) (No)

If "Yes", name of company .....

Job classification .....

Place of last employment in the Coal Industry U.S.S. Coal & Coke Co., Gary, W. Va. Belcher Coal Co. Keystone, W. Va.

Dates of last employment in the Coal Industry, from Nov. 8,57 to 11-15-58

Job Classification Coal Loder

List all employment since leaving the Coal Industry—

Place	Date Began	Date Terminated	Type Work
None	No	No	None

Signature of Miner

/s/ Bob Taylor

State of West Virginia)

) SS

County of Mercer)

Subscribed and sworn to before me, James S. Redmond, a Notary Public, this 28th day of May, 1958

/s/ James S. Redmond

Notary Public

My commission expires November 26th 1966.

Exhibit No. 142—(Continued)

Year	From (Mo.)	To (Mo.)	Name of Coal Company	Location of Coal Co. Town	State	Type Work
1927	Dec	Dec	Rudasar Coal Co	Kolstar	Alabama	Loader
1928	"	"	Carrema Coal Co	Dixon	Alabama	Loader
1929	"	"	Consolidated Coal Co	Coalwood	W.Va	Loader
1931	"	"	" "	Carretta	W.Va	Loader
1932	"	"	Pocahontas Fuel Co	Almagama	W.Va	"
1936	Sept.	1954 Aug.	U.S. Coal & Coke	Earl, McDowell County	W.Va	"
1956	April	Mar.	Lee Jones Coal Co	Matoaka	W.Va	"
1956	May	Sept.	Pine Knob	Rhoda	W.Va	"
1956	[illegible]	[illegible]	Pocahontas Co	Blackwolf	W.Va	"
1956	7-23	7-26	Hewhinney Co	Hellens	W.Va	"
1956	8-11	12-28	Pocahontas Fuel Co	Elkhorn	W.Va	"
1956	"	"	C & H Coal Co	Northfork	W.Va	"
1957	1-5	1-5	Biggs Coal Co	"	"	"
1957	1-16	11-30	McGhee Coal Co	"	"	"
1957	2-3	5-30	Lee Jones Coal Co	Kimball	W.Va	"
1957	6-3	7-26	Miller & Lovell Coal Co	Kolstene	W.Va	"
1957	5-6	5-31	B & W Co.	Northfork	W.Va	"
1957	11-9	1958 Dec.	Belcher Coal Co	Keystone	W.Va	"

Non-Signatory

RECEIVED
FEB 2 1959
PENSION

R-5
(Rev. 3-22-54)

Exhibit No. 142—(Continued)

Quarter or Earlier		Employer	Ref. No.	Kind of Work
From	To			
6/27	12/50	U.S. Coal & Coke	1763	Coal Loader
3/51	9/53	U.S. Steel	1763	Coal Loader
3/54	9/54	U.S. Steel	1763	Coal Loader
6/55		U.S. Steel	1763	Mine Worker
12/54	12/54	Montgomery Ward & Co.	1763	Helper Unloading Truck
12/55		Adria Coal Co.	1763	Coal Loader
12/55		Ophria Conner and William Harris	1763	Coal Loader
3/56				
6/56	12/56	Amos Blankenship & Maxie Lockhart	8784	Coal Loader
9/56	12/56	Clarence A. Mansfield - S & M Coal Co.	8784	Coal Loader
9/56				
3/57	6/57	Big Four Wrecking Co.	8784	Coal Loader
8/31	3/35	Pocahontas Fuel Co	Division 1763	Coal Loader

RECEIVED

SEP 1 1950

PENSION

W-99

Exhibit No. 142—(Continued)

December 8, 1958

Mr. Robert Taylor
910 Ridge Street
Bluefield, West Virginia
Dear Mr. Taylor:

This will acknowledge your recent letter with further reference to your application for Pension.

As explained previously, evidence in Trust Fund files indicates you are not sixty years of age. Accordingly, further consideration cannot be given your application until you submit documentary proof of your age. Please refer to the Form P-25 previously furnished you with outlines evidence acceptable to the Fund.

Sincerely yours,
Josephine Roche, Director
UMWA Welfare and Retirement Fund

* * *

CONGRESS OF THE UNITED STATES
House of Representatives
Washington, D. C.
April 22nd 1959

Miss Josephine Roche, Director
UMWA Welfare and Retirement Fund
907 Fifteenth Street, N. W.
Washington 5, D. C.

Dear Miss Roche:

I am enclosing statement dated April 16th, 1959, made by Mr. W. H. Steen, Manager, Industrial Relations, United States Steel Corporation, Gary, West Virginia, that the records of that Company indicate that my constituent, Bob Taylor, was born on January 1st, 1897.

On March 17th, 1959, a member of your staff suggested to my office by telephone that Mr. Taylor contact this Company, where he applied for a job in November of 1936, to obtain the enclosed statement.

Exhibit No. 142—(Continued)

I hope very much that this additional evidence will establish Mr. Taylor's entitlement to the pension, and should be most grateful if you would advise me.

Thanking you, and with all good wishes, I am

Sincerely yours,
ELIZABETH KEE, M. C.
(Mrs. John Kee)
5th W. Va. District.

* * *

United Mine Workers of America
Welfare and Retirement Fund
907 Fifteenth Street, Northwest
Washington 5, D. C.

File No. 97435
Name TAYLOR, Robert
District No. —
Local Union No. —

Authorization of Pension

The application of Robert Taylor
Address 910 Ridge Street, Bluefield, West Virginia
is hereby approved. The first payment is for the month of May, 1959.
DATE: 4-24-59

By Donald L. McFarland
Review Unit, Pension Benefits

NOTICE TO PENSIONER:

This pension is subject to suspension at any time by the Trustees for any reason stated in the rules and regulations heretofore adopted by the Trustees, and shall be subject to termination at any time by the Trustees, for any matter, cause or thing, of which they shall be the sole judges and without assignment of reason therefor.

Exhibit No. 143

Ala Boys Industrial School
Birmingham 6, Ala
July 1960

Miss Josephine Roche Director
United Mine Workers Welfare and Retirement Fund

Dear Miss Roche:—

Please send me Information Concerning Pensions from the Welfare and Retirement Fund.

I was Employed in the Coal Industry from the year of 1916 till June 1951 by Roden Coal Co. at Marvel Ala. and from July 1951 to March 1954 by The Catec Coal Co. at Marvel Ala. My occupation was Hoist Engineer and pumper I was forced out of the Coal Industry because the Mines Closed. Due to my age at the time I could not obtain Employment in other mines.

I was a member of Local union 5797 District 20, at Marvel, Ala. From June 1933 through 1954 But am not now in good standing with the union I am sixty years of age can prove my Work Record by Responsible people.

Sincerely
/s/ Thomas Liddle

* * *

July 27, 1960

Mr. Thomas Liddle
Birmingham, Alabama
Roebuck Springs
Birmingham, Alabama

Corres. file

Dear Mr. Liddle:

This is in reply to your recent letter inquiring about pension benefits from the Fund.

Under current Trustee regulations governing pensions, an applicant is required to submit proof satisfactory to the Fund that he was sixty years of age or over at the time of filing his application, that he had completed twenty years of service in a classified job as an employee in the coal industry within the thirty year period immediately preceding the date his applica-

Exhibit No. 143—(Continued)

tion is received at the Fund, that he retired from the coal industry after May 29, 1946, following regular employment in a classified job in the mine of an operator signatory to the Agreement and that he was regularly employed in a classified job in the coal industry immediately prior to May 29, 1946.

If you feel that you meet the above cited requirements of eligibility for pension and wish to apply, please advise us and we will forward the necessary application forms and instructions to you.

Sincerely yours,
Josephine Roche, Director
UMWA Welfare and Retirement Fund

Exhibit No. 143—(Continued)

UNITED MINE WORKERS OF AMERICA

WELFARE AND RETIREMENT FUND

907 Fifteenth Street, N. W., Washington 5, D. C.

APPLICATION FOR PENSION

By filing this application, no rights accrue to the applicant until the benefit is authorized for payment. The burden of proving eligibility for this benefit is on the applicant.

All Questions Must Be Answered—Failure to Do So Will Delay Processing

1. District No.—20 Local Union No.—5197 Date.....
2. Name (Print)—Thomas (*First*) [illegible] (*Middle*) Liddle (*Last*)
3. Social Security Number 4 1 8 0 3 1 9 2 2
4. Address—Ala. Boys Industrial School (*Street and Number*) Birmingham (*City*) Ala. (*State*)
5. Date of Birth—Sept. (*Month*) 9 (*Day*) 1900 (*Year*) Place of Birth—Whitwell, Tenn.
6. Name of Father—John W. (*First*) Liddle (*Last*) Place of Birth—Holywells, England
7. Name of Mother—Isabelle (*First*) Riddle (*Maiden*) (*Last*) Place of Birth—Holywells, England
8. Name of Wife, if living—Annie (*First*) Mae (*Middle*) Liddle (*Last*) Age—55
9. Number of Children under 18 years of age—None
10. Have you ceased working in the coal industry?—Yes (*Yes*) If "yes", what date—Feb. (*Month, Day, Year*) 1953 (*No*) and reason for retirement—I was night (Hoist Engineer) and they stoped the night shift. I have worked in the mines 37 years.
11. Were you ever connected with the management or operation of any of the coal companies where you have been employed or did you ever have any financial interest in any company?—No.
12. If "yes", indicate below the name of the company or companies and the period involved.

NAME OF COMPANY	FROM (*month, year*)	TO (*month, year*)
None	None	None

Exhibit No. 143—(Continued)

EMPLOYMENT RECORD

List separately year-by-year in the space provided below all employment in the coal industry for the past thirty years. Start with your first employment in the coal industry in this period list all employers up to and including the last. Your employment for each year must be listed on a separate line. If you had more than one employer during any year list the period of employment with each on a separate line. Include any period of service in the Armed Forces.

Applicants who wish credit for service in the Armed Forces should attach copy of discharge.

Applicants who were off work due to compensable mine inquiry or occupational disease should attach copy of workmen's compensation award.

Year	From Mo.	To Mo.	Name of Coal Company	Location of Coal Company Town	State	Mine No.	Local Union No.	Type Work
1930	1	12	Roden Coal Co.	Marvel,	Ala.	1		Pumper
1931	1	12	" " "	"	"	1		"
1932	1	12	" " "	"	"	1		"
1933	1	12	" " "	"	"	1	5797	"
1934	1	12	" " "	"	"	1	"	Hoist Engineer
1935	1	12	" " "	"	"	1	"	" "
1936	1	12	" " "	"	"	1	"	" "
1937	1	12	" " "	"	"	1	"	" "
1938	1	12	" " "	"	"	1	"	" "
1939	1	12	" " "	"	"	1	"	" "
1940	1	12	" " "	"	"	1	"	" "
1941	1	12	" " "	"	"	1	"	" "
1942	1	12	" " "	"	"	1	"	" "
1943	1	12	" " "	"	"	1	"	" "
1944	1	12	" " "	"	"	1	"	" "
1945	1	12	" " "	"	"	1	"	" "
1946	1	12	" " "	"	"	1	"	" "
1947	1	12	" " "	"	"	1	"	" "
1948	1	12	" " "	"	"	1	"	" "
1949	1	12	" " "	"	"	1	"	" "
1950	1	7	" " "	"	"	1	"	" "
			No. 1 Mine Closed	June 1950				
1950	7	12	Roden Coal Co.	Marvel	"			Supply House
1951	1	11	" " "	"	"			" "
1951	12	12	Cates Coal Co.	"	"		1797	Hoist Engineer
1952	1	12	" " "	"	"		"	" "
1953	1	3	" " "	"	"		"	" "

O.K. Signatory—Sept. 9, 1960

CERTIFICATION BY APPLICANT

Any person, who knowingly and willfully falsifies any records or makes any false representations or statements or withholds any information in order to secure for himself or for any other person a Fund benefit, shall be barred from receiving any benefits from the Fund; and in any case where payment has been made as a result of such false statements or omission of such information, the recipient of benefits will be required to reimburse the Fund in the amount received from the Fund.

(If signature is made by mark (X) two witnesses who know the applicant must sign.)

_____ (Witness)

_____ (Witness)

I certify that the statements made by me in this application are true and correct and that I have listed all of my employment in the coal industry during the past 30 years.

Applicant sign here Thomas Liddle

DO NOT print or stamp

Exhibit No. 143—(Continued)

United Mine Workers of America
Welfare and Retirement Fund
907 Fifteenth Street, Northwest
Washington 5, D. C.

File No. 104788
Name LIDDLE, Thomas
District No. —
Local Union No. —

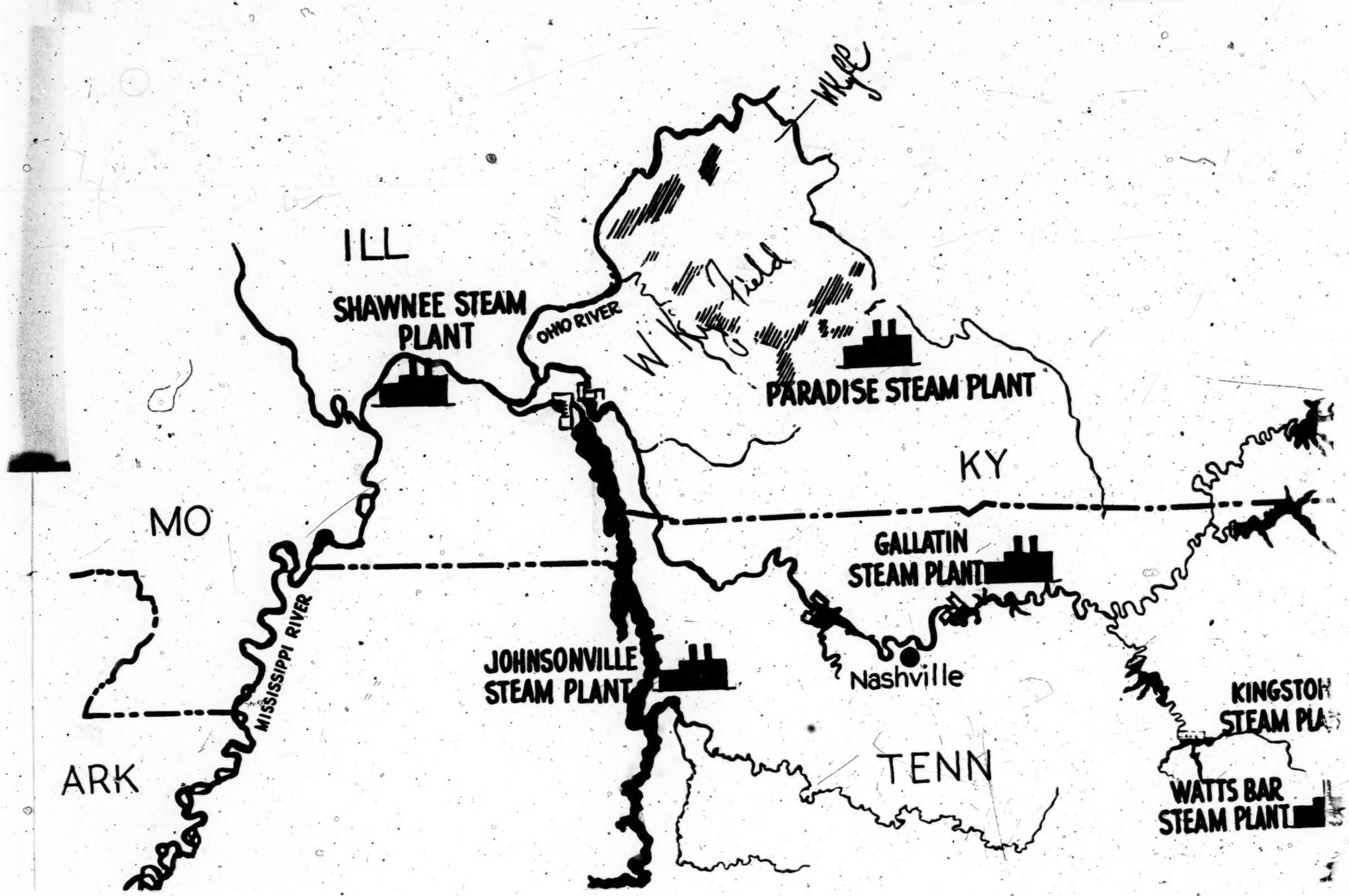
Authorization of Pension

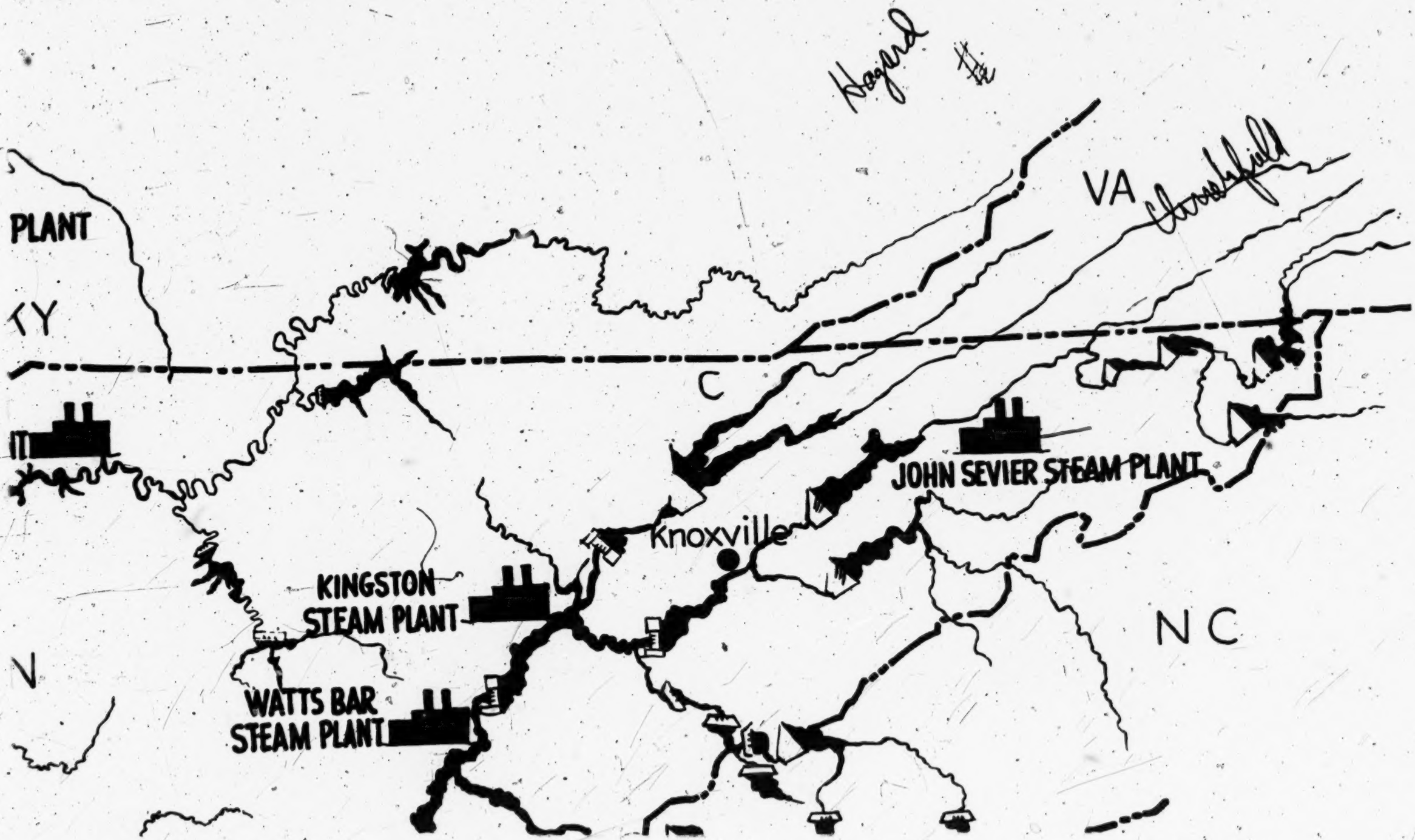
The application of Thomas Liddle
Address Alabama Boys Industrial School, Birmingham, Alabama is hereby approved. The first payment is for the month of December, 1960.
DATE: 11-30-60

By /s/ Donald L. McFarland
Review Unit, Pension Benefits

NOTICE TO PENSIONER:

This pension is subject to suspension at any time by the Trustees for any reason stated in the rules and regulations heretofore adopted by the Trustees, and shall be subject to termination at any time by the Trustees, for any matter, cause or thing, of which they shall be the sole judges and without assignment of reason therefor.
PLEASE NOTE ENCLOSED "NOTICE TO TRUST FUND PENSIONERS" DATED OCTOBER 28, 1960.


ILL
SHAWNEE STEAM PLANT
OHIO RIVER
PARADISE STEAM PLANT
KY
MO
MISSISSIPPI RIVER
GALLATIN STEAM PLANT
JOHNSONVILLE STEAM PLANT
Nashville
ARK
TENN
WATTS BAR STEAM PLANT


PLANT
TY
IT
KINGSTON
STEAM PLANT
WATTS BAR
STEAM PLANT
Knoxville
JOHN SEVIER STEAM PLANT
VA
NC
V

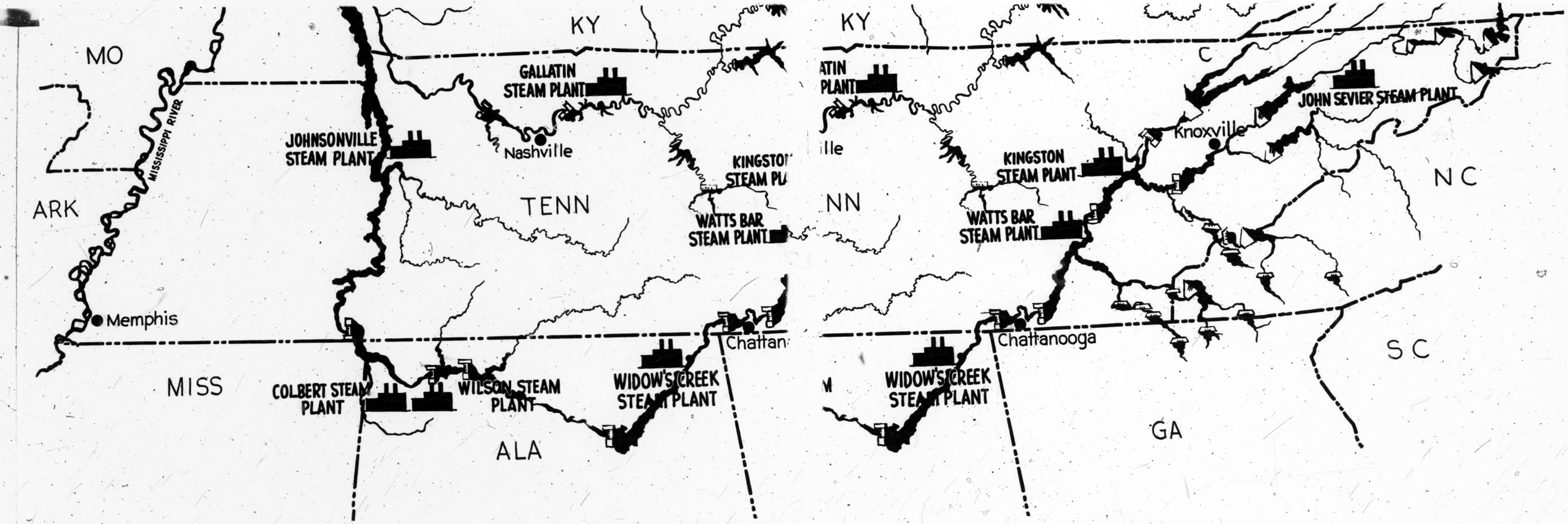

MO
KY
MISSISSIPPI RIVER
GALLATIN STEAM PLANT
JOHNSONVILLE STEAM PLANT
Nashville
KINGSTON STEAM PLANT
TENN
ARK
WATTS BAR STEAM PLANT
Memphis
Chattan
MISS
COLBERT STEAM PLANT
WILSON STEAM PLANT
WIDOW'S CREEK STEAM PLANT
ALA
KY
ATIN PLANT
ille
NN
C
JOHN SEVIER STEAM PLANT
Knoxville
KINGSTON STEAM PLANT
NC
WATTS BAR STEAM PLANT
Chattanooga
SC
WIDOW'S CREEK STEAM PLANT
GA

Exhibit No. 146-A

TABLE 1. UNITED STATES CONSUMPTION OF ENERGY FUELS AND WATERPOWER IN PERCENT OF B.T.U.'s, 1940-1959[1]

Year	Bituminous coal and Lignite	Anthracite	Crude Oil and net Petroleum Products Imported	Natural Gas and Natural Gas Liquids	Water Power	Total
1940	47.2	5.2	31.4	12.4	3.8	100.0
1941	48.4	5.0	30.8	12.1	3.7	100.0
1942	50.7	5.2	27.5	12.4	4.2	100.0
1943	51.1	48.8	27.1	12.6	4.4	100.0
1944	48.5	4.7	29.1	13.3	4.4	100.0
1945	46.5	4.2	30.5	14.1	4.7	100.0
1946	43.0	4.5	32.8	15.0	4.7	100.0
1947	43.5	3.7	32.9	15.5	4.4	100.0
1948	40.1	3.8	35.1	16.6	4.4	100.0
1949	36.9	3.0	36.3	18.8	5.0	100.0
1950	34.8	3.0	37.2	20.3	4.7	100.0
1951	33.3	2.5	37.9	22.0	4.3	100.0
1952	30.0	2.4	39.4	23.8	4.4	100.0
1953	29.7	1.9	40.0	24.3	4.1	100.0
1954	26.2	1.9	41.5	26.3	4.1	100.0
1955	27.8	1.5	40.8	26.1	3.8	100.0
1956	27.0	1.4	41.5	26.3	3.8	100.0
1957	25.8	1.3	41.4	27.8	3.7	100.0
1958	23.1	1.2	42.0	29.5	4.2	100.0
1959	22.4	1.1	42.7	29.9	3.9	100.0

[1] Source: U. S. Bureau of Mines 1959 "Minerals Yearbook," Volume II, "Fuels," pages 8-9.

Exhibit No. 147-A

TABLE 2. UNITED STATES CONSUMPTION OF BITUMINOUS COAL BY CONSUMER CLASSES, IN PERCENT, 1940-1959[1]

Year	Industrials[2]	Coke Producers[3]	Electric Utilities	Retail Deliveries	Railroads	Total
1940	30.3	18.9	11.4	19.6	19.8	100
1941	29.9	18.9	12.2	19.2	19.8	100
1942	29.3	18.7	11.7	18.9	21.4	100
1943	28.1	17.3	12.5	20.2	21.9	100
1944	26.0	17.9	13.0	20.7	22.4	100
1945	26.5	17.0	12.8	21.3	22.4	100
1946	27.9	16.7	13.7	19.7	22.0	100
1947	27.3	19.2	15.8	17.7	20.0	100
1948	26.0	20.6	18.4	16.7	18.3	100
1949	26.3	20.5	18.1	19.8	15.3	100
1950	25.7	22.9	19.4	18.6	13.4	100
1951	26.7	24.2	21.7	15.9	11.5	100
1952	27.0	23.3	24.7	16.0	9.0	100
1953	26.7	26.4	26.3	14.1	6.5	100
1954	25.7	23.5	31.7	14.3	4.8	100
1955	25.3	25.3	33.2	12.5	3.7	100
1956	25.7	24.5	35.8	11.2	2.8	100
1957	25.2	26.1	38.1	8.6	2.0	100
1958	26.8	21.0	42.0	9.2	1.0	100
1959	24.4	21.6	45.3	8.0	.7	100

[1]Source: Basic data from U. S. Bureau of Mines 1959 "Minerals Yearbook," Volume II, "Fuels," page 120.
[2]Oven coke plants plus beehive coke plants.
[3]Steel and rolling mills, cement mills, bunker, and other manufacturing and mining industries.

Exhibit No. 148-A

TABLE 3. TRENDS IN BITUMINOUS COAL PRODUCTION IN THE UNITED STATES AND TENNESSEE, 1940-1959
INDEX 1950 = 100[1]

(Data plotted on Figure 3.)

Year	United States	Tennessee
1940	89.2	118.5
1941	99.6	139.0
1942	112.9	160.9
1943	114.3	141.6
1944	120.0	143.3
1945	111.9	123.7
1946	103.4	110.8
1947	122.1	123.4
1948	116.1	127.9
1949	84.8	82.3
1950	100.0	100.0
1951	103.4	106.5
1952	90.4	103.8
1953	88.6	107.8
1954	75.9	126.8
1955	90.0	139.1
1956	97.0	174.5
1957	95.4	156.9
1958	79.5	133.8
1959	79.8	116.6

[1]Source: Based on production data shown in Tables B and C.

Exhibit No. 149-A

TABLE 4. UNITED STATES TOTAL PRODUCTION OF BITUMINOUS COAL IN PERCENT, BY SIZE OF ANNUAL OUTPUT, 1940-1959[1]

Year	CLASS 1 500,000 tons and over	CLASS 2 200,000 to 500,000 tons	CLASS 3 100,000 to 200,000 tons	CLASS 4 50,000 to 100,000 tons	CLASS 5 10,000 to 50,000 tons	CLASS 6 Less than 10,000 tons	Total
1940	45.7	26.6	13.4	5.8	5.8	2.7	100
1941	45.3	28.1	12.5	5.7	5.8	2.6	100
1942	48.2	26.4	12.0	5.5	5.7	2.2	100
1943	47.1	27.9	11.1	5.8	6.0	2.1	100
1944	45.6	26.6	13.0	6.1	6.7	2.0	100
1945	42.3	25.5	14.6	7.6	7.8	2.2	100
1946	38.2	27.0	14.8	8.6	8.8	2.6	100
1947	41.5	24.6	14.9	8.0	9.4	2.5	100
1948	38.0	25.6	13.8	9.1	10.2	3.3	100
1949	29.3	27.3	16.1	10.9	11.4	5.0	100
1950	35.9	27.1	14.0	8.6	10.2	4.2	100
1951	42.4	25.4	12.2	8.0	8.8	3.2	100
1952	40.5	26.2	12.9	8.1	9.0	3.3	100
1953	44.4	26.4	10.9	7.2	8.0	3.1	100
1954	44.1	25.3	10.5	7.5	9.1	3.5	100
1955	47.4	22.5	10.1	7.2	8.7	4.1	100
1956	48.6	20.8	10.2	6.8	9.3	4.3	100
1957	48.5	21.3	9.0	6.7	10.5	4.0	100
1958	45.7	21.2	10.1	6.9	11.4	4.7	100
1959	49.9	19.2	9.0	6.6	10.4	4.9	100

[1]Sources. Basic data from U. S. Bureau of Mines Mineral Yearbooks, by years, as follows:
1940, Minerals Yearbook 1941, pp. 831, 832; 1941, M.Y. 1942, pp. 858, 859; 1942, M.Y. 1943, pp. 870, 871; 1943, M.Y. 1944, pp. 855, 856; 1944, M.Y. 1945, pp. 862, 863; 1945, M.Y. 1946, pp. 296, 297; 1946, M.Y. 1947, pp. 281, 282; 1947, M.Y. 1948, pp. 299, 300; 1948, M.Y. 1949, pp. 293, 294; 1949, M.Y. 1950, pp. 278-280; 1950, M.Y. 1951, pp. 318, 319; 1951, M.Y. 1951, pp. 320, 321; 1952, M.Y. Vol. II, pp. 58, 59; 1953, M.Y. Vol. II, pp. 47, 48; 1954, M.Y. Vol. II, p. 44; 1955, M.Y. Vol. II, pp. 43, 44; 1956, M.Y. Vol. II, pp. 46, 47; 1957, M.Y. Vol. II, pp. 61, 62; 1958, M.Y. Vol. II, pp. 63, 64; 1959, M.Y. Vol. II, pp. 59, 60.

Exhibit No. 150-A

TABLE 5. TENNESSEE TOTAL PRODUCTION OF BITUMINOUS COAL IN PERCENT, BY SIZE OF ANNUAL OUTPUT, 1940-1959[1]

Year	CLASS 1 500,000 tons and over	CLASS 2 200,000 to 500,000 tons	CLASS 3 100,000 to 200,000 tons	CLASS 4 50,000 to 100,000 tons	CLASS 5 10,000 to 50,000 tons	CLASS 6 Less than 10,000 tons	Total
1940	---	48.8	24.7	14.7	8.1	3.7	100.0
1941	---	30.5	24.7	13.0	8.2	3.6	100.0
1942	6.5	44.0	24.2	12.0	9.0	4.3	100.0
1943	7.5	46.0	18.4	16.5	6.5	5.1	100.0
1944	---	49.7	21.3	11.6	13.4	4.0	100.0
1945	---	39.0	23.8	19.5	13.6	4.1	100.0
1946	---	36.5	27.5	20.2	12.5	3.3	100.0
1947	---	32.4	43.3	8.2	12.0	4.1	100.0
1948	---	34.8	35.6	14.8	9.6	5.2	100.0
1949	---	10.6	34.2	33.6	12.2	9.4	100.0
1950	---	19.6	38.1	23.5	13.7	5.1	100.0
1951	---	15.6	30.2	25.7	16.8	11.7	100.0
1952	---	19.9	25.8	17.1	17.4	19.8	100.0
1953	---	27.9	17.3	10.1	17.7	27.0	100.0
1954	---	---	---	---	---	---	---
1955	---	20.7	19.5	13.1	26.2	20.5	100.0
1956	8.8	22.2	13.0	16.3	23.4	16.3	100.0
1957	---	30.6	17.0	13.2	23.7	15.5	100.0
1958	---	24.4	3.6	19.9	30.6	21.5	100.0
1959	---	26.7	3.8	13.0	35.3	21.2	100.0

[1]Sources, Basic data from U. S. Bureau of Mines Mineral Yearbooks, by years, as follows:
1940, Minerals Yearbook 1941, pp. 831, 832; 1941, M.Y. 1942, pp. 858, 859; 1942, M.Y. 1943, pp. 870, 871; 1943, M.Y. 1944, pp. 855, 856; 1944, M.Y. 1945, pp. 862, 863; 1945, M.Y. 1946, pp. 296, 297; 1946, M.Y. 1947, pp. 281, 282; 1947, M.Y. 1948, pp. 299, 300; 1948, M.Y. 1949, pp. 293, 294; 1949, M.Y. 1950, pp. 278-280; 1950, M.Y. 1951, pp. 318, 319; , M.Y. 1951, pp. 320, 321; 1952, M.Y. Vol. II, pp. 58, 59; 1953, M.Y. Vol. II, 47, 48; 1954, M.Y. Vol. II, p. 42; 1955, M.Y. Vol. II, pp. 43, 44; 1956, M.Y. , . II, pp. 46, 47; 1957, M.Y. Vol. II, pp. 61, 62; 1958, M.Y. Vol. II, pp. 63, 64; 1959, M.Y. Vol. II, pp. 59, 60.

Exhibit No. 151-A

TABLE 6. NUMBER OF BITUMINOUS COAL MINES, BY SIZE OF ANNUAL OUTPUT IN THE UNITED STATES, 1940-1959[1]

Year	CLASS 1 500,000 tons and over	CLASS 2 200,000 to 500,000 tons	CLASS 3 100,000 to 200,000 tons	CLASS 4 50,000 to 100,000 tons	CLASS 5 10,000 to 50,000 tons	CLASS 6 Less than 10,000 tons	Total
1940	247	389	432	371	1,157	3,728	6,324
1941	276	454	437	402	1,305	3,948	6,822
1942	316	495	484	445	1,492	3,740	6,972
1943	318	537	464	481	1,544	3,276	6,620
1944	310	518	559	540	1,776	3,225	6,928
1945	277	476	591	629	1,920	3,140	7,033
1946	249	457	560	637	2,016	3,414	7,333
1947	303	498	618	704	2,665	3,912	8,700
1948	265	490	580	768	2,697	4,279	9,079
1949	164	383	497	666	2,148	4,701	8,559
1950	218	456	514	622	2,367	5,252	9,429
1951	264	434	464	604	2,046	4,197	8,009
1952	231	386	425	532	1,820	3,881	7,275
1953	226	398	358	484	1,629	3,576	6,671
1954	190	300	290	410	1,612	3,328	6,130
1955	227	320	331	471	1,908	4,599	7,856
1956	246	323	365	488	2,112	4,986	8,520
1957	245	303	311	466	2,393	4,821	8,539
1958	200	265	295	408	2,169	4,927	8,264
1959	212	248	261	383	1,948	4,667	7,719

[1] Sources, U. S. Bureau of Mines Mineral Yearbooks, by years, as follows: 1940, Minerals Yearbook 1941, pp. 831, 832; 1941, M.Y. 1942, pp. 858, 859; 1942, M.Y. 1943, pp. 870, 871; 1943, M.Y. 1944, pp. 855, 856; 1944, M.Y. 1945, pp. 862, 863; 1945, M.Y. 1946, pp. 296, 297; 1946, M.Y. 1947, pp. 281, 282; 1947, M.Y. 1948, pp. 299, 300; 1948, M.Y. 1949, pp. 293, 294; 1949, M.Y. 1950, pp. 278-280; 1950, M.Y. 1951, pp. 318, 319; 1951, M.Y. 1951, pp. 320, 321; 1952, M.Y. Vol. II, pp. 58, 59; 1953, M.Y. Vol. II, pp. 47, 48; 1954, M.Y. Vol. II, p. 44; 1955, M.Y. Vol. II, pp. 43, 44; 1956, M.Y. Vol. II, pp. 46, 47; 1957, M.Y. Vol. II, pp. 61, 62; 1958, M.Y. Vol. II, pp. 63, 64; 1959, M.Y. Vol. II, pp. 59, 60.

Exhibit No. 152-A

TABLE 7. NUMBER OF BITUMINOUS COAL MINES, BY SIZE OF ANNUAL OUTPUT, IN TENNESSEE, 1940-1959

Year	CLASS 1 500,000 tons and over	CLASS 2 200,000 to 500,000 tons	CLASS 3 100,000 to 200,000 tons	CLASS 4 50,000 to 100,000 tons	CLASS 5 10,000 to 50,000 tons	CLASS 6 Less than 10,000 tons	Total
1940		10	10	12	21	71	124
1941		12	12	13	25	84	146
1942	1	12	13	14	31	103	174
1943	1	12	10	17	29	110	180
1944		12	12	12	46	69	151
1945		9	10	21	39	61	140
1946		8	14	15	30	49	113
1947		8	10	7	34	63	131
1948		9	16	13	30	88	156
1949		2	11	19	21	103	156
1950		4	15	16	30	68	133
1951		3	11	18	43	181	256
1952		4	10	14	52	279	359
1953		6	7	8	55	453	529
1954							361
1955		5	9	14	90	386	504
1956	1	7	9	21	101	388	533
1957		7	11	14	83	376	491
1958		5	2	20	97	376	500
1959		5	2	12	103	358	480

Sources: U. S. Bureau of Mines Mineral Yearbooks, by years, as follows: 1940, Minerals Yearbook 1941, pp. 831, 832; 1941, M.Y. 1942, pp. 858, 859; 1942, M.Y. 1943, pp. 870, 871; 1943, M.Y. 1944, pp. 855, 856; 1944, M.Y. 1945, pp. 862, 863; 1945, M.Y. 1946, pp. 296, 297; 1946, M.Y. 1947, pp. 281, 282; 1947, M.Y. 1948, pp. 299, 300; 1948, M.Y. 1949, pp. 293, 294; 1949, M.Y. 1950, pp. 278-280; 1950, M.Y. 1951, pp. 318, 319; 1951, M.Y. 1951, pp. 329, 321; 1952, M.Y. Vol. II, pp. 58, 59; 1953, M.Y. Vol. II, pp. 47, 48; 1954, M.Y. Vol. II, p. 42; 1955, M.Y. Vol. II, pp. 43, 44; 1956, M.Y. Vol. II, pp. 46, 47; 1957, M.Y. Vol. II, pp. 61, 62; 1958, M.Y. Vol. II, pp. 63, 64; 1959, M.Y. Vol. II, pp. 56, 60.

Exhibit No. 153-A

TABLE 8. UNITED STATES TOTAL PRODUCTION OF BITUMINOUS COAL BY METHOD OF MINING, IN PERCENT, 1940-1959

Year	Underground Production Mechanically Loaded	Strip	Augur	Underground Production Hand Loaded	Total Production
1940	32*	9†		59*	100
1941	36*	11†		53*	100
1942	40*	12†		48*	100
1943	42*	14†		44*	100
1944	44*	16†		40*	100
1945	45*	19†		36*	100
1946	46*	21†		33*	100
1947	47*	22†		31*	100
1948	49*	23†		28*	100
1949	51*	24†		25*	100
1950	53*	24†		23*	100
1951	57*	22†		21*	100
1952	58*	23†		19*	100
1953	61*	23†	1†	15*	100
1954	62*	25†	1†	12*	100
1955	63*	25†	1†	11*	100
1956	61*	25†	2†	12*	100
1957	62*	25†	2†	11*	100
1958	59*	28†	2†	11*	100
1959	59*	29†	2†	10*	100

(1) Less than 0.1 percent.

Source: Basic data from U. S. Bureau of Mines Minerals Yearbooks, by years, as follows:

1940, Minerals Yearbook 1941.* p. 862.† p. 841; 1941, M.Y. 1942.* p. 883.† p. 869; 1942, M.Y. 1943.* p. 910.† p. 886; 1943, M.Y., 1944.* p. 879.† p. 868; 1944, M.Y. 1945.* p. 885.† p. 871; 1945, M.Y. 1946.* p. 320.† p. 306; 1946, M.Y. 1947.* p. 300.† p. 287; 1947, M.Y. 1948.* p. 321.† p. 305; 1948, M.Y. 1949.* p. 312.† p. 295; 1949, M.Y. 1950.* p. 283.† p. 266; 1950, M.Y. 1951.* p. 328.† p. 325; 1951, M.Y. 1951.* p. 326.† p. 326; 1952, M.Y. Vol. II.* p. 63.† p. 63; 1953, M.Y. Vol. II.* p. 91.† p. 52; 1954, M.Y. Vol. II.* p. 70.† p. 48; 1955, M.Y. Vol. II.* p. 74.† p. 48; 1956, M.Y. Vol. II.* p. 78.† p. 50; 1957, M.Y. Vol. II.* p. 93.† p. 64; 1958, M.Y. Vol. II.* p. 96.† p. 66; 1959, M.Y. Vol. II.* p. 91.† p. 62.

Exhibit No. 154-A

TABLE 9. TENNESSEE TOTAL PRODUCTION OF BITUMINOUS COAL BY METHOD OF MINING, IN PERCENT, 1940-1959

Year	Underground Production Mechanically Loaded	Strip	Augur	Underground Production Hand Loaded	Total Production
1940	12*	(1)†	—	88*	100
1941	20*	(1)†	—	80*	100
1942	22*	—	—	78*	100
1943	27*	(1)†	—	73*	100
1944	34*	2†	—	64*	100
1945	42*	3†	—	55*	100
1946	42*	4†	—	54*	100
1947	46*	8†	—	46*	100
1948	47*	14†	—	39*	100
1949	43*	11†	—	46*	100
1950	38*	12†	—	50*	100
1951	36*	9†	—	55*	100
1952	32*	10†	—	58*	100
1953	34*	12†	1†	53*	100
1954	27*	23†	1†	49*	100
1955	27*	23†	1†	49*	100
1956	33*	22†	4†	41*	100
1957	31*	33†	4†	32*	100
1958	29*	29†	7†	35*	100
1959	32*	23†	6†	39*	100

Source: Basic data from U. S. Bureau of Mines Minerals Yearbooks, by years, as follows:
1940, Minerals Yearbook 1941,* p. 862,† p. 841; 1941, M.Y. 1942,* p. 883,† p. 869; 1942, M.Y. 1943,* p. 910,† p. 886; 1943, M.Y. 1944,* p. 879,† p. 865; 1944, M.Y. 1945,* p. 885,† p. 871; 1945, M.Y. 1946,* p. 320,† p. 305; 1946, M.Y. 1947,* p. 300,† p. 287; 1947, M.Y. 1948,* p. 321,† p. 305; 1948, M.Y. 1949,* p. 312,† p. 295; 1949, M.Y. 1950,* p. 283,† p. 286; 1950, M.Y. 1951,* p. 325,† p. 325; 1951, M.Y. 1951,* p. 326,† p. 326; 1952, M.Y. Vol. II,* p. 63,† p. 63; 1953, Vol. II,* p. 91,† p. 52; 1954, Vol. II,* p. 70,† p. 48; 1955, Vol. II,* p. 74,† p. 48; 1956, Vol. II,* p. 78,† p. 50; 1957, Vol. II,* p. 93,† p. 64; 1958, Vol. II,* p. 96,† p. 66; 1959, Vol. II,* p. 91,† p. 62.

Exhibit No. 135-A

TABLE A. UNITED STATES EXPORTS OF BITUMINOUS COAL 1940-1959

(Thousands of net tons)

Year	Canada	Europe	Other	Total
1940[1]	13,537	652	2,277	16,466
1941[2]	18,195	370	2,175	20,740
1942[3]	21,016	253	1,674	22,943
1943[4]	24,270	294	1,272	25,836
1944[4]	24,367	218	1,447	26,032
1945[5]	21,586	3,924	2,446	27,956
1946[5]	21,880	16,074	3,255	41,209
1947[6]	25,848	36,703	6,116	68,667
1948[7]	25,843	16,093	3,994	45,930
1949[7]	15,982	8,682	3,178	27,842
1950[7]	23,009	794	1,665	25,468
1951[7]	22,823	27,925	5,974	56,722
1952[7]	20,957	20,672	6,014	47,643
1953[8]	19,584	8,312	5,864	33,760
1954[8]	15,910	10,471	4,660	31,041
1955[8]	17,185	28,677	5,415	51,277
1956[9]	20,654	41,156	6,743	68,553
1957[9]	18,445	49,702	8,299	76,446
1958[9]	12,235	32,889	5,167	50,291

[1]Minerals Yearbook, 1940, p. 815
[2]Minerals Yearbook, 1942, p. 908
[3]Minerals Yearbook, 1943, pp. 940, 941
[4]Minerals Yearbook, 1945, pp. 911, 912
[5]Minerals Yearbook, 1947, p. 333
[6]Minerals Yearbook, 1949, pp. 338, 339
[7]Minerals Yearbook, Vol. II, 1952, pp. 129, 130
[8]Minerals Yearbook, Vol. II, 1956, pp. 111, 112
[9]Minerals Yearbook, Vol. II, 1959, pp. 127, 128

TABLE B. SALIENT STATISTICS ON BITUMINOUS COAL IN THE UNITED STATES, 1940-1958[1]

Year	Production (net tons)	Average value per ton f. o. b. mines	Number of mines	Average number of men working daily	Average tons per man per day	Average number of days worked	Percentage of underground production—		Percentage of total production—	
							Cut by machine	Mechanically loaded	Mechanically cleaned	Mined by stripping
1940	460,771,500	$1.91	6,324	439,075	5.19	202	88.4	85.4	22.2	9.2
1941	514,149,245	2.19	6,822	456,981	5.20	216	89.0	90.7	22.9	10.7
1942	582,692,937	2.36	6,972	461,991	5.12	246	89.7	45.2	24.4	11.5
1943	590,177,069	2.69	6,620	416,007	5.38	264	90.3	48.9	24.7	13.5
1944	619,576,240	2.92	6,928	393,347	5.67	278	90.5	52.9	25.6	16.3
1945	577,617,327	3.06	7,033	383,100	5.78	261	90.8	56.1	25.6	19.0
1946	533,922,068	3.44	7,333	396,434	6.30	214	90.8	58.4	26.0	21.1
1947	630,623,722	4.16	8,700	419,182	6.42	234	90.0	60.7	27.7	22.1
1948	599,518,229	4.99	9,079	441,631	6.26	217	90.7	64.3	30.2	23.3
1949	437,868,036	4.88	8,559	433,698	6.43	157	91.4	67.0	35.1	24.2
1950	516,311,053	4.84	9,429	415,582	6.77	183	91.8	69.4	38.5	23.9
1951	533,664,732	4.92	8,009	372,897	7.04	203	93.4	73.1	45.0	22.0
1952	466,840,782	4.90	7,275	335,217	7.47	186	92.8	75.6	48.7	23.3
1953	457,290,449	4.92	6,671	293,106	8.17	191	92.3	79.6	52.9	23.1
1954	391,706,300	4.52	6,130	227,397	9.47	182	88.8	84.0	59.4	25.1
1955	464,633,408	4.50	7,856	225,093	9.84	210	88.1	84.6	58.7	24.8
1956	500,874,077	4.82	8,520	228,163	10.28	214	84.6	84.0	58.4	25.4
1957	492,703,916	5.08	8,539	228,635	10.59	203	80.9	84.8	61.7	25.2
1958	410,445,547	4.86	8,264	197,402	11.33	184	75.3	84.9	63.1	28.3

[1]Source: U. S. Bureau of Mines 1959 "Minerals Yearbook," Volume II, pages 46-48.

TABLE C. SALIENT STATISTICS OF BITUMINOUS COAL IN TENNESSEE, 1940-1958 1/

4157A

Year	Production (net tons)	Average value per ton f.o.b. Mines	Number of mines	Average number of men working daily	Average tons per man per day	Average number of days worked	Percentage of underground production: Cut by Machine	Percentage of underground production: Mechanically loaded	Percentage of total production: Mechanically cleaned	Percentage of total production: Mined by stripping
1940	6,000,452 a/	$2.00 a/	122 a/	8,566 a/	3.38 a/	208 a/	70.8 a/	11.5 a/	5.2 a/	(f)
1941	7,015,271 a/	2.34 a/	116 b/	9,172 a/	3.53 a/	210 a/	73.2 a/	20.2 a/	1.6 a/	a/
1942	8,150,237 a/	2.51 a/	176 b/	9,618 a/	3.15 a/	266 a/	76.8 a/	22.5 a/	5.6 a/	—
1943	7,178,918 a/	2.83 a/	160 a/	7,926 a/	3.78 a/	239 a/	76.7 a/	23.1 a/	6.3 a/	a/
1944	7,266,047 a/	3.26 a/	151 a/	6,860 a/	4.02 a/	271 a/	76.9 a/	38.9 a/	4.8 a/	1.5 a/
1945	6,270,708 a/	3.43 a/	140 a/	5,472 a/	4.03 a/	240 a/	78.8 a/	13.1 a/	4.8 a/	3.3 a/
1946	5,618,352 a/	3.48 a/	113 a/	6,738 a/	4.24 a/	196 a/	81.4 a/	13.5 a/	2.2 a/	5.6 a/
1947	6,258,483 a/	4.77 a/	131 a/	6,386 a/	4.69 a/	209 a/	83.9 a/	19.6 a/	3.0 a/	8.3 a/
1948	6,483,029 a/	5.74 a/	156 a/	6,852 a/	4.82 a/	196 a/	81.1 a/	54.0 a/	4.1 a/	13.5 a/
1949	4,172,272 a/	5.25 a/	156 a/	7,022 a/	4.26 a/	139 a/	87.0 a/	18.7 a/	4.1 a/	11.1 a/
1950	5,069,800 a/	5.10 a/	133 a/	6,464 a/	4.67 a/	162 a/	89.5 a/	19.5 a/	7.1 a/	11.5 a/
1951	5,400,946 a/	4.99 a/	256 a/	6,518 a/	4.90 a/	169 a/	83.4 a/	40.0 a/	11.2 a/	7.9 a/
1952	5,264,954 a/	4.85 a/	359 a/	6,910 a/	5.01 a/	151 a/	73.9 a/	38.3 a/	7.1 a/	10.6 a/
1953	5,466,569 a/	4.60 a/	529 a/	6,372 a/	5.50 a/	156 a/	65.1 a/	39.8 a/	6.8 a/	12.1 a/
1954	6,128,831 a/	3.96 a/	361 a/	4,507 a/	7.97 a/	179 a/	56.4 a/	35.8 a/	7.3 a/	23.2 a/
1955	7,052,844 a/	4.08 a/	504 a/	6,397 a/	6.79 a/	172 a/	58.4 a/	36.7 a/	8.1 a/	23.4 a/
1956	8,217,770 a/	4.02 a/	533 a/	6,406 a/	7.17 a/	178 a/	65.7 a/	44.0 a/	11.3 a/	22.4 a/
1957	7,955,688 a/	3.92 a/	491 a/	6,226 a/	7.71 a/	122 a/	68.3 a/	46.6 a/	9.1 a/	17.3 a/
1958	6,781,600 a/	3.83 a/	500 a/	5,834 a/	8.22 a/	111 a/	75.7 a/	44.6 a/	4.6 a/	24.8 a/

1/ Source: U. S. Bureau of Mines Minerals Yearbooks, by years, as follows:
1940, Minerals Yearbook 1941, a/ p.836, b/ p.832, c/ p.841, d/ basic data p.822, e/ p.861, f/ basic data p.822; 1941, N.Y. 1942, a/ p.853, b/ p.859, c/ p.868, d/ p.883, e/ basic data p.865; 1942, N.Y. 1943, b/ p.860, c/ p.870, d/ p.886, e/ p.876 of 1944 Vol., a/ p.915; 1943, N.Y. 1944, a/ p.847; b/ p.865, c/ p.878, d/ p.892, e/ basic data p.878; 1944, N.Y. 1945, a/ p.857, b/ p.871, c/ p.881, d/ p.899; 1945, N.Y. 1946, a/ p.259, b/ p.305, c/ p.311, d/ p.324; 1946, N.Y. 1947, a/ p.278 b/ p.287, c/ p.298, d/ p.303; 1947, N.Y. 1948, a/ p.296, b/ p.305, c/ p.320, d/ p.329; 1948, N.Y. 1949, a/ p. 270, b/ p.28 c/ p.311, d/ p.318; 1949, N.Y. 1950, a/ p.276, b/ p.286, c/ p.300, d/ p.308; 1950, N.Y. 1951, a/ p.316, b/ p.327, c/ p.353 d/ p.358, e/ p.325; 1951, N.Y. 1952, a/ p. 317, b/ p.326, c/ p.353, d/ p.358, e/ p.3 ; 1952 N.Y. Vol. II, a/ p.50, b/ p.48, c/ p.90, d/ p.97, e/ p.63; 1953, N.Y. Vol. II, a/ p.43, b/ p.55, c/ p.[illegible]107, d/ p.[illegible]2; 1954, N.Y. Vol. IV, a/ p.42, b/ p.40, c/ p.70, d/ p.73, e/ p.48; 1955, N.Y. Vol. II, a/ p.40, b/ p.47, c/ p. 78, d/ p.77, e/ p.48; 1956, N.Y. Vol.II, a/ p.63, b/ p.52, c/ p.78, d/ p.81, e/ p.50; 1957, N.Y. Vol. II, a/ p.58, b/ p.66, c/ p.89, d/ p.87, e/ p.68; 1958 N.Y. Vol. II, a/ p. 58, b/ p.62, c/ p.96, d/ p.102, e/ p.66.

Exhibit No. 157-A

1725a

Exhibit No. 165

AVERAGE PRICE F.O.B. MINE

	United States	Tennessee	Phillips On Spot Market
1949	$4.88	$5.25	
1950	4.84	5.40	
1951	4.92	4.99	
1952	4.90	4.85	
1953	4.92	4.60	
1954	4.52	3.96	
1955	4.50	4.08	
1956	4.82	4.02	$3.92
1957	5.08	3.92	3.20⅓
1958	4.86	3.83	3.13⅓
1959			

Exhibit No. 166

TENNESSEE VALLEY AUTHORITY
ANNUAL CONSUMPTION OF COAL IN TONS
FISCAL YEAR ENDING 6-30-56 THROUGH 6-30-59

Year	Shawnee	Johnsonville	Colbert	Gallatin	Widows Creek	Kingston	John Sevier	Watts Bar
1956	4,481,000	2,573,000	2,321,000	___	2,367,000	4,290,000	1,149,000	406,000
1957	4,793,000	2,369,000	2,205,000	608,000	1,904,000	4,699,000	1,662,000	___
1958	4,849,000	2,074,000	1,903,000	1,193,000	1,223,000	4,326,000	1,450,000	___
1959	4,835,000	2,695,000	2,255,000	1,442,000	1,576,000	4,334,000	1,503,000	___

Exhibit No. 167

TABLE 60.—Average value per ton, f.o.b. mines, of bituminous coal and lignite produced in the United States, 1957–58, by States

State	1957				1958			
	Underground mines	Strip mines	Auger mines	Total, all mines	Underground mines	Strip mines	Auger mines	Total, all mines
Alabama	$6.74	$5.25	$3.40	$6.49	$6.87	$5.17	$6.53	$6.47
Alaska	8.41	8.80	.....	8.66	9.72	9.28	.....	9.13
Arizona	7.02	.....	.....	7.02	7.03	.....	.....	7.03
Arkansas	8.55	6.89	.....	7.83	8.22	7.34	.....	7.53
Colorado	6.36	3.57	.....	6.08	6.97	3.60	.....	6.49
Georgia	4.65	.....	.....	4.65	5.00	.....	.....	5.00
Illinois	4.02	3.97	.....	4.00	4.09	3.94	3.96	4.02
Indiana	4.19	3.79	.....	3.92	4.20	3.76	.....	3.89
Iowa	4.06	3.31	.....	3.46	4.13	3.35	.....	3.52
Kansas	5.69	4.43	.....	4.45	6.08	4.49	.....	4.51
Kentucky	4.91	3.38	3.86	4.53	4.81	3.33	3.51	4.36
Maryland	5.21	3.28	.....	4.12	4.69	3.13	.....	3.77
Missouri	4.26	4.23	.....	4.26	4.94	4.26	.....	4.29
Montana:								
Bituminous	5.83	4.65	.....	5.23	6.30	3.44	.....	5.94
Lignite	4.03	3.38	.....	3.80	4.27	1.95	.....	2.34
Total, Montana	5.71	4.59	.....	5.23	6.14	2.33	.....	4.94
New Mexico	6.04	6.13	.....	6.05	6.52	4.17	.....	6.15
North Dakota (lignite)	4.11	2.22	.....	2.32	4.73	2.33	.....	2.34
Ohio	4.65	3.64	3.71	3.96	4.88	3.64	3.65	3.94
Oklahoma	8.91	5.84	.....	6.45	8.85	6.02	.....	6.65
Pennsylvania	6.34	4.10	3.55	5.77	6.21	3.86	3.12	5.52
South Dakota (lignite)	.....	3.75	.....	3.75	.....	4.00	.....	4.00
Tennessee	4.25	3.38	2.88	3.92	3.99	3.67	2.99	3.83
Utah	5.87	.....	.....	5.87	5.70	.....	.....	5.70
Virginia	5.33	3.96	4.11	5.22	4.98	3.74	3.15	4.86
Washington	7.68	7.30	.....	7.66	7.81	7.30	.....	7.50
West Virginia	5.71	4.43	4.48	5.58	5.46	4.02	3.83	5.22
Wyoming	6.37	2.48	.....	3.67	6.53	2.72	.....	3.57
Total	5.52	3.89	4.12	5.08	5.33	3.80	3.60	4.86

Exhibit No. 168:

COAL SHIPPED TO T.V.A. FROM WEST KENTUCKY & NASHVILLE AND T.V.A. TOTAL RECEIPTS OF COAL

	T.V.A. Total Receipts[1]	Shipped by West Kentucky and Nashville[2]	Per Cent of Total Shipped by West Kentucky & Nashville
1952		496,500	
1953		648,662	
1954	10,196,290	978,824	9.6
1955	14,377,000	1,298,923	9.0
1956	20,354,000	1,511,987	7.4
1957	19,581,879	963,384	4.9
1958	17,033,466	1,094,396	6.4
1959	17,808,900	1,336,870	7.5

[1]From deposition of Mr. Hill of T.V.A., read in evidence, Record 1590-1593.
[2]Nashville Coal Company acquired by West Kentucky Coal Company October 1, 1955; shown in figures starting that date.

Exhibit No. 169

WEST KENTUCKY COAL COMPANY—
NASHVILLE COAL COMPANY, INC.
BIDS ON COAL, TO TVA FROM UNIONTOWN MINE

Date	Tons	Award	TVA Plant Evaluation Colbert		TVA Plant Evaluation Shawnee
Date	Tons	Award	Colbert		Shawnee
2/28/57	12,500	No	($4.75)	.2180[1]	———
3/13/57	12,500	No	($4.75)	.2180[2]	———
3/20/57	12,500	No	($4.75)	.2180[3]	———
3/27/57	20,000	No	($4.25)	.1961[4]	———
4/11/57	20,000	No	($4.25)	.1961[5]	———
4/24/57	20,000	No	($4.25)	.1961[6]	———
9/ 4/57	60,000	No		.1961[7]	.1675[8]
9/18/57	60,000	No		———	($3.70) .1668[9]
9/27/57	18,000	Yes		———	($3.70) .1668[10]
10/ 2/57	18-60,000	No		———	($3.70) .1668[11]
10/ 8/57	18-60,000	No		———	($3.70) .1668[12]
10/15/57	18-60,000	No		———	($3.70) .1668[13]
10/25/57	18,000	Yes		———	($3.70) .1649[14]
10/30/57	18-60,000	No		———	($3.70) .1651[15]
11/ 6/57	18-60,000	No		———	($3.70) .1649[16]
11/15/57	18,000	Yes		———	($3.70) .1649[17]
11/22/57	36,000	Yes		———	($3.70) .1649[18]
11/26/57	18-36,000	No		———	($3.70) .1649[19]
12/ 4/57	18-36,000	No		———	($3.70) .1649[20]
12/20/57	36,000	Yes		———	($3.62) .1616[21]
12/23/57	18-36,000	No		———	($3.62) .1616[22]
1/ 3/58	50,000	Yes		———	($3.58) .1599[23]
1/15/58	18-50,000	No		———	($3.58) .1599[24]
1/21/58	18-50,000	No		———	($3.58) .1599[25]
1/29/58	18-50,000	No		———	($3.55) .1586[26]
2/19/58	18-30,000	No		———	($4.00) .1777[27]
3/ 5/58	18-36,000	No		———	($4.00) .1777[28]
3/12/58	18-50,000	No		———	($3.55) .1586[29]

[1] No Colbert award made.
[2] High Successful bid, 0.1837.
[3] High successful bid, 0.1816.
[4] High successful bid, 0.1829.
[5] Barge bids not acceptable.
[6] Barge bids not acceptable.
[7] Barge bids not acceptable.
[8] Highest successful bid, 0.1617.
[9] Highest successful bid, 0.1613.
[10] Highest of the awards. 37,450 tons awarded. Only one unsuccessful bidder, 1600 tons. Contract performed by Nashville.
[11] Highest successful award, 0.1641.
[12] High successful bid, 0.1635.
[13] High successful bid, 0.1631.
[14] High bid of those awarded. 35,900 tons awarded in all. (Improved guaranteed analysis accounts for lower BTU cost).
[15] High successful bid, 0.1629.
[16] High successful bid, 0.1630.
[17] Highest bid of those awarded. 32,000 tons awarded in all.
[18] Only award to Shawnee. Many cheaper to Shawnee but awarded elsewhere. Only one unsuccessful bidder—bid 0.1857 Shawnee.
[19] High successful bid, 0.1626.
[20] High successful bid, 0.1616.
[21] Second High bidder of those bidding. 45,500 tons awarded. No unsuccessful bidders for Shawnee.
[22] Highest successful bid, 0.1610.
[23] 55,000 tons awarded in all. 73,900 tons unsuccessfully bid, as low as 0.1601.
[24] Highest successful bid, 0.1576.
[25] Highest successful bid, 0.1555.
[26] Highest successful bid, 0.1555.
[27] No Shawnee awards. Many bids in low 1500's.
[28] Highest successful bid, 0.1529.
[29] Highest successful bid, 0.1524.

Exhibit No. 170

BARGE LOADINGS AT UNIONTOWN
1958

Month	Amount
January	124,101.17
February	70,817.15
March	88,871.21
April	94,447.61
May	64,093.50
June	49,856.31
July	88,017.38
August	73,704.69
September	58,993.83
October	98,686.55
November	129,973.10
December	117,698.62
Total	1,059,261.12

Exhibit No. 171

COMPARISON OF TOTAL COAL PRODUCTION OF WEST KENTUCKY COAL COMPANY—NASHVILLE COAL, INC. MINES AND TOTAL NATIONAL PRODUCTION

Year		West Kentucky/Nashville* (Tons)	National (Tons)
1953		2,873,347	457,290,000
1954		2,625,862	392,000,000
1955	West Kentucky	3,054,927	
	Nashville	1,057,200	
		4,112,127	470,000,000
1956	West Kentucky	3,610,156	
	Nashville	4,104,490	
		7,714,646	500,000,000
1957	West Kentucky	3,143,498	
	Nashville	3,378,043	
		6,521,541	490,000,000
1958	West Kentucky	2,591,773	
	Nashville	3,131,919	
		5,723,692	405,000,000
1959	West Kentucky	2,334,376	
	Nashville	3,598,493	
		5,932,869	410,000,000
1960	West Kentucky	2,695,740	
	Nashville	3,560,446	
		6,256,186	413,000,000

*Nashville Coal, Inc. included beginning October 1, 1955.

Exhibit No. 173

Date	Phillips[1] Tonnage Shipped By Rail	Phillips[4] Average Price Rail Coal	Phillips[2] Total Tonnage	Phillips[4] Average Price All Coal	National[3][4] Average Price Strip Mines
1955	23,985.15	$3.35	33,898.29	$3.93	$3.48
1956	14,128.70	3.92	23,363.32	4.59	3.74
1957	19,717.67	3.20	23,474.22	3.63⅓	3.69
1958	25,603.03	3.13⅓	32,079.89	3.72	3.80

[1]Exhibits 3, 6, 7, 22
[2]Exhibits 3, 6, 7—Stipulation
[3]U. S. Bureau of Mines Annual Reports
[4]Price Per Ton F.O.B. Mine

VOLUME V

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1964

No. [redacted] 48

UNITED MINE WORKERS OF AMERICA,
PETITIONER,

vs.

JAMES M. PENNINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 17, 1964
CERTIORARI GRANTED MAY 18, 1964

Supplemental Appendix

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 14,809

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admrx. of the Estate of Burse Phillips, deceased,
Cross-Plaintiffs-Appellees,

v.

UNITED MINE WORKERS OF AMERICA,
Cross-Defendant-Appellant.

No. 14,810

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, As Trustees of the UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND,
Plaintiffs-Appellees,

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admrx. of the Estate of Burse Phillips, deceased,
Defendants-Appellants.

Appeals from Judgments and Orders of the United States District Court for the Eastern District of Tennessee, Northern Division

---

EXCERPTS FROM EXHIBIT 77

CONTENTS OF SUPPLEMENTAL APPENDIX

Page

EXCERPTS FROM:

National Bituminous Coal Wage Agreement of 1947 ... 1735a

National Bituminous Coal Wage Agreement of 1948 ... 1736a

National Bituminous Coal Wage Agreement of 1950 ... 1737a

National Bituminous Coal Wage Agreement of 1950, As Amended January 18, 1951 ... 1739a

National Bituminous Coal Wage Agreement of 1950, As Amended September 29, 1952 ... 1739a

National Bituminous Coal Wage Agreement of 1950, As Amended Effective September 1, 1955 ... 1740a

National Bituminous Coal Wage Agreement of 1950, As Amended Effective October 1, 1956 ... 1740a

National Bituminous Coal Wage Agreement of 1950, As Amended Effective December 1, 1958 ... 1741a

EXHIBIT 77

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1947

Effective July 1, 1947 to June 30, 1948
Executed at Washington, D. C., July 8, 1947

THIS AGREEMENT, made this 7th day of July, 1947, by and between the coal operators and associations signatory hereto hereinafter referred to as Operators, parties of the first part, and the International Union, United Mine Workers of America, hereinafter referred to as Mine Workers, on behalf of each member thereof, party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements previous agreements as herein provided. This Agreement (subject to the amendments, modifications and supplements as hereinafter provided) carries forward and preserves the terms and conditions of the Appalachian Joint Wage Agreement (dated June 19, 1941), effective April 1, 1941, to March 31, 1943, the Supplemental Six-Day Work Week Agreement, the National Bituminous Coal Wage Agreement (dated April 11, 1945), effective April 1, 1945, and all the various District Agreements executed between the United Mine Workers of America and the various Operators and Coal Associations (based upon the aforesaid basic agreements as they existed on March 31, 1946, subject to the terms and conditions of this Agreement and as amended, modified and supplemented by this Agreement as herein set out.

WITNESSETH: It is agreed that this contract is for the exclusive joint use and benefit of the contracting parties, as defined and set forth in this Agreement. It is agreed that the United Mine Workers of America is recognized herein as the exclusive bargaining agency representing the employees of the parties of the first part. It is further agreed that as a condition of employment all employees shall be or become, members of the United Mine Workers of America, except in those exempted classifications of employment as hereinafter provided in this Agreement. This provision does not change

the rules or practices of the industry pertaining to management. The Mine Workers intend no intrusion upon the rights of management as heretofore practiced and understood. It is the intent and purpose of the parties hereto that this Agreement will promote and improve industrial and economic relationship in the bituminous coal industry and to set forth herein the basic agreements covering rates of pay, hours of work and conditions of employment to be observed between the parties, and shall cover the employment of persons employed in the bituminous coal mines covered by this Agreement during such time as such persons are able and willing to work.

* * * * * * * * * *

Mine Safety Program

* * * * * * * * * *

(f) The International Union, United Mine Workers of America, may designate memorial periods provided it shall give proper notice to each district.

* * * * * * * * * *

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1948

Effective July 1, 1948, to June 30, 1949

EXECUTED at Washington, D. C., June 25, 1948

THIS AGREEMENT, made this 25th day of June, 1948, by and between the coal operators and associations signatory hereto hereinafter referred to as Operators, parties of the first part, and the International Union, United Mine Workers of America, hereinafter referred to as Mine Workers, on behalf of each member thereof, party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements previous agreements as herein provided. This Agreement (subject to the amendments, modifications and supplements as hereinafter provided) carries forward and preserves the terms and conditions of the Appalachian Joint Wage Agreement (dated June 19, 1941), effective April 1, 1941, to March 31, 1943, the Supplemental Six-Day Work Week Agreement, the National Bi-

tuminous Coal Wage Agreement (dated April 11, 1945), effective April 1, 1945, the National Bituminous Coal Wage Agreement of 1947 (dated July 8, 1947), effective July 1, 1947, and all the various District Agreements executed between the United Mine Workers of America and the various Operators and Coal Associations (based upon the aforesaid basic agreements) as they existed on June 30, 1948, subject to the terms and conditions of this Agreement and as amended, modified and supplemented by this Agreement as herein set out.

* * * * * * * * * * *

Termination of Agreement

This Agreement dated June 25, 1948, shall be effective as of July 1, 1948, and shall terminate June 30, 1949; PROVIDED, HOWEVER, That either the "Parties of the First Part" or "Party of the Second Part" may terminate this Agreement on any earlier date by giving at least thirty (30) days' written notice to the other party of such desired earlier termination date.

* * * * * * * * * * *

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950

Effective March 5, 1950, to June 30, 1952
Executed at Washington, D. C., March 5, 1950

THIS AGREEMENT, made this 5th day of March, 1950, by and between the coal operators and associations signatory hereto hereinafter referred to as Operators, parties of the first part, and the International Union, United Mine Workers of America, hereinafter referred to as Mine Workers, on behalf of each member thereof, party of the second part, covering all of the bituminous coal mines owned or operated by said first parties, amends, modifies and supplements previous agreements as herein provided. This Agreement (subject to the amendments, modifications and supplements as hereinafter provided) carries forward and preserves the terms and conditions of the Appalachian Joint Wage Agreement (dated June 19, 1941) effective April 1, 1941, to March 31, 1943, the Supplemental Six-Day Work Week Agreement, the National Bituminous Coal Wage Agreement (dated April 11, 1945)

effective April 1, 1945, and all the various District Agreements executed between the United Mine Workers of America and the various Operators and Coal Associations (based upon the aforesaid basic agreements) as they existed on March 31, 1946, subject to the terms and conditions of this Agreement and as amended, modified and supplemented by this Agreement as herein set out.

WITNESSETH: It is agreed that this contract is for the exclusive joint use and benefit of the contracting parties, as defined and set forth in this Agreement. It is agreed that the United Mine Workers of America is recognized herein as the exclusive bargaining agency representing the employees of the parties of the first part. It is further agreed that as a condition of employment all employees shall be, or become, members of the United Mine Workers of America, to the extent and in the manner permitted by law, except in those exempted classifications of employment as hereinafter provided in this agreement. This provision does not change the rules or practices of the industry pertaining to management. The Mine Workers intend no intrusion upon the rights of management as heretofore practiced and understood. It is the intent and purpose of the parties hereto that this agreement will promote and improve industrial and economic relationship in the bituminous coal industry and to set forth herein the basic agreements covering rates of pay, hours of work and conditions of employment to be observed between the parties, and shall cover the employment of persons employed in the bituminous coal mines covered by this Agreement.

* * * * * * * * * * * *

(f) The International Union, United Mine Workers of America may designate memorial periods not exceeding a total of 5 days in the period ending April 1st, 1951, and not to exceed a total of 5 days in the period from April 1, 1951, to June 30th, 1952, provided it shall give proper notice to each district.

* * * * * * * * * * * *

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950

As Amended January 18, 1951
Effective February 1, 1951

* * * * * * * * * * *

Termination of Agreement

Amend the "Termination of Agreement" section of the National Bituminous Coal Wage Agreement of 1950 by striking out all of the said section below the caption and inserting in lieu thereof the following:

"This Amended Agreement dated January 18th, 1951, shall be effective as of February 1, 1951, and is not subject to termination by any party signatory hereto prior to March 31st, 1952, PROVIDED, HOWEVER, that either the parties of the first part or the party of the second part may, on or after March 31st, 1952, terminate this Agreement by giving at least sixty (60) days' written notice to the other party of such desired termination date."

* * * * * * * * * * *

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950

As Amended September 29, 1952
Effective October 1, 1952

* * * * * * * * * * *

Application of Contract to Coal Lands

As a part of the consideration for this Agreement, the Operators signatory hereto agree that this Agreement covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production. The said Operators agree that they will not lease out any coal lands as a subterfuge for the purpose of avoiding the application of this Agreement.

* * * * * * * * * * *

"This Amended Agreement dated September 29, 1952, shall be effective as of October 1, 1952, and is not subject to termination by any party signatory hereto prior to September 30, 1953, PROVIDED, HOWEVER, That either the parties of the first part or the party of the second part may, on or after September 30, 1953, terminate this Agreement by giving at least sixty (60) days' written notice to the other party of such desired termination date."

* * * * * * * * * * *

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950

As Amended Effective September 1, 1955

* * * * * * * * * * *

Termination of Agreement

Amend the "TERMINATION OF AGREEMENT" section of the National Bituminous Coal Wage Agreement of 1950 by striking out the present language and inserting in lieu thereof the following:

"This Amended Agreement, Dated August 20, 1955, shall be effective as of September 1, 1955, and is not subject to termination by any party signatory hereto prior to August 31, 1956, PROVIDED, HOWEVER, That either the parties of the first part or the party of the second part may, on or after August 31, 1956, terminate this Agreement by giving at least sixty (60) days' written notice to the other party of such desired termination date."

* * * * * * * * * * *

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950

As Amended Effective October 1, 1956

* * * * * * * * * * *

Termination of Agreement

Amend the "TERMINATION OF AGREEMENT" section of the National Bituminous Coal Wage Agreement of 1950 by striking out the present language and inserting in lieu thereof the following:

"This Amended Agreement, dated October 4, 1956, shall be effective as of October 1, 1956, and is not subject to termination by any party signatory hereto prior to September 30, 1957, PROVIDED, HOWEVER, That either the parties of the first part or the party of the second part may terminate this Agreement on or after September 30, 1957 by giving at least sixty (60) days' written notice to the other party of such desired termination date."

* * * * * * * * * * *

NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1950

As Amended Effective December 1, 1958

* * * * * * * * * * *

Termination of Agreement

Amend the "TERMINATION OF AGREEMENT" section of the National Bituminous Coal Wage Agreement of 1950 by striking out the present language and inserting in lieu thereof the following:

"This Amended Agreement, dated December 3rd, 1958, shall be effective as of December 1, 1958, and is not subject to termination by any party signatory hereto prior to November 30, 1959, PROVIDED, HOWEVER, That either the parties of the first part or the party of the second part may terminate this Agreement on or after November 30, 1959, by giving at least sixty (60) days' written notice to the other party of such desired termination date."

* * * * * * * * * * *

[fol. 1743] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—October 20, 1962 (omitted in printing).

[fol. 1745] [File endorsement omitted]

Nos. 14809-10

IN UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 14809

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admrx. of the Estate of BURSE PHILLIPS, deceased, Cross-Plaintiffs-Appellees,

v.

UNITED MINE WORKERS OF AMERICA, Cross-Defendant-Appellant.

No. 14810

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, as Trustees of the UNITED MINE WORKERS OF AMERICA WELFARE and RETIREMENT FUND, Plaintiffs-Appellees,

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admrx. of the Estate of BURSE PHILLIPS, deceased, Defendants-Appellants.

Appeals from the United States District Court for the Eastern District of Tennessee, Northern Division.

OPINION—Decided December 18, 1963

Before: CECIL, Chief Judge, MILLER, Circuit Judge, and FREEMAN, District Judge.

MILLER, Circuit Judge. This is an action by John L. Lewis, Henry G. Schmidt and Josephine Roche, as Trus-

[fol. 1746] tees of the United Mine Workers of America Welfare and Retirement Fund, hereinafter referred to as Trustees, against the defendants, James M. Pennington, Raymond E. Phillips, and Burse Phillips, individually and trading as Phillips Brothers Coal Company, a partnership, hereinafter referred to as Phillips. The Trustees seek to recover $55,982.62 as royalty payments alleged to be due and unpaid pursuant to the terms of a trust provision contained in a wage agreement between United Mine Workers of America, hereinafter referred to as UMW or the Union, and Phillips. Following the death of the defendant Burse Phillips, Lillian Goad Phillips, Administratrix of his estate, was substituted as a party defendant.

The complaint alleges that on or about October 1, 1953, Phillips and the Union entered into the National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, hereinafter referred to as the Wage Agreement, and at specified dates thereafter entered into said Wage Agreement, as amended September 1, 1955, and as amended October 1, 1956, and that pursuant to the terms of said Wage Agreement, as amended, Phillips was required to pay into the Welfare Fund the sum of 40 cents per ton on each ton of coal produced for use or sale. The parties have stipulated the amount of tonnage of coal so produced during the period of October 1, 1953, through December 31, 1958, which was subject to the 40 cents per ton royalty, that Phillips made royalty payments thereon pursuant to the Wage Agreements in the total amount of $2,227.70, and that the amount of royalty which was not paid on said total production was $55,982.62, being the amount sued for.

There is no contention by the defendants that the Wage Agreements were not executed by the partnership, but it is contended by them that they were invalid and that no liability exists for the unpaid royalties.

The answer alleges that the agreements were entered into by Phillips by reason of duress on the part of UMW, which conducted a program of terrorism in the section in which Phillips' mine was located, with the result that the agreements were unwillingly executed because Phillips knew that they would not be permitted to operate their coal mine unless said agreements were signed.

The answer further alleges that UMW and certain large producers of coal entered into a conspiracy, the purpose of [fol. 1747] which was to place financial burdens upon Phillips and other small operators similarly situated that could not possibly be paid out of funds realized from the operation of the mine, and such mines, thus being unable to meet the demands, would be closed down, either through violence or suits such as the present one, leaving the business of shipping coal in interstate commerce and to the government agencies to the large coal operators; that UMW and the large coal companies conspired to increase such financial burdens by increasing the wage scale, both by modifications of the Wage Agreement and by having the Walsh-Healey Act apply to the coal industry and have the minimum wage determined thereunder; and that such conspiracy and the acts thereunder were in violation of Sections 1 and 2 of the Sherman Anti-Trust Act, Sections 1 and 2, Title 15, United States Code.

Section 1 of the Sherman Act provides in part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Section 2 of the Act provides in part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine. . . ."

This same alleged conspiracy is the basis of a cross claim against UMW, in which the large coal producing companies were not made cross defendants, which also alleged that during the time the Wage Agreements were in effect and for the purpose of fulfilling the conspiracy, UMW forcibly closed down Phillips' mining operation and forcibly kept the mine closed over a period of time, which was

accomplished by the presence of armed mobs comprised of members or agents of UMW, which intermittently marched through the countryside, closing numerous mines on their forays and creating a reign of terror.

The cross claim alleges that by reason of the conspiracy and the enforced closing down of the mine, Phillips was [fol. 1748] damaged in the amount of $100,000.00, which should be tripled under the provisions of Section 4 of the Clayton Act, Section 15, Title 15, United States Code.

By an amended answer and cross claim Phillips alleges that in contrast to the disputes which existed between the large coal-producing companies of the country and UMW during the period of World War II and the postwar period, there has been no dispute of any consequence between these parties since 1950, that the alleged conspiracy commenced in 1950, and that it has been implemented by additional understandings between the parties to make more effective the activities in restraint of trade. It specifically alleges that the Union agreed to the termination of employment for thousands of its members because of the mechanization of mines, that it would not protest the closing down of mines which could not be mechanized, and that it would go along with the understanding that the coal industry would be confined to a comparatively few companies and the miners employed would be reduced drastically; that as a consequence of this understanding, membership of the United Mine Workers has decreased from 500,000 to 150,000; that the Union agreed that it would not make special agreements with the small operators in the Kentucky and Tennessee region, which would give consideration to local conditions and the particular coal seams mined by the operators, but would have a standard agreement for all operators; that the Union agreed that in the planned mechanization program it would aid in the financing which would become necessary to attain the mechanization of the mines of the large companies; that the large coal-producing companies agreed with the Union that they would not protest the demands of the Union with respect to wage increases so long as the companies were able to match those increases by increased productivity through mechanization; that the companies agreed that there would be no

protests from them over the Union's use of the Welfare Fund for its own purposes and in furtherance of its organizing efforts; that under the 1958 Wage Agreement it was required that all signatory operators refrain from buying or marketing nonunion coal; and that the Union and the large companies agreed that they would do all things possible to restrain the production, marketing and sale of nonunion coal.

[fol. 1749] By another amended cross claim Phillips claims damages for the period commencing four years prior to the filing of the original cross claim on February 14, 1958, the period of damage to end December 31, 1958, at which time the cross plaintiffs ceased to do business, as limited by the four-year limitation provided by Section 15b, Title 15, United States Code.

UMW moved to dismiss the cross claim on the ground that it stated no cause of action, that in so far as it alleged an unfair labor practice on the part of the Union under the provisions of Section 158(b), Title 29, United States Code, exclusive jurisdiction thereof was vested in the National Labor Relations Board, and that it stated no cause of action under the Sherman Anti-Trust Act or under Section 301 of the Taft-Hartley Act, Section 185, Title 29, United States Code. The motion was overruled, except in so far as it challenged the jurisdiction of the District Court over any alleged unfair labor practice under Section 158(b), Title 29, United States Code, which ground of the motion was upheld by the Court.

Thereafter, UMW filed its answer in which it denies that it joined in any conspiracy in restraint of trade or commerce in violation of the Sherman Act, or that it monopolized or attempted to monopolize or conspire with any other person or group of persons to monopolize any part of the trade or commerce among the several states. Affirmatively, it alleges that by virtue of Section 6 of the Clayton Act, Section 17, Title 15, United States Code, it is exempt from the provisions of Sections 1 and 2 of the Sherman Act. It contends that it is a labor organization within the meaning of Section 6 of the Clayton Act and it acted as such for its members in the negotiations for the execution of the Wage Agreements and that during the

period of time involved herein its acts were motivated by legitimate labor goals and for the purpose of securing union standards of wages and better conditions of employment for its members, thus qualifying for the exemption provided by the Act.

The claim of the Trustees against Phillips and Phillips' cross claim against the Union were consolidated for trial by jury. Following a trial of some four and one-half weeks the case was submitted to the jury.

As an aid to the jury in reaching its verdict, the Court prepared two verdict forms for the jury to answer.

[fol. 1750] Form No. 1 contained one paragraph reading as follows:

> "Did the Trustees engage in a combination or conspiracy so as to unreasonably restrain trade or commerce among the several states as alleged by the original defendant, Phillips Brothers Coal Company."

The jury answered this question yes.

Form No. 2 contained three paragraphs. The first paragraph read as follows:

> "Did the cross defendant, UMW, engage in a combination or conspiracy so as to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states outside and beyond the exemption created by the anti-trust statutes to a labor organization as alleged by cross plaintiffs, Phillips Brothers' Coal Company."

The jury answered this question yes. The jury was instructed that if its answer to this first question was no, the remaining two questions need not be answered, but that if its answer to this first question was yes, it should answer the remaining two questions.

The second question read as follows:

> "If your answer to question 1 is yes, was cross plaintiff, Phillips Brothers' Coal Company, damaged in its business or property as a direct and proximate result of the conspiracy."

The jury was instructed that if its answer to this second question was no, it need not answer question 3. The jury answered the second question yes.

The third question for the jury to answer read as follows:

> "We find in favor of cross plaintiff, Phillips Brothers' Coal Company, and fix its damages in the amount of ..... dollars."

The jury in answering this question fixed the damages in the amount of $90,000.00.

At the close of the evidence for Phillips, the Trustees and the Union moved for directed verdicts in their favor, which motions were overruled. At the close of all the evidence, the Trustees and the Union moved for judgments in their favor notwithstanding the verdict and, in the alterna- [fol. 1751] tive, that the verdict be set aside and that a new trial be granted.

The District Judge ruled that there was no material or substantial evidence to support the finding of the jury that the Trustees of the Welfare Fund, as distinguished from the Union, engaged in a combination or conspiracy to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states and ordered that the verdict of the jury in so finding be set aside. However, in entering judgment for the Trustees, he reduced the amount of the recovery from $55,582.62 to $43,424.22, ruling that the Trustees were entitled to royalties only for the period from and after April 25, 1955, to and including December 31, 1958, in that the employees of Phillips were not members of the Union until April 25, 1955. The Trustees have not appealed from this judgment, which eliminated the earlier part of their claim. Phillips has appealed from the judgment against it, which is appeal No. 14810, being one of the two appeals being herein considered.

The District Judge overruled the motion of the Union for judgment notwithstanding the verdict and, in the alternative, for a new trial, and entered judgment for Phillips against the Union in the amount of $270,000.00, being three times the amount of damages awarded by the jury, and also included in the judgment the additional sum of $55,000.00 as a reasonable amount of attorneys' fees to be

awarded and assessed in accordance with the applicable statutes, thus making a total award in the favor of Phillips in the amount of $325,000.00. The Union has taken an appeal from this judgment, which is No. 14809, being the other of the two appeals herein being considered. The two appeals have been heard together on a joint appendix.

We consider first appeal No. 14809 taken by UMW from the judgment against it in favor of Phillips.

The first question presented is whether a labor organization is exempt from the provisions of the anti-trust laws under Section 6 of the Clayton Act, Section 17, Title 15, United States Code. It provides as follows:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual [fol. 1752] help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

Although some question about this may have existed prior to 1945, the Supreme Court held in that year that although an exemption exists in cases where a labor union acts alone in furtherance of its own purposes, it does not exist in cases where a labor union combines with a nonlabor organization to restrain competition in, or to monopolize the marketing of, goods in interstate commerce. *Allen Bradley Co.* v. *Local Union No. 3, etc.*, 325 U.S. 797. See also: *United Brotherhood of Carpenters, etc.* v. *United States*, 330 U.S. 395, 400; *Los Angeles Meat & Provision Drivers Union* v. *United States*, 371 U.S. 94, 99-101. The District Judge was not in error in refusing to dismiss the cross claim or to direct a verdict for the Union on this ground, and in submitting to the jury under a proper instruction

the question whether the Union acted alone in carrying out the legitimate objects of labor unions, or aided, cooperated, conspired or combined with business groups in order to accomplish purposes which the anti-trust laws prohibit.

There is evidence to the effect that UMW forcibly closed down Phillips' mine by the presence of armed mobs which intermittently marched through the countryside. Reference is made to recent decisions of this Court holding that under certain conditions damages caused by such illegal action are recoverable by the injured party. *United Mine Workers of America* v. *Meadow Creek Coal Co.*, 263 F. (2) 52, C.A. 6th, cert. denied, 359 U.S. 1013; *United Mine Workers of America* v. *Osborne Mining Co.*, 279 F. (2) 716, C.A. 6th, cert. denied, 364 U. S. 881; *Gilchrist* v. *United Mine Workers of America*, 290 F. (2) 36, C.A. 6th, cert. denied, 368 U.S. 875; *Flame Coal Co.* v. *United Mine Workers of America*, 303 F. (2) 39, C.A. 6th, cert. denied, 371 U.S. 891. However, the Union is correct in its contention that these cases are not applicable to the present action against it. Those actions were not brought under the anti-trust laws. Although a cause of action may exist for such damage under the common law or the Taft-Hartley Act, it does not follow that a cause of action also exists under [fol. 1753] Sections 1 and 2 of the Sherman Anti-Trust law where a combination or conspiracy in restraint of trade or an attempt to monopolize trade or commerce among the states must be shown. *Ace Beer Distributors, Inc.* v. *Kohn, Inc.*, 318 F. (2) 283, 286, C.A. 6th. The District Judge correctly charged the jury on this issue in stating to it that the activities of labor unions, which are not violative of the Sherman Act, do not become violations of the Sherman Act even if such activities are carried out by violent means, and that acts of violence in and of themselves are not material to the determination of the question of whether the anti-trust laws were violated. However, it was not error for the jury to consider such evidence as bearing on the overall issue of whether such acts were done as part of a conspiracy to restrain competition or create a monopoly. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469; *Allen Bradley Co.* v. *Local Union No. 3, etc.*, supra, 325 U.S. 797, 809-811.

It must also be kept in mind in considering this appeal that we are not concerned with any alleged violation of the Taft-Hartley Act, which, as the District Judge correctly held in ruling on the Union's motion to dismiss the cross claim, is a matter within the exclusive jurisdiction of the National Labor Relations Board. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236. We think that the Union's rights were fully protected in this respect by the charge to the jury that the Taft-Hartley Act is not one of the anti-trust laws, that the jury was not concerned with awarding damages for any violation of the Taft-Hartley Act, that it must consider simply whether there had been a violation of the anti-trust laws, not the Taft-Hartley Act, causing damage to Phillips, and that even if there was a violation of the Taft-Hartley Act, it would not on that account be a violation of the anti-trust laws.

The Union's main contention on this appeal is that the evidence was insufficient to take the case to the jury on the allegations of the cross claim that it conspired with certain large coal producing companies to restrain trade in the bituminous coal industry among the several states or to monopolize the trade in such industry among the several states, and that it was error for the District Judge to overrule its motions for a directed verdict and for judgment notwithstanding the verdict.

[fol. 1754] The evidence in these cases is voluminous. It appears that many of the basic facts are not in dispute, although there is strong disagreement between the parties about the inferences or conclusions to be drawn from these facts. A review of the evidence in detail would unduly lengthen this opinion. We think it is sufficient to discuss some of the principal factual aspects of the case, which lead us to the conclusion that, although recognizing that some factual disputes may exist, yet taking that view of the evidence, with inferences reasonably and justifiably to be drawn therefrom, most favorable to the prevailing party, there is substantial evidence in the record to justify the submission of this case to the jury and to support the verdict. *Battjes* v. *United States*, 172 F. (2) [illegible] 5, C.A. 6th; *Local 175, etc.* v. *United States*, 219 F. (2) 431, 433, C.A.

6th, cert. denied; 349 U.S. 917.' On this appeal we do not judge the credibility of witnesses or weigh conflicting evidence.

The Union contends that not only was there no direct evidence that it conspired with large coal companies, or with anyone, for the purpose of putting any operator out of business, but that there is the unchallenged testimony of its President and its Secretary-Treasurer that it at no time joined with or agreed with any coal operator for such purpose. But it is recognized that conspiracies are seldom capable of proof by direct testimony and it is settled that they may be inferred from the acts of the parties thereto. Circumstantial evidence of the existence of a conspiracy may be sufficiently strong to raise a factual question for the jury even though there is no direct evidence that a conspiracy existed. It is the function of the jury to observe the witnesses while testifying, to appraise their credibility, to draw inferences from the facts established, to resolve conflicts in the evidence and to reach ultimate conclusions of fact. *Eastern States Retail Lumber Dealers Ass'n.* v. *United States*, 234 U.S. 600, 612; *Local 175, etc.* v. *United States, supra*, 219 F. (2) 431, 433, C.A. 6th, cert. denied, 349 U.S. 917; *Loew's Inc.* v. *Cinema Amusements*, 210 F. (2) 86, 93, C.A. 10th, cert. denied, 347 U.S. 976.

In support of the basic theory of the cross claim that UMW and the major coal companies conspired to eliminate the smaller and weaker companies thus leaving the industry to the major coal companies alone, the following background was given to the jury. After World War II the economies of the Bituminous Coal Industry became un- [fol. 1755] stable by reason of the fact that there was more coal being produced than the markets required; that before 1950 the major coal producers and the union were in agreement that the major problem of the industry was overproduction and that the growth of smaller independent and nonunion producers was contributing to the problem; that the major companies and the Union disagreed on how the problem should be handled; that on its side the Union was contending that the answer was to cut down on the working time of the producers; that the Union urged a three-day work week; that for many months before the 1950

contract was signed the Union took the initiative on this question and directed the working time of the men in the industry; that this domination of the men in the industry was interfered with by the passage of the new Taft-Hartley Act; that the Union's efforts to maintain closed shops and to maintain a Union controlled welfare fund were challenged and in some instances were defeated in the Courts by the major coal companies; that the major coal companies were opposed to the Union's dictating the working time of the men in the industry because it cut into profits.

Phillips contends that a marked change occurred in the relations of the Union and the major coal companies in 1950 as disclosed in their bargaining relations before and after that year; that the understanding at the time of the signing of the 1950 Wage Agreement was that the major coal companies were to decide on the working time for their employees; that this was a surrender on the part of the Union of its previous policy of seeking to control the economics of the industry by controlling the working time; that the understanding was that the problem of stabilizing the economics of the industry was to be taken care of by eliminating the smaller and weaker companies, leaving the industry to the major coal companies alone.

The following history of the Wage Agreements between UMW and the coal operators show the increased financial burden placed upon the operators over the period of 1945 through 1958.

UMW and mine operators have negotiated collective bargaining agreements since UMW's beginning in 1890 until the present time. Failure of collective bargaining purposes to function led to work stoppages and seizures and operations of the mines by the Federal Government on five occasions during 1943 through 1946. The National Bi- [fol. 1756] tuminous Coal Wage Agreement of 1945 terminated pursuant to its terms on March 30, 1946. Collective bargaining between the Secretary of the Interior and UMW resulted in a contract increasing wages $1.85 per day, establishing a welfare and retirement fund of 5 cents per ton on all coal produced for use or for sale and continuing the nine-hour day with overtime for work in excess of seven hours per day and thirty-five hours per week.

Ensuing disputes thereafter resulted in UMW terminating the agreement, but negotiations were resumed and a new agreement was entered into effective July 1, 1947, which increased wages $1.20 a day, reduced the work day to eight hours and increased payments to the welfare fund to 10 cents per ton. Following the resignation of the Welfare Fund's neutral trustee and a disagreement of the remaining two trustees with respect to pension payments, the UMW announced that the operators had dishonored the contract and a nationwide strike began in March 1948. The President invoked Taft-Hartley's national emergency provisions, a Board of Inquiry held hearings and injunction proceedings to enjoin the strike were instituted.

A new agreement was executed on June 25, 1948, which provided for an increase of $1.00 per day in wages and raised the royalty payment to the welfare fund to 20 cents per ton.

Under the 1950 agreement, executed on March 5, 1950, wages were increased 70 cents a day, and Welfare Fund royalties were increased from 20 cents to 30 cents a ton.

The 1951 agreement effective February 1, 1951, which amended the 1950 agreement, raised wages $1.60 a day to $16.35.

The 1952 agreement, effective October 1, 1952, raised basic daily wages $1.90 to $18.25, and increased fund payments from 30 cents to 40 cents a ton.

The 1955 agreement, effective September 1, 1955, raised wages in two steps for a total of $2.00 per day to $20.25, the vacation period was lengthened two days and vacation pay increased to $40.00.

The 1956 agreement, signed October 4, 1956, provided a $2.00 a day wage increase to $22.25 on a two-step basis. Vacation pay was raised $40.00 and for 1956 only a Christmas vacation period of three days with a $40.00 payment was provided.

The 1958 agreement, effective December 1, 1958, pro- [fol. 1757] vided a two-step $2.00 a day wage increase, which brought basic wages as of April 1, 1959, to $24.25 daily. Vacation pay was raised $20.00 to a total of $200.00 for a fourteen-day period.

The campaign to impose the wage contracts upon the smaller nonunion mines was intense after 1950. In areas of strong resistance mobs and terrorism were used. One or more of the major coal companies assisted in closing the operations of the principal union competitor of UMW in the bituminous coal labor field. We think the evidence supports the contention of Phillips that the Union knew that the weaker companies could not meet the increased costs of wages and welfare fund payments required by the successive wage agreements and that they would fall by the wayside by reason thereof, and that the increased costs in the successive agreements were geared to the abilities of the major coal companies to mechanize and not have their profits affected by the increased costs.

There was also evidence that before signing the Wage Agreement in October 1953 Phillips told the UMW representative that it was a new company just starting out and that it could not pay the wage scale or the 40 cents a ton to the Welfare Fund, and that the representative told them that they could work out their own working arrangements with their employees and pay whatever they could to the Welfare Fund. To its knowledge, no employee of the partnership belonged to the Union at that time and the Union did not represent the employees, although the Union succeeded in organizing the company later.

With respect to suits against coal operators in Tennessee for unpaid royalties, two suits were filed in 1954, no suits were filed in 1955, one suit was filed in 1956, no suits were filed in 1957, thirty-nine suits were filed in 1958, thirty-eight of which were pending as of December 1, 1960, when the tabulation was made, and seven suits were filed in 1959. It was the established policy of the Trustees to make no discounts or reductions or settlements for less than the full amount owed, irrespective of the economic condition of the operator. Many of the small operators were unable to meet the increased labor cost under the Wage Agreement and the payments to the Welfare Fund, and discontinued operations. Phillips strongly stresses the heavy increase in the litigation in 1958. The present action was filed against it on January 6, 1958.

[fol. 1758] The 1952 Wage Agreement contained a so-called "land-lease" provision, under which the signatory operators agreed that the Wage Agreement covered the operation of all of the coal mines owned or held under lease by them or by any subsidiary or affiliate, or acquired during the term of the agreement. The evidence showed that there was a large reserve of coal lands owned or held under lease by the major coal companies. It is argued that this provision barred the small coal companies that could not pay the union wage and the royalties to the Welfare Fund from operating this land and that there was but little good coal land available to them as a result of this provision.

The 1952 Wage Agreement contained a clause which provided that the signatory operators would not buy, sell or deal in coal mined by companies that did not pay the same labor costs as contained in the Wage Agreement. The major coal companies had the practice of frequently buying coal from the smaller companies to apply on their large long-term contracts. This market was eliminated for those small companies that could not operate under the provisions of the Wage Agreement.

There was evidence showing that UMW acquired outright 85,400 shares, out of 857,264 shares outstanding, of the common stock, and the entire 50,000 shares of the preferred stock of West Kentucky Coal Company, one of the major coal companies, of which the Nashville Coal Company was a subsidiary. The common stock was acquired at a price of about $25.00 per share. Later, the stock market quotation rose to about $40.00 a share and thereafter declined to about $11.00 per share. The preferred stock was acquired at about $50.00 per share. The preferred stock became voting stock when dividends were in arrears. Arrearage dates back to April 1, 1958. On June 30, 1960, it was $309,375.00. In addition to the stock owned outright, UMW held substantial blocks of the stock of the two companies as collateral on loans. Under the provisions of many of these notes, which the collateral secured, the borrower was relieved from personal liability upon surrender of the collateral. The notes were renewed annually. If the interest was not paid, usually because dividends were not paid on the stock held as collateral, it was added to the

principal of the renewal note. If the stock held as collateral declined in value, there was no demand for additional collateral. One of these loans in the amount of $2,513,-[fol. 1759] 895.18, secured by 90,600 shares of common stock of West Kentucky Coal Company, was to Cyrus S. Eaton, Chairman of the Board of West Kentucky Coal Company and Nashville Coal Company, as well as Chairman of the Board of Chesapeake & Ohio Railway Company, Steep Rock Iron Mines, Portsmouth Corporation, and a member of the Board of Cleveland Cliffs Iron Company, Cleveland Electric Illuminating Company, Kansas City Power & Light Company, and Sherwin Williams Company. This direct and indirect interest in the two coal companies totaled over $25,000,000.00. The shares of common stock of West Kentucky Coal Company owned outright and held as collateral totaled more than one-half of the outstanding common stock. It was not unreasonable for the jury to conclude from these facts that it was the purpose of the UMW to have a very material voice, if not the dominant one, in determining the policies and operations of these two major coal companies, which, as is hereinafter pointed out are charged with playing an important role in the alleged conspiracy.

The evidence showed the large growth of the Tennessee Valley Authority steam plants, generating electricity by steam. The use of coal by TVA increased from 500,000 tons in 1950 to approximately 20,000,000 tons in 1956. The TVA plants were designed for the use of coal only. TVA buys coal under term and spot market bids. The spot market involves small orders of coal to be delivered in a short period of time, which offers definite advantages to small companies with weak financial resources, which can thus avoid long-term commitments. About seventy-five percent of TVA coal is bought on term contracts and about twenty-five percent on spot contracts. In 1955 UMW and two of the large coal producing companies successfully sought a determination by the Secretary of Labor of a minimum wage in the coal industry under the Walsh-Healey Act. The minimum wage determined was materially higher, in most instances twice as high, than the minimum wage determined in any other industry under the Walsh-Healey Act. This minimum wage determination

prevented Phillips from bidding on the TVA term market, although it left open to Phillips for the time being the TVA spot market.

We believe that the following evidence is relevant on this phase of the case. At the 1956 Convention of the Union, President John L. Lewis introduced Secretary of Labor [fol. 1760] Mitchell, who, in the course of his remarks, spoke as follows:

> "I have had occasion, as Mr. Lewis has indicated, to work with your organization in the Department of Labor on many fronts. . . As you know, about a year ago the Secretary of Labor, for the first time in history, found a minimum wage in the coal industry which controlled the wages that were to be paid to workers who worked on government contracts. We purposely sought that determination in order to exclude from government bidding those nonunion mines which are a detriment to the industry. And I think by and large we have succeeded, except for certain areas of government purchasing which still have to be, shall I say, investigated. Twenty-five per cent, at the moment of the TVA purchases are made under contracts less than $10,000.00, which excepts such purchases from the determination of the Walsh-Healey Act. I have set in motion a study of the TVA purchasing policy to see if there is any evasion of the Walsh-Healey determination on the part of TVA. I don't know whether there is or not, but if there is, you can be sure that we will correct it: . . . I propose to continue this enforcement policy, because I believe it is in the interest not only of the worker but is in the interest of the fair employer to prevent the chiseling, nonunion employer from competing in the market place with fair employers who hire union labor."

President Lewis, responding at the end of the speech, said:

> "I am sure that the Chair voices the sentiments in the mind of every delegate in expressing our appreciation of the address of the distinguished Secretary of Labor. His personal assurance of his intention to

fairly treat the men of the coal industry is bulwarked and borne out by his attitude in the entire period of three and a half years of his incumbency of that office."

Although this evidence was objected to by the Union, it was admitted by the District Judge with the cautionary admonition that the Secretary of Labor couldn't say anything that would prejudice the rights of the UMW unless the UMW authorized him to say it, or unless the UMW ap- [fol. 1761] proved what he said, or ratified what he said, or acquiesced in what he said. We are of the opinion that this evidence was not improperly received.

Contracts for less than $10,000.00 were not subject to the wage determination of the Walsh-Healey Act. Phillips sold coal on the TVA spot market under contracts for less than $10,000.00, thus avoiding the wage determination of the Walsh-Healey Act. About the end of 1956 the price of coal on the spot market began to decline, which continued through 1957 and 1958, finally reaching a very low figure in 1958. During 1956, 1957 and 1958 Pittsburg-Midway Coal Co., Peabody Coal Co., West Kentucky Coal Co. and Nashville Coal Co., four of the large coal producing companies, made large offerings of tonnage on the TVA spot market at generally declining prices, with a number of such bids being successful. There was evidence that West Kentucky coal was sold extensively in the middle western market, most of it up and down the Mississippi Valley, that the middle western utility market had held up well, but that the distress coal which was for sale by West Kentucky Coal Co. and Nashville Coal Co. was for the most part thrown into the TVA market rather than the other market. There was also evidence that West Kentucky Coal Co., Nashville Coal Co. and Peabody Coal Co. did not make an analysis of the profit on the coal sold to TVA, the President of Peabody Coal Co. stating that he was "afraid to look at some of them." There was also evidence that the heavy offerings of West Kentucky coal on the TVA spot market would have the effect of bearing down on the price heavily.

We believe it was a reasonable deduction which the jury could make that the wage determination for the coal in-

dustry under the Walsh-Healey Act and the dumping of West Kentucky coal on the TVA spot market materially and adversely affected the operations of Phillips in the important TVA market, thus contributing to the elimination of the company as a competitor to the large coal producing companies operating in that area, including the West Kentucky Coal Company, in which the UMW had such a dominant interest.

On the question of damages, Phillips introduced evidence showing the total tonnage it shipped on the TVA steam market in 1956, 1957 and 1958, the average price Phillips received for this steam coal, and the national average for [fol. 1762] all kinds of coal for those years. This is shown by the following table:

Year	Phillips Shipments	Price Received	National Average
1956	14,128.70 tons	$3.92	$4.82
1957	19,717.67	3.20½	5.08
1958	25,603.03	3.13⅓	4.86

The difference between what Phillips would have received in each of these years if it had received the national average and the amount it actually received was $12,715.83 in 1956, $37,003.49 in 1957, and $44,207.90 in 1958, or a total of $93,927.22. The jury by its verdict awarded damages in the amount of $90,000.00.

The Union challenges the sufficiency of this evidence to sustain an award of damages on the ground that the national average price of all kinds of coal does not afford a valid base of comparison with Phillips TVA coal. In particular, it contends that Phillips was a strip mine coal operator and that the national average price of all coal is substantially above the national average price of strip mine coal; that the utility market is the lowest coal market in price and may not be compared, pricewise, with the average market for all coal; that the spot market was the lowest part of the low-price utility market and that Phillips sold its coal on this lower priced spot market rather than on the higher priced term market; and that Phillips sold its premium (block and egg) coal separately from its utility coal well above the prices received for its utility

coal, but did not include receipts for its premium coal in its average price which is compared with the national average price of all coals.

These factors, if unexplained or unaccounted for, could have the effect of reducing the amount of the difference between the national average of all coals and the average price which Phillips received on the TVA spot market for steam coal, but in the light of other factors involved and brought out by the evidence, as hereinafter pointed out, we do not think the comparison was so unfair as to reject its consideration by the jury in its entirety in determining what, if any, damage Phillips suffered by reason of the conspiracy, if it found such a conspiracy existed.

In this connection there was evidence that the quality of steam coal, rather than the fact that it was deep underground coal instead of strip mining coal, was the important [fol. 1763] factor in the price; that the national average for high volatile bituminous coal was 12,900 BTU per pound, that the average for Tennessee high volatile bituminous coal was 13,460 BTU per pound; that Campbell County, Tennessee, coal, in which county Phillips operated, had an average of 13,200 BTU; and that there was a guaranteed minimum of 13,215 BTU per pound in the Phillips coal offered on a dry basis.

There was also evidence that the market for steam coal was not restricted to the utilities but included industrial concerns and railroads, and that the higher priced coal sold at retail had fallen from 20 per cent of the total in 1940 to 8 per cent in 1958. Although the fact was a disputed one, there was evidence to the effect that the difference between the national average price for all bituminous coal and the price received by Phillips for steam coal was not materially affected by the fact that the national average price was for all bituminous coal, including so-called premium coal, and that the coal sold by Phillips on the TVA market did not include premium coal.

It is true that damages which are speculative cannot be recovered. But that does not mean that when damages have resulted from a wrongful act, they cannot be recovered because they are uncertain in amount or because the injured party cannot show with certainty the exact amount

of damage incurred. It is enough if the evidence shows the extent of the damage as a matter of just and reasonable inference, although the result be only approximate. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555. We are of the opinion that the evidence in the present case brought the case within that rule. The District Judge instructed the jury at length upon the question of damages. In our opinion, the rights of the Union on the question of damages were fully protected.

UMW contends that the District Judge erred in admitting evidence with reference to the Walsh-Healey prevailing wage determination and having TVA comply therewith, and in charging the jury concerning UMW's efforts to obtain Walsh-Healey prevailing wage determinations and to have TVA enforce such wages. It relies upon *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127. It was held in that case that no violation of the Sherman Act can be predicated upon mere attempts to influence the passage or enforcement of [fol. 1764] laws, and that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly.

With respect to the Walsh-Healey Act, the District Judge charged the jury:

> "Any approach to the Secretary of Labor, which was designed to raise the minimum wages to be paid by coal operators doing business with the TVA or other governmental agencies, was not a violation of the antitrust laws. Therefore, you will not give any consideration whatever to this approach to or meeting with the Secretary of Labor, unless you find that the approach to the Secretary of Labor was a part of the conspiracy to get the prevailing wages establish (sic) in the coal industry so high as to drive the small operators out of business."

UMW contends that although the first part of this instruction was in accordance with the ruling in the *Noerr*

case, it was error to qualify the instruction by the concluding words, "unless you find. . . . "

The District Judge also instructed the jury that it was no violation of the antitrust law for the Union or the coal operators to urge the TVA to abide by the spirit and letter of the Walsh-Healey Act or to modify its methods of buying coal, "unless the parties so urged the TVA to modify its policies in buying coal for the purpose of driving the small operators out of business." The qualifying words in this instruction are likewise complained of.

We do not construe the *Noerr* ruling as creating an unlimited exemption to Sections 1 and 2 of the Sherman Anti-Trust Act. We believe that the *Noerr* ruling had reference to conduct which in good faith looked to the enforcement of the law or a modification of an existing policy, unaccompanied by a purpose or intent to further a conspiracy to violate a statute. It is the illegal purpose or intent inherent in the conduct which vitiates the conduct which would otherwise be legal. We find no error in the two instructions complained of.

Complaint is also made of the admission in evidence by the District Judge of statements of George Love, an alleged co-conspirator, before a prima facie case of the alleged [fol. 1765] conspiracy was presented. In doing so, the District Judge told the jury, "before these statements are competent as evidence and binding upon any alleged co-conspirator, the jury will have to find that there was a conspiracy and that such statements were made in furtherance of the conspiracy." We find no error in admitting the statements before presenting a prima facie case of the alleged conspiracy, provided that the admission in evidence is conditional upon such proof of the conspiracy being later introduced, as the jury was instructed in this case. The District Judge has a wide discretion in controlling the order of proof. *United States* v. *Manton*, 107 F. (2) 834, 844, C.A. 2nd, cert. denied, 309 U.S. 664; *Flintkote Company* v. *Lysfjord*, 246 F. (2) 368, 378, C.A. 9th, cert. denied, 355 U.S. 835. We find no merit in the contention that without the statements of Mr. Love, the evidence was insufficient to support the allegation that a conspiracy existed.

Accordingly, the judgment in case No. 14809 is affirmed.

Case No. 14810

In this case the jury found that the Trustees of the Welfare Fund engaged in a combination or conspiracy so as to unreasonably restrain trade or commerce among the several states. The District Judge was of the opinion that there was no substantial evidence to support the verdict, set aside the verdict, and entered judgment for the Trustees notwithstanding the verdict, although in a reduced amount from that asserted by the Trustees.

On this appeal Phillips contends that the verdict is supported by evidence from which it could reasonably be concluded that (1) the Trustees paid benefits only to members of UMW; (2) the Trustees required the beneficiaries of the trust to picket or perform other acts for the UMW in order to obtain or retain pension benefits, or acquiesced in the doing of these things by the beneficiaries; (3) the Trustees, as a punitive measure, brought legal actions to recover royalties on coal produced; (4) the Trustees held out to the men in the industry that the Fund was under union control; and (5) the Fund, in fact, was under the domination and control of the UMW.

In setting aside the verdict the District Judge expressed the opinion that the action of a majority of the Trustees was required to bind the Fund (see *Van Horn* v. *Lewis*, [fol. 1766] 79 F. Supp. 541, D.C.D.C.); that the action of John L. Lewis, President of UMW, alone, without authorization or consent of the majority of the Trustees, was not sufficient to show that the Trustees conspired with the large coal operators to drive a small operator out of business, and that there was no evidence to support the finding that Mr. Lewis, for himself and another of the Trustees, entered into the alleged conspiracy.

We are of the opinion that the District Judge was not in error in setting aside the verdict and entering judgment for the Trustees notwithstanding the verdict. We find no direct evidence that the Trustees participated in the alleged conspiracy, and the inferences which Phillips would have us draw are not justifiable or reasonable in the light of the strong and uncontradicted testimony of the Trustees themselves. We concur in the opinion of the District Judge

in his analysis of the evidence on this aspect of the case, to which we refer.

Since the District Judge ruled that the evidence was not sufficient to sustain the verdict that the Trustees engaged in a conspiracy to unreasonably restrain interstate commerce in violation of the Sherman Act, it was not necessary for him to rule upon Phillips' contention that such a violation of the Sherman Act, if it had occurred, was a bar to the right of the Trustees to recover in this action. However, should it be that that ruling and our concurrence in it is not the correct one, we are nevertheless of the opinion that, contrary to the contentions of Phillips, the verdict of the jury was not a bar to the right of the Trustees to collect the royalty payments which had accrued under the contract on the coal already mined. *Kelly* v. *Kosuga*, 358 U.S. 516; *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 549; *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U.S. 165.

Phillips also attacks the validity of the contract under which the Trustees are seeking a recovery on two other grounds. (1) It is contended that UMW had not performed the statutory requirements necessary to be performed before a valid union security clause could be inserted in the contract between it and Phillips, and since the contract contained such a union security clause, it rendered the contract invalid. (2) It is contended that since the evidence shows that the contract was forced upon Phillips through threats and violence and Phillips' employees were in like [fol. 1767] manner forced to join the Union in order to make it possible for Phillips to operate its mines, this constituted an unfair labor practice on the part of the Union under the Labor-Management Relations Act, Sections 157 and 158 (b), Title 29, United States Code, which, in turn, rendered the contract void in its entirety.

We doubt that these issues are before us on this appeal. They were not submitted to the jury and no facts were found by the jury with respect thereto. On the contrary, the District Judge instructed the jury:

> "The sole question for you to decide in the suit of the Trustees is whether the plaintiff Trustees engaged

> in a combination or conspiracy so as to unreasonably restrain trade or to monopolize commerce among the several states as alleged by Phillips Brothers."

Twice thereafter in his charge, the District Judge repeated the substance of this instruction to the jury. Following the instructions and a consideration of the UMW's objections to the charge, counsel for Phillips stated to the Court:

> "If your Honor please, the defendants and cross-plaintiffs have no exceptions to the charge and no requests for additional charges."

Lively v. *Elkhorn Coal Co.*, 206 F. (2) 396, 399, C.A. 6th. Nevertheless, we will briefly answer these two contentions.

The first contention is rejected on the authority of *N.L.R.B.* v. *Rockaway News Supply Co.*, 345 U.S. 71, and *Lewis* v. *Benedict Coal Corporation*, 361 U.S. 459, 468-470.

In support of the second contention, Phillips relies upon *International Ladies' Garment Workers' Union* v. *N.L.R.B.*, 366 U.S. 731. In that case the employer entered into a collective bargaining agreement with a union which represented only a minority of the employees. The Labor Board found that both the employer and the union were guilty of an unfair labor practice, ordered the employer to cease and desist from giving effect to the collective bargaining agreement, and directed the holding of a representation election. The Court of Appeals granted enforcement of the order. The Supreme Court affirmed. In doing so, it said:

> "On the facts shown, the agreement must fail in its entirety. It was obtained under the erroneous claim of majority representation."

[fol. 1768] We think that statement must be construed in the light of the circumstances under which it was made. The Court did not have before it the question of the validity of the contract in a common law action to enforce it. The issue which it was passing upon was whether the execution of the contract constituted an unfair labor practice, and, if so, what was the proper remedy. The remedy was to direct the parties to cease and desist from operating under

it. Because of the unfair labor practices the agreement *failed* to be binding on the parties. The same might be true of the bargaining agreement in this case if this was a proceeding before the Labor Board involving an alleged unfair labor practice. But it is not that kind of a proceeding, over which the Labor Board has exclusive jurisdiction. *Portland Web Pressmen's Union* v. *Oregonian Publishing Co.*, 286 F. (2) 4, C.A. 9th, cert. denied, 366 U.S. 912. Neither the District Court nor this Court has jurisdiction to find either of the parties to the bargaining agreement guilty of an unfair labor practice, and no such finding has been made. In the absence of such a proceeding and finding, we are of the opinion that the ruling in *International Ladies' Garment Workers' Union* v. *N.L.R.B.*, supra, 366 U.S. 731, is not applicable.

In any event, with respect to the coal already mined and the rights accrued thereby, we are of the opinion that the Trustees' right to recover is not barred. *Lewis* v. *Benedict Coal Corporation*, supra, 361 U.S. 459; *Kelly* v. *Kosuga*, supra, 358 U.S. 516.

The judgment in case No. 14810 is affirmed.

[fol. 1769]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JUDGMENT—Filed December 18, 1963

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

Shackelford Miller, Jr., United States Circuit Judge.

[fol. 1770] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 1771]

SUPREME COURT OF THE UNITED STATES

No. 927—October Term, 1963

UNITED [illegible]E WORKERS OF AMERICA, Petitioner,

vs.

JAMES M. PENNINGTON, et al.

ORDER ALLOWING CERTIORARI—May 18, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



Office-Supreme Court, U.S.
FILED
MAR 17 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] 46

UNITED MINE WORKERS OF AMERICA, *Petitioner,*

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, ADMX. OF THE ESTATE OF BURSE PHILLIPS, deceased,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

HARRISON COMBS
900 Fifteenth Street, N. W.
Washington, D. C.

E. H. RAYSON
R. R. KRAMER
904 Burwell Building
Knoxville, Tennessee

M. E. BOIARSKY
511 Kanawha Valley Building
Charleston, West Virginia

Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdiction	2
Basis for Federal Jurisdiction in the United States District Court	3
Questions Presented	4
Statutes Involved	5
Statement of the Case	5
A. The Judgment Appealed	5
B. The Conspiracy Issue	7
a. In the Trial Court	7
The Trial Court Declared That 1950 Court Proceedings and Negotiations Accordant Therewith Weakened, If Not Destroyed, Phillips' Conspiracy Allegations. Its Opinion Ignores That Evidence	9
b. In the Sixth Circuit	9
1. UMW's Knowledge of the Effect of Increased Labor Costs on "Weaker" Companies	10
2. The "Land-Lease" and "Protective Wage" Clauses in the National Agreement	10
3. UMW Investments in West Kentucky Coal Co. and Nashville Coal Co.	11
4. UMW Efforts To Have the U. S. Secretary of Labor Establish Minimum Wage Rates for Coal Industry Under Authority of the Walsh-Healey Act and To Have TVA Comply With Them in Government Coal Purchases	12
C. The Issue Relating to the Admission of Evidence and Jury Instructions Concerning UMW's Efforts To Obtain a Walsh-Healey Minimum Wage Determination and To Have TVA Comply Therewith	13

Page

THE FACTS 13

1. Phillips' Mining Operations and Execution of the UMW Agreement 13

2. UMW Officials Deny Any Conspiracy 14

3. The 1949-50 Negotiations and Federal Court Decrees Antedating Execution of the 1950 Agreement 14

The Injunctions of February 11, 1950 15

4. Mine Mechanization Was an Existent Fact Prior to the 1949-50 Negotiations and Was Not an Issue in That Bargaining Period 16

5. The Pattern of Collective Bargaining in the Post-1950 Agreement Period Accords With National Labor Policy 17

6. The "Land-Lease" and "Protective Wage" Clauses in the National Agreement 18

7. UMW and Operators' Efforts Obtained Walsh-Healey Minimum Wage Determinations and Sought to Have TVA Comply Therewith 21

REASONS FOR GRANTING THE WRIT 23

I. This Case Presents a Construction of the Sherman Act That a Violation Thereof Can Be Predicated Upon the Exercise of Legitimate Union Objectives and the Exercise of Collective Bargaining Techniques Looking Toward the Realization of Improved Wage and Working Condition Standards, Themselves Proper and Legal Under National Labor Policy 23

The Sixth Circuit's Use of UMW Knowledge That Weaker Companies Would Go Out of Business Because of the Inability to Pay Labor Costs in the UMW Agreement Collides With This Court's American Steel Foundries and Apex Cases 25

Page

The Sixth Circuit's Opinion Conflicts With Congressional Intent of Legislation Following Apex and Allen Bradley Which Shows Congress' Purpose To Be That Union Activities Pertaining to Organizing and Collective Bargaining Were Not To Be Regulated by Sherman 29

The Sixth Circuit's Opinion is Offensive to National Labor Policy in its Failure to Concern Itself With Implementing Clayton's Immunity Provision and the Clear Proof Requirement of Norris-LaGuardia 30

II. The Sixth Circuit's Decision Represents an Incorrect Construction and Interpretation of a Prior Important Decision of this Court Construing the Sherman Act. It Conflicts too with a Decision of the District of Columbia Court of Appeals 33

III. The Sixth Circuit's Sanction of the Admission of Evidence and the Jury Charge Relating to UMW's Efforts to Obtain Walsh-Healey Determinations and to Have TVA Comply Therewith is in Conflict with this Court's Noerr and the District of Columbia Circuit's Riss Cases 35

IV. The Sixth Circuit's Sanction of the Admission of Evidence Placing the Secretary of Labor in the Role of a Co-Conspirator Offends the Rule That the Sherman Act Is Not Applicable to Authorized Actions of Public Officers 36

V. The Need for this Court's Guidance in Pending Cases Involving Similar Claims in Excess of 37 Million Dollars Emphasizes the Importance of the Writ's Issuance Herein 37

Conclusion 39

INDEX TO APPENDIX IN PETITION

	Page
Appendix A (Sixth Circuit):	
Opinion	1a
Judgment, December 18, 1963	29a
Order, October 20, 1962	29a
Appendix B (District Court):	
Judgment, August 2, 1961	30a
Opinion, July 31, 1961	33a
Appendix C (Statutes):	
15 U.S.C.A., Sections 1, 2, 3, 15, 17	48a
29 U.S.C.A.:	
Sec. 52	50a
Sec. 102	51a
Sec. 104	52a
Sec. 106	53a
Sec. 141	54a
Sec. 151	55a
Sec. 157	56a
Sec. 158	57a
Sec. 185	61a
Sec. 187	61a
Sec. 201	62a
Sec. 202	62a
41 U.S.C.A. 35-45	62a
Appendix D (Pending Cases)	66a

Page

CASES CITED

Alcoa S. S. Co., Inc. v. U.S., 338 U.S. 421, 423 38
Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797 ..... 24, 25, 27, 29, 31
American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184 ..... 25, 26
Apex Hosiery Co. v. Leader, 310 U.S. 469 ..24, 25, 26, 27, 29
Assn. of Western Railways v. Riss & Co., Inc., D.C. Cir., 299 F. 2d 133 (1962) 33, 35, 36
Eastern Rr. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 12, 13, 23, 33, 34, 35, 36
Endicott Johnson Corp. v. Perkins, 317 U.S. 501 ..21, 33-34
Local 761, Int. Union, etc., Workers v. NLRB, 366 U.S. 667, 671 38
Los Angeles Meat Etc. Union, Local 626 v. U.S., 371 U.S. 94, 157-8 27
Maryland use of Markley v. Baldwin, 112 U.S. 490, 493 36
Miley v. John Hancock Mut. L. Ins. Co., D.C. Mass., 1957, 148 F. Supp. 299, aff'd. 1 Cir., 242 F. 2d 758, cert. den. 355 U.S. 828 37
NLRB v. Truck Drivers Local Union, 353 U.S. 87, 95-6 32
Parker v. Brown, 317 U.S. 341, 350 37
Perkins v. Lukens Steel Co., 310 U.S. 113 (1940) 21, 34
Ruth Elkhorn Coals, Inc. v. Mitchell, Sec'y. of Labor, D.C. Cir., 248 F. 2d 635 (1957), cert. den. 355 U.S. 953 21
Stroud v. Benson, D.C., E.D. North Carolina, 1957, 155 F. Supp. 482, vacated on other grounds, 4 Cir., 254 F. 2d 448, cert. den. 358 U.S. 817 37
Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19, 29-30 36
The Order of Rr. Telegraphers v. Chicago, etc. R. Co., 362 U.S. 330, 339-40 31
U.S. v. Hutcheson, 312 U.S. 219 .....23, 24, 27, 31
U.S. v. Int. Union, UMWA, DC, D.C., 1950, 89 F. Supp. 179 16
U.S. v. Standard Oil Co., 332 U.S. 301, 302 38

Page

STATUTES INVOLVED

28 U.S.C. 1254(1) and 2101(c) 2

Clayton Act 24, 28, 31

Sec. 4 (15 U.S.C.A. 15) 3, 4, 5

Sec. 6 (15 U.S.C.A. 17) 4, 5, 6, 8, 23, 24, 26, 27, 30

Sec. 20 (29 U.S.C.A. 52) 27

Fair Labor Standards Act of 1938 28

Sec. 1 (29 U.S.C.A. 201) 5

Sec. 2 (29 U.S.C.A. 202) 5

Norris-LaGuardia Act 24, 27, 28, 31

Sec. 2 (29 U.S.C.A. 102) 5

Sec. 4 (29 U.S.C.A. 104) 5

Sec. 6 (29 U.S.C.A. 106) 4, 5, 24, 30

Labor Management Relations Act, 1947 (Taft-Hartley Act) 14, 15, 17, 24, 28, 29

29 U.S.C.A. 141 ..... 5, 17, 24

29 U.S.C.A. 151 ..... 5, 29

Sec. 7 (29 U.S.C.A. 157) 5, 25, 30, 31

Sec. 8 (29 U.S.C.A. 158) 31

Sec. 8(a)(3) (29 U.S.C.A. 158(a)(3)) 5

Sec. 8(b)(1)(A) (29 U.S.C.A. 158(b)(1)(A)) 5

Sec. 8(b)(3) (29 U.S.C.A. 158(b)(3)) 5, 18

Sec. 8(b)(4) (29 U.S.C.A. 158(b)(4)) 5, 30

Sec. 8(e) (29 U.S.C.A. 158(e)) 5, 30

Sec. 301 (29 U.S.C.A. 185) 29

Sec. 303 (29 U.S.C.A. 187) 29

Sherman Antitrust Act 3, 4, 5, 6, 12, 17, 19, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37

15 U.S.C.A., Secs. 1, 2, 3 ..... 3, 4, 5, 12

Walsh-Healey Act (41 U.S.C.A. 35-45) 4, 5, 8, 12, 13, 21, 23, 28, 33, 35, 36, 37

MISCELLANEOUS

U. S. Dept. of Labor, Bulletin No. 1305, Technological Change and Production in the Bituminous Coal Industry, 1920-60, p. 118, Table 27A 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

UNITED MINE WORKERS OF AMERICA, *Petitioner,*

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, ADMX. OF THE ESTATE OF BURSE PHILLIPS, deceased.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner United Mine Workers of America (herein called "UMW") prays that a writ of ceritiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered December 18, 1963, in Case No. 14809, styled *James M. Pennington, Raymond E. Phillips and Lillian Goad Phillips, Admrx. of the Estate of Burse Phillips, deceased,* Cross-Plaintiffs-Appellees v. *United Mine Workers of*

America, Cross-Defendant-Appellant, wherein the Sixth Circuit affirmed a judgment of the United States District Court for the Eastern District of Tennessee, Northern Division, entered August 2, 1961, against UMW in Phillips' favor[1] for $270,000 and $55,000 for attorneys' fees, aggregating $325,000, after sustaining a jury's conspiracy finding and overruling UMW's motion for judgment notwithstanding the jury verdict and, in the alternative, for a new trial (84-5a).[2]

A certified appendix record in said case, together with the proceedings in the Sixth Circuit, is furnished herewith, in accordance with this Court's Rules.

OPINION BELOW

The Sixth Circuit's opinion appears in Appendix A hereto, pages 1-29a; in the certified record; and it is reported in 325 F. 2d 804 (Adv. Op. February 17, 1964).

JURISDICTION

The Court of Appeals' judgment affirming the trial court was entered December 18, 1963 (A. 29a).[3] This Court's jurisdiction is invoked under 28 U.S.C., Sections 1254(1) and 2101(c).

---

[1] The United States District Court for the Eastern District of Tennessee, Northern Division is called "*trial*" or "*district*" court; and the United States Court of Appeals for the Sixth Circuit, "*Sixth Circuit*". Judgment entered was for James M. Pennington, Raymond E. Phillips and Lillian Goad Phillips, Admx. of the Estate of Burse Phillips, deceased, and the partnership Phillips Coal Company, called "*Phillips*" (84a). *Unless otherwise indicated, all emphases herein are supplied.*

[2] Pagination references are to the printed certified record under Rule 21 of this Court, filed in this Court's Clerk's office.

[3] The abbreviation "A." refers to the appendix to this petition.

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

When Phillips as a signatory to the National Bituminous Coal Wage Agreement of 1950, as amended in 1952, 1955 and 1956, failed to perform his covenant therein to pay into the United Mine Workers Welfare and Retirement Fund of 1950 (called "Fund") forty cents per ton on each ton of coal produced for use or for sale, Fund's Trustees instituted an action against Phillips to recover such delinquencies.[4] Contemporaneously with filing an answer therein, Phillips filed a cross-claim against both UMW and the Trustees (19a), invoking jurisdiction under "Title 15 USCA, Sections 1, 2 and 3" (19a) and seeking damages of $100,000 to be trebled under Section 15 of that Title (20a).

---

[4] The trial court consolidated for jury trial Trustees' case against Phillips (filed January 6, 1958) with that of Phillips against UMW (47a). The trial court charged the jury it was to decide only whether Trustees combined or conspired so as to unreasonably restrain trade or monopolize commerce and that, upon receipt of the jury's determination of the conspiracy issue, the court would then determine, as a question of law, whether "Trustees are or are not entitled to recover the unpaid royalties" from Phillips (1546-7a). UMW objected to the consolidation (47a).

The jury found Trustees engaged in a combination or conspiracy. The district court, upon Trustees' motion, held "there is no material or substantial evidence . . . to support the" jury finding, set aside the jury verdict, and entered judgment in favor of Trustees for $43,424.22 (83a).

Upon Phillips' appeal (styled *Lewis et al.* v. *Pennington, et al.*, No. 14,810), the Sixth Circuit affirmed (A. 29a). Phillips' Petition for Certiorari is now pending as No. 867 in this Court.

QUESTIONS PRESENTED

1. May a labor union be held a conspirator under the Sherman Antitrust Act where it has achieved an industry-wide, multi-employer collective bargaining agreement, negotiated in accordance with procedures established by law, which results in stabilizing wage rates and working conditions at levels above the ability of some employers to pay?

2. Where a labor union and employer signatories to a collective bargaining agreement obtain from the United States Secretary of Labor, under the Walsh-Healey Act, a minimum wage rate for the bituminous coal industry on coal purchased by federal agencies, is such union activity conspiratorial conduct under the Sherman Antitrust Act?

3. Where a labor union is charged with having conspired with employer groups in violation of the Sherman Antitrust Act when it executed an industry-wide, multi-employer collective bargaining agreement in conformity with injunctive orders of a federal district court, union denials of the conspiracy are uncontradicted, and there is no direct evidence proving the conspiracy, may a court or jury infer the existence of a conspiracy from union activities either sanctioned under law or within the jurisdiction of the National Labor Relations Board, in light of the antitrust immunity of labor unions and the clear proof requirement of Section 6 of the Norris-LaGuardia Act?

4. Was there substantial evidence to warrant the jury's verdict of conspiracy and of damages under the Sherman Antitrust Act?

STATUTES INVOLVED

The statutory provisions involved are Sections 1, 2 and 3, Sherman Antitrust Act (15 USCA 1, 2 and 3); Sections 4 and 6, Clayton Act (15 USCA 15, 17), Section 20, Clayton Act (29 USCA 52); Sections 2, 4 and 6, Norris-LaGuardia Act (29 USCA 102, 104 and 106); the Labor Management Relations Act, 1947 [29 USCA Sections 141, 151, 157, 158(a)(3), 158(b)(1)(A), 158(b)(3), 158(b)(4), 158(e), 185, 187; Fair Labor Standards Act of 1938, Sections 1 and 2 (29 USCA 201, 202); and the Walsh-Healey Act (41 USCA 35-45)].[5]

STATEMENT OF THE CASE

A. THE JUDGMENT APPEALED.

In an action instituted by Fund Trustees to recover unpaid royalties from Phillips, admittedly a signatory to the industry-wide National Bituminous Coal Wage Agreement of 1950, and as amended in 1952, 1955 and 1956, Phillips filed a cross-claim against UMW (19a), seeking treble damages under the Sherman Act (15 USCA 1, 2, and 3),[6] based upon an alleged conspiracy between UMW, Fund Trustees, and certain major coal companies (not made parties to the cross-claim) to force small mines out of business.[7]

---

[5] These statutes are referred to herein as *Sherman, Clayton, Norris-LaGuardia, Taft-Hartley, Fair Labor Standards,* and *Walsh-Healey,* respectively.

[6] The pertinent provisions of these sections are to be found in Appendix C to this brief, A. 48-9a.

[7] It required an answer (filed February 14), an amendment (filed March 5), a second amendment (filed March 24) and a third amendment (filed June 26) to finalize Phillips' theory of the alleged conspiracy (11a, 21a, 26a, 30a).

UMW denied the conspiracy charges, alleged that under Section 6 of the Clayton Act (15 USCA 17) negotiation and execution of the several Agreements by it as a labor organization and its conduct in their enforcement did not constitute *Sherman* violations, and asserted "all of the acts done by UMW" herein "were motivated by legitimate labor goals" to secure union standards of wages and working conditions for its members (58-59a).[8]

In a jury trial recorded in a transcript of 3,539 pages and 175 exhibits, which commenced April 11, 1961, and was submitted to the jury on May 17, which on May 19, returned a verdict in Phillips' favor, responsive to a submitted verdict form (85a)[9] that UMW had engaged in a "combination or conspiracy so as to unreasonbly restrain trade . . . beyond the exemption created by the anti-trust statutes to a labor organization" as Phillips had alleged (85a). UMW motions for judgment n.o.v. or for new trial (64a) were overruled (83a). Judgment for $270,000 (trebling the jury's damage award of $90,000) and $55,000 for attorneys' fees, favorable to Phillips, was entered (83-4a; A. 32a).

Upon appeal the Sixth Circuit affirmed the judgment (A. 29a).

---

[8] UMW's answer and amended answer are found in the certified record at pp. 38-40a.

[9] The verdict form read (1578a): "Did the cross defendant, UMW, engage in a combination or conspiracy so as to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states outside and beyond the exemption created by the anti-trust statutes to a labor organization as alleged by cross plaintiffs, Phillips Brothers' Coal Company."

B. THE CONSPIRACY ISSUE

a. In the Trial Court

The conspiracy's formation, Phillips charged, occurred when the 1950 Agreement was executed, its purpose being to stabilize the bituminous coal industry's economics by eliminating therefrom small producers unable to pay high wages and welfare fund royalties and the conspirators knowing and intending these smaller companies would go out of business by reason of such inability (1542a), thereby leaving the industry's business to major coal companies.[10]

According to Phillips, the conspiracy included UMW agreement to surrender to operators its policy of controlling working time at the mines, UMW's acquiescence for large coal companies to increase productivity through mine mechanization; and UMW's willingness that mines incapable of mechanization be closed despite the resultant loss of UMW membership (31a).

In exchange, as Phillips theorized, major coal companies agreed not to object to increased wages and welfare fund payments, subject to operator ability "to match those increases by increased productivity through mechanization" (32a), and to permit UMW to control the Fund and dominate the industry's employees.

The conspiracy's purposes, Phillips theorized, were to be achieved through the National Agreement's use (1539a). Lack of industrial strife in the industry following the 1950 Agreement with attendant increases in wages and welfare fund payments, increased UMW

---

[10] Theories advanced by Phillips are found in the certified record, pp. 49-56a, 1538-43a. Theories of UMW to defeat recovery by Phillips are found at pp. 57-60a, 1543-45a.

organizing activities, the Agreement's land-lease and protective wage clauses, UMW-operator efforts to obtain a Walsh-Healey Act minimum wage determination and to have TVA comply therewith and mechanization of mines were among the elements, Phillips contended, which proved the conspiracy Phillips alleged was formed in 1950.

UMW officials denied the charged conspiracy and denied making any agreement other than the 1950 Agreement; and these denials were not disputed. Although the trial court permitted the jury to hear testimony as to each of the elements enumerated above, and the jury in a *general verdict* found UMW had conspired outside and beyond labor's immunity under *Clayton's* Section 6, without delineating upon which of the elements it premised the finding and without specifying with whom UMW supposedly had conspired, upon post-verdict motions for judgment n.o.v. or for new trial, the trial court tacitly rejected all of those elements as proof of the alleged conspiracy.[11]

It justified the jury verdict against UMW *solely* upon its statement that *"There is some proof . . . that Union representatives and large coal operator representatives discussed stabilization of prices at one time or another during the critical periods referred to in the cross-claim"* (87a).

---

[11] The trial court noted "Trustees testified positively that the Union did not dominate or control the Fund" and "The evidence is not sufficient to show the contrary" (98a). Likewise, the trial court expressly rejected Phillips' contention that UMW control of the Fund and domination of the employees were to be achieved by the requirement that union membership was a prerequisite for obtaining Fund benefits after 1950, that Trustees required pensioners to picket for UMW in order to obtain or retain Fund benefits and that Trustees held out to industry employees the Fund was under UMW control (98a).

The Trial Court Declared That 1950 Court Proceedings and Negotiations Accordant Therewith Weakened, If Not Destroyed, Phillips' Conspiracy Allegations. Its Opinion Ignores That Evidence

Federal court proceedings which preceded the 1950 Agreement's execution, on UMW's motion for directed verdict (1524a), occasioned the trial court's comment the 1950 court proceedings and negotiations pursuant thereto *"put a grave burden upon"* Phillips, expressing they *"greatly weaken, if not destroy"*, Phillips' conspiracy charges (1524-33a). They indicated to the trial court *"these parties were acting through regular channels"* and *"were bargaining with each other"* and *"weren't acting in concert"* but acted *"because they were made to act"* (1527-8a).

The trial court's dubiety finds expression in its further statement, *"This is not an easy case"* but *"a very complex"* one, as well as its recognition that the union's motion for directed verdict is a *"serious motion and is a debatable motion, certainly"* (1532-33a).

Notably, in denying UMW's post-verdict motions, when it assigned the sole basis for upholding the verdict, the district court failed to explain away its concern noted above.

b. In the Sixth Circuit

UMW's appeal was argued October 20, 1962 (A. 29a). *Fourteen months later,* on December 18, 1963, the Sixth Circuit affirmed the district court's judgment (A. 29a).

The Sixth Circuit abandoned and ignored the district court's reason for sustaining the jury verdict. Its opinion makes no mention of the *1950* federal district court proceedings and directives and the negotiations antecedent to the 1950 Agreement's execution which had so grossly concerned the district court nor does it mention the trial court's concern or dubiety.

The Sixth Circuit noted, *without challenge,* UMW's contention there was no direct evidence of the alleged

conspiracy (A. 12a). Notably, in avowing "the following background was given to the jury" (A. 12a), the Sixth Circuit stated *as facts* the *theories advanced* by Phillips and related to the jury *as theories* (1538-43a). It did not undertake a "review of the evidence in detail"; instead, it chose what it regarded as some *"principal factual aspects"* which led to its conclusion "there is *substantial evidence*" to support the jury verdict (A. 11-12a). Among these are:

1. UMW's Knowledge of The Effect of Increased Labor Costs on "Weaker" Companies.

Pointing to wage increases of $9.50 per day during an eight-year period (1951-1958 since the 1950 Agreement was executed) and the 1952 increase of welfare fund payments from 30¢ to 40¢ per ton (since which time no increase had been had in such payments), and though there is no record basis that the wage increases were too high, the Sixth Circuit observed, *"We think the evidence supports" Phillips' contention the "Union knew that the weaker companies could not meet the increased costs of wages and welfare fund payments required by the successive wage agreements and that they would fall by the wayside by reason thereof, and that the increased costs in the successive agreements were geared to the abilities of the major coal companies to mechanize and not have their profits affected by the increased costs"* (A. 15a).

2. The "Land-lease" and "Protective Wage" Clauses in the National Agreement.

Two other "principal factual aspects" relied upon by the Sixth Circuit in warranting the jury's inference are the so-called "land-lease" clause in the 1952 Agreement and subsequent amendments and the "protective wage" clause in the 1958 Agreement. (A. 16-17a).

Of the "land-lease" clause the Sixth Circuit declared

(A. 16a), "The evidence showed that there was a large reserve of coal lands owned or held under lease by the major coal companies" and that "It is argued that this provision barred the small coal companies that could not pay the union wage and the royalties to the Welfare Fund from operating this land and that there was but little good coal land available to them as a result of this provision".

The "protective wage" clause, as the Sixth Circuit stated, "contained a clause which provided that the signatory operators would not buy, sell or deal in coal mined by companies that did not pay the same labor costs as contained in the Wage Agreement" (A. 16-17a). Continuing the Sixth Circuit declared (A. 17a), "The major coal companies had the practice of frequently buying coal from the smaller companies to apply on their large long-term contracts. This market was eliminated for those small companies that could not operate under the provisions of the Wage Agreement."[12]

3. UMW Investments in West Kentucky Coal Co. and Nashville Coal Co.

The Sixth Circuit's opinion notes UMW's investments in West Kentucky and its subsidiary, Nashville Coal, concluding "it was not unreasonable for the jury to conclude" UMW's purpose was "to have a very material voice, if not the dominant one, in determining the policies of these two major coal companies" (A. 18a). This use of UMW investments and its

[12] The protective wage clause was in the *1958* Agreement executed December 3, *1958; it did not become effective until April, 1959 (1207a) which does not fall within the stipulated (63a) damage period of time involved in this case, such period ending December 31, 1958;* hence, it could not be regarded as having any probative value of the alleged conspiracy. Pertinently, Phillips did not execute the 1958 Agreement.

conclusion as a basis for the jury's conspiracy finding are challenged by undisputed facts (492a, 585a, 591-4a, 1121a, 1123-28a, 1444-45a, 1146a) and the district court's jury charge that UMW had a right to make such investments and it was not a *Sherman* violation so to do (1557a).

4. UMW Efforts To Have the U. S. Secretary of Labor Establish Minimum Wage Rates for Coal Industry Under Authority of the Walsh-Healey Act and to have TVA Comply With Them In Government Coal Purchases.

Pointing to efforts of UMW and of two major coal producers in obtaining a determination of minimum wage rates for the coal industry by the Secretary of Labor under the Walsh-Healey Act to apply to federal government's purchases of coal, their efforts to have TVA comply with such minimum rates, and an address of Secretary of Labor Mitchell at a 1956 UMW Convention, the Sixth Circuit held "it was a reasonable deduction" for the jury to "make that the wage determination for the coal industry under the Walsh-Healey Act... materially and adversely affected the operations of Phillips in the important TVA market, thus contributing to the elimination of the company as a competitor to the large producing companies operating in that area . . ." (A. 20-21a).

The Sixth Circuit rejected UMW's contention that evidence concerning the *Walsh-Healey* determination was permissive conduct under *Eastern Rr. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), saying (A. 24a), "We do not construe the *Noerr* ruling as creating an unlimited exemption to Sections 1 and 2 of the Sherman Anti-trust Act. We believe that the *Noerr* ruling had reference to conduct which in good faith looked to the enforcement of the law or a modification of an existing policy, unaccom-

panied by a purpose or intent to further a conspiracy to violate a statute. It is the illegal purpose or intent inherent in the conduct which vitiates the conduct which would otherwise be legal".

Likewise the Sixth Circuit placed the Secretary of Labor, who did no more than carry out his statutory duty, in the role of a co-conspirator.

C. THE ISSUE RELATING TO THE ADMISSION OF EVIDENCE AND JURY INSTRUCTIONS CONCERNING UMW'S EFFORTS TO OBTAIN A WALSH-HEALEY MINIMUM WAGE DETERMINATION AND TO HAVE TVA COMPLY THEREWITH.

Both the trial court and the Sixth Circuit rejected UMW's complaint (453-8a) that admission of evidence concerning the *Walsh-Healey* wage determinations, public hearings thereon, the issuance of an order setting such a wage rate, and Secretary of Labor Mitchell's statements at a UMW Convention concerning the determination, as well as UMW and operators efforts to have TVA comply with the wage rate so determined, was prejudicially erroneous under *Noerr,* as was the trial court's instructing the jury such efforts were valid *unless* they produced a trade restraint (1558a, 1587a) and the refusal to give a UMW proffered instruction omitting the "unless" provision.

THE FACTS

1. Phillips' Mining Operations and Execution of the UMW Agreement

Without UMW solicitation, Phillips, a partnership consisting of Raymond E. Phillips, Burse Phillips and James Pennington, organized in 1953 with a capital of $27,000, employing about 8 employees (175a, 181-2a), and conducting a coal mine stripping operation in Campbell County, Tennessee, executed the 1952 Agreement October 1, 1953 (117a, 178a). None of Phillips' employees then belonged to UMW (179a). Phillips again executed the 1952 Agreement in 1955, and there-

after executed the 1953 and 1956 Agreements. Its employees voluntarily joined UMW (229a).

2. UMW Officials Deny Any Conspiracy

Undisputed are the denials of John L. Lewis and John Owens, UMW's President and Secretary-Treasurer, respectively, and chief union negotiators in the 1949-50 bargaining sessions, of any agreement other than the 1950 Agreement and amendments thereto (1189a), or UMW-operator plan or understanding of concerted action (1189a, 1224-5a) or UMW agreement with any coal operator to influence pricing or operations of mines to eliminate small, or any other, operator from the mining industry (1139-40a), or that the 1950 Agreement "would be used" therefor (392a).

3. The 1949-50 Negotiations and Federal Court Decrees Antedating Execution of the 1950 Agreement

From UMW's inception in 1890 its objectives have included improved standards of working and living conditions, achieved in a pattern of multiple-employer collective bargaining (1097a, 1099a).

The 1946 Agreement, which had provoked operator litigation against UMW, expired June 30, 1949. A successor, industry-wide, multiple-employer agreement (National Bituminous Coal Wage Agreement of 1950) was executed by UMW and operators March 5, 1950. Interim bargaining negotiations focused around three issues carried over from the 1948 Agreement, namely: operator complaint that (1) the union-shop clause in the 1948 Agreement did not comply with Taft-Hartley's requirements; (2) the welfare fund could not be administered for UMW members only, as operators claimed that Agreement provided; and (3) the 1948 Agreement's "able and willing" and "memorial period" clauses, operators complained, gave UMW control over working time of the mines.

The Injunctions of February 11, 1950.

These complaints, resulting in failure of collective bargaining processes to achieve a labor contract, caused NLRB to issue and process an unfair labor practice complaint against UMW and its President, and a Board Regional Director and United States Attorney General, harmonious to a Presidential Board of Inquiry Report, severally to seek injunctive relief, responsive to which the federal district court, in two separate orders on February 11, 1950, enjoined UMW from insisting that (1) a successor agreement require UMW membership of employees "without compliance" with Taft-Hartley's requirements, (2) the agreement provide for a welfare and retirement fund to be administered for UMW members only and (3) the agreement contain the "willing and able" and "memorial period" clauses and *ordered operators and UMW* "engage in free collective bargaining *in good faith*" to resolve their disputes and "make every effort to adjust and settle their differences" as Taft-Hartley contemplated (1476-8a).

Under district court scrutiny,[13] NLRB and Attorney General surveillance, with assistance of members of the Presidential Inquiry Board, *and with UMW's bargaining abilities circumscribed by judicial restraints,* UMW and operators, bargaining in good faith, achieved the 1950 Agreement, which, obedient to the February 11, 1950 injunction, created a union-security clause to comply with Taft-Hartley, made Fund benefits available to signatories' employees *regardless of UMW* membership, and eliminated the

[13] During negotiations, the district court, in chambers, with some parties present, discussed negotiations and warned any negotiator leaving negotiating conferences would do so at peril (1505a).

"able and willing" clauses and amended the "memorial period" clauses.

UMW's full obedience to the district court's injunctive commands is manifested in dismissal of all court proceedings upon motion of the federal agencies involved (1480a, 1483-86a), and in the district court's absolving UMW and Lewis of charges they had contemned the court's injunctive mandates (*U. S.* v. *Int. Union, UMWA*, DC, D.C., 1950, 89 F. Supp. 179).

4. Mine Mechanization Was An Existent Fact Prior to the 1949-50 Negotiations and Was Not An Issue in That Bargaining Period

Phillips' contention the coal industry's mechanization resulted from conspiracy and that increases in wages and royalty payments were tailored to meet major coal companies' abilities to pay such increases (113-14a) overlooks the *undisputed fact that, prior to 1950, mechanization was a normal procedure in the coal industry* (616a, 746-47a, 748a). In 1940 *mechanically loaded coal amounted to 35.4%* of all underground production and *by 1949* this had *increased* to 67% (1724a). Likewise, of total production *22.2% was mechanically cleaned* and this was *increased to 35.1%* (1724a) in 1949. *Indeed, Phillips' mining operations were highly mechanized* (211a).

UMW never opposed mechanization (1130a, 1218a), because of the free enterprise system and *UMW's belief that mechanization is a management prerogative to buy such equipment as management chooses and UMW does not "attempt to abridge it"* (1214a, 1223a).

"Had the coal industry not increased productivity with its attendant lowering of costs", it would have succumbed to its competitors—world competition in

coal and competitive fuels such as oil, gas and diversified fuels made from coal or petroleum bases (1130-1a). The 1950 Agreement was executed by operators, according to *Phillips' witness* George H. Love, because "it was our best judgment to conclude the contract and stop losing coal business to other fuels" (545a).

The need of lower cost production through mechanization is shown in the coal industry's loss of markets when coal's share of the national energy market declined from 46.5% in 1945 to 36.9% in 1949 and from 34.8% in 1950 to 23.1% in 1958 (1714a, 113-34a).

In the period 1950-58, when the coal industry invested heavily in new machinery and equipment, coal production increased from 6.77 tons per man day in 1950 to 11.33 tons in 1958 (1724a). In the same period, wages rose from an average of $16.08 per day in 1950 to $24.16 average in 1958.[14] But, as output per man increased as a result of mechanization, UMW insisted this higher productivity justified a higher rate.

5. The Pattern of Collective Bargaining in the Post-1950 Agreement Period Accords With National Labor Policy

Whereas Phillips argued that the industrial peace which followed the 1950 Agreement's execution[15] and

---

[14] U. S. Dept. of Labor, Bulletin No. 1305, Technological Change and Production in the Bituminous Coal Industry, 1920-60, p. 118, Table 27A.

[15] In the Sixth Circuit, UMW argued that in the 1940's UMW had been the target of condemnation by the three branches of the federal government, by coal operators and by segments of the public and that a contrasting peaceful, orderly pattern of collective bargaining, consonant with Taft-Hartley's policy of eliminating industrial strife (29 USCA 141), should not serve as a basis to stamp UMW as a *Sherman* conspirator. To do so, UMW stressed, would place the federal judiciary in the posture of telling UMW it dare not follow the industrial peace proclaimed in the Taft-Hartley Act.

the fact miners achieved wage increases of $9.50 per day over the eight years following the 1950 Agreement's execution and a 10¢ royalty increase in 1952 (which has since remained unchanged) establish the alleged conspiracy, yet, Phillips' argument ignores that in the *1946-48* period miners obtained $4.05 per day increase, establishment of a welfare fund with royalty increased from the original 5¢ per ton in 1946 to 20¢ in 1948, in addition to a reduction in hours per work day (266a, 267-8a). In addition, the 1950 Agreement increased wages 70¢ a day and royalty payments to the Fund to 30¢ per ton.

Phillips' argument that differences in bargaining patterns before and after the 1950 Agreement's execution show the conspiracy ignores the undisputed facts that, while operators formed the Bituminous Coal Operators' Association (called "BCOA") to promote stable industrial relations on a national basis and representing coal producers and associations in Pennsylvania, Illinois, Indiana, Northern West Virginia, Ohio and Virginia (394a), signatory operators include numerous other coal associations and coal producers with whom UMW bargained long prior to 1950 operators select their representatives, and UMW meet with such persons as the operators advised represented it as Taft-Hartley's Section 8(b)(3) [29 USC 158(b)(3)] commands (1247-48a).

6. The "Land-Lease" and "Protective Wage" Clauses in the National Agreement

Two other of the "principal factual aspects" relied upon by the Sixth Circuit to warrant the jury's inference are the so-called "land-lease" and "protective wage" clauses of the National Agreement which the trial court told the jury were lawful and not violative of

Sherman, provided they were inserted at UMW's insistence for legitimate labor goals and were "not the result of an agreement with large coal operators to drive small operators out of business" (1558a). Both clauses sought legitimate labor goals (448a, 1109-10a, 1206a, 1207a). Both were insisted upon by UMW and resisted by operators (1111a, 1201a, 1205-6a).

Under the land-lease clause operators agreed the Agreement "covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production. The said operators agree that they will not lease out any coal lands as a subterfuge for the purpose of avoiding the application of this Agreement" (445a, 1200a, 1739a).

This provision has its genesis in a 1943 Agreement when it read, "The operators agree they will not lease *any operating mines* subject to the supplemental agreement as a subterfuge for the purpose of avoiding the provisions of this supplemental agreement" (1198a). It so appeared in the 1945 National Agreement (1199a). In the 1952 Agreement and subsequent amendments the provision was expanded to cover "coal lands" owned or held under lease by operators or acquired by them. UMW officials' undisputed testimony is that its purpose was *solely* to protect "wage standards and the conditions of the working miner" (1109a, 1201a), to prevent coal operators from repudiating their agreement, and to tighten up the processes of collective bargaining (1201a).

The Sixth Circuit declared (A. 16a), "The evidence showed that there was a large reserve of coal lands

owned or held under lease by the major coal companies" and that "It is argued that this provision barred the small coal companies that could not pay the union wage and the royalties to the Welfare Fund from operating this land and that there was but little good coal land available to them as a result of this provision", although T. Reed Scollon, Chief of Division of Bituminous Coal, Bureau of Mines, U. S. Department of Interior (1280a) testified that at the present rate of coal consumption "there are proved reserves of coal for about *seventeen hundred years*" (1310a) and that in 1958 there were in excess of 8,000 mines producing coal for consumption, of which number more than 2,000 were in Phillips' class (Class 5) and almost 5,000 small producers of less than 10,000 tons annually, all sharing in such coal reserves (Ex. 151-A, 1719a).

The "protective wage" clause's purposes, undisputed evidence shows, had to do with "substandard mines" because of their structure and inefficiency (448a). The clause "is a continuation" of UMW's efforts over years to have an agreement which would prevent operators from vitiating the agreement signed by them "by entering into some kind of a lease or by purchasing coal, closing their own mines down, from sub-standard mines that were paying sub-standard wages" (1206-8a, 1110a).

7. UMW and Operators' Efforts Obtained Walsh-Healey Minimum Wage Determinations and Sought to Have TVA Comply Therewith

In 1936, Congress enacted the Walsh-Healey Act whose purpose this Court avowed is "to use the leverage of the government's immense purchasing power to raise labor standards".[16]

In 1955 and 1958 UMW, Consolidation and other coal companies petitioned United States Secretary of Labor Mitchell to promulgate a minimum wage [not prices (465a)] for the bituminous coal industry on coal purchased by government agencies (457-8a, 1625a, 1634a); public hearings at which both UMW and operators representatives testified (458a, 1634-8a) resulted in the Secretary of Labor's orders setting a prevailing minimum wage for coal industry employees (466a, 1620-1a).

At the 1956 UMW Convention (467a), Secretary Mitchell, introduced by John L. Lewis, in a speech, said: "As you know, about a year ago the Secretary of Labor, for the first time in history, found a minimum wage in the coal industry which controlled the wages that were to be paid to workers who worked on government contracts.[17] We purposely sought that determination in order to exclude from government bidding those non-union mines which are a detriment to the industry" (466a). Mitchell noted that coal was "one of our basic resources" and determination of the minimum wage was "for the benefit of our national

---

[16] (1626-7a, citing *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501 and *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940).

[17] Secretary Mitchell's determination was affirmed in *Ruth Elkhorn Coals, Inc.* v. *Mitchell, Sec'y of Labor*, D.C. Cir., 248 F. 2d 635 (1957), cert. den. 355 U.S. 953.

security" as well as benefit of the worker and the fair employer (468a), and that in the national interest "it is necessary for us to see that those operations which can produce coal quickly and efficiently are kept alive to the extent possible by government purchasing in peace time" (469a). Mitchell told the Convention he was investigating if TVA was evading the Walsh-Healey determination, with assurances of correction, if any. Mitchell also stated he believed the enforcement policy to be "in the interest not only of the worker but is in the interest of the fair employer to prevent the chiseling, nonunion employer from competing in the market place with fair employers who hire union labor" (467a). Continuing, Mitchell noted that it was likewise "for the benefit of our national security" because when strip and non-union mines "which pay people a miserly wage exist and deprive union-operated mines of business, you are thereby reducing your strategic potential in time of emergency. So, it is our job as government officials to see to it that the potential production is kept at the highest possible level" (468a).

In 1958, upon request of UMW and operators and after hearing thereon, the Secretary of Labor raised the prevailing wage in the coal industry 50¢ an hour (470-3a, 1634a).

UMW criticized TVA's paying "lesser and lesser amounts for" coal and using the tremendous influence of TVA's purchases of coal "*to decrease the living standards of the men*" (1625a) "*and ignoring safety standards and health conditions . . .*" (1627a). It was not a "question of union or non-union mines" (1632a).

UMW criticized TVA's policy of purchasing coal on contracts of less than $10,000 (474-6a). A UMW rep-

resentative attended a meeting in March, 1958, as did TVA directors, representatives of Southern Coal Producers Association, Southern Coal Sales and Inter-Mountain Coals, when coal producers requested TVA obtain most of its coal on term contracts rather than the spot market (781-3a).

At a March 20, 1958 meeting coal company representatives suggested TVA "limit [its] spot purchases to approximately ten per cent of [its] total requirements" (832-3a). UMW urged TVA officials *"to patronize those concerns that paid the American standard of wages"* and that TVA comply with Walsh-Healey requirements in awarding contracts (1138-9a).

The Sixth Circuit (*ante*, p. 12) regarded these activities as circumstantial evidence warranting an inference of a conspiracy, despite this Court's contrary holding in *Noerr* (365 U.S. 127).

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS A CONSTRUCTION OF THE SHERMAN ACT THAT A VIOLATION THEREOF CAN BE PREDICATED UPON THE EXERCISE OF LEGITIMATE UNION OBJECTIVES AND THE EXERCISE OF COLLECTIVE BARGAINING TECHNIQUES LOOKING TOWARD THE REALIZATION OF IMPROVED WAGE AND WORKING CONDITION STANDARDS, THEMSELVES PROPER AND LEGAL UNDER NATIONAL LABOR POLICY.

The Sixth Circuit has devised a new and unusual device by which to nullify totally and render meaningless the immunity granted labor organizations under Section 6 of the Clayton Act (15 USCA 17) and to render the right of collective bargaining illusory and "the road to prison", condemned in *U. S.* v. *Hutcheson*, 312 U.S. 219, 234-5. It has done so by employing a lawfully-obtained collective bargaining agreement and

legally-accomplished union objectives of higher standards of wages and working conditions permissible under national labor policy, together with union activities heretofore judicially professed to be outside of *Sherman's* scope, as components of circumstantial evidence from which a jury may find a union to have conspired in violation of *Sherman*. To achieve its results the Sixth Circuit has evaded consideration not only of the immunity section but also the clear proof requirement of *Norris-LaGuardia's* Section 6 (29 USCA 106), and prior decisions of this Court and national labor policy as expressed in the Taft-Hartley Act (29 USCA 141 et seq.).

While *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, declared that to some undefined extent labor unions are subject to *Sherman* (p. 488), it enunciated that under *Clayton's* Section 6, restraints on the sale of employees' services are not conspiracies outlawed by *Sherman* (pp. 502-3). *U. S.* v. *Hutcheson*, 312 U.S. 219, 231, made clear a union's liability under the antitrust laws "is to be determined only by reading" Sherman, Clayton and Norris-LaGuardia Acts "as a harmonizing text of outlawry of labor conduct."[18] Even *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797, which brought within *Sherman's* scope union "activities for the purpose of 'employer-help' in controlling markets and prices" (325 U.S. 808), recognized that *Sherman's* policy was "to preserve a competitive business economy" *with "the rights of labor to organize to better its conditions through the agency of collective*

[18] Pertinent provisions of these statutes appear in Appendix C hereto, A. 48-54a.

bargaining" (325 U.S. 806). When the union acts alone in its own self interest for betterment of its members, independent of nonlabor groups intent upon violating anti-monopoly laws, *Allen Bradley* makes clear its acts are sheltered from penalties imposed under such laws.

The Sixth Circuit's conclusion, approving the jury finding of a conspiracy against UMW, is offensive to that test for it stands for the proposition that a union, acting with employers *as it must in the discharge of its collective bargaining function,* restrains trade by exercising collective employee rights protected by *Taft-Hartley's* Section 7 (29 USCA 157) when, in consequence of the exercise of those rights, certain employers are excluded from an industry engaged in commerce.

The Sixth Circuit's Use of UMW Knowledge That Weaker Companies Would Go Out of Business Because of the Inability to Pay Labor Costs in the UMW Agreement Collides With This Court's American Steel Foundries and Apex Cases

The Sixth Circuit's declaration that UMW knowledge "that the weaker companies could not meet the increased costs of wages and welfare fund payments required by the successive wage agreements, and that the increased costs in the successive wage agreements were geared to the abilities of the major coal companies to mechanize and not have their profits affected by the increased costs" was a basis for upholding the jury's conspiracy verdict against UMW is challenged by pronouncements in *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U.S. 184, and *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469.

The primary purpose of organizing people into trade unions is to eliminate wage competition. Professing that "Union was essential to give laborers opportunity to deal on equality with their employer", this Court in *American Steel Foundries* sanctioned its extention beyond one employer, saying, to render a union "at all effective, employees must make their combination extend beyond one shop" and continuing, "It is helpful to have as many as may be in the same trade . . . united, because, in the competition between employers, they are bound to be affected by the standard of wages of their trade" (257 U.S. 209).

To give purposeful content to *Clayton's* Section 6, *Apex* rejected restraints on the sale of employees' services as violative of *Sherman* "however much they curtail the competition among employees" (310 U.S. 503). Though recognizing that "successful union activity, as for example, consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards", nonetheless this Court continued in *Apex* (310 U.S. 503-4):

> *"Since in order to render a labor combination effective it must eliminate the competition from non-union made goods . . . an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act."*

But, what *Apex* avows to be permissive under *Sherman*, the Sixth Circuit antithetically condemns, averring that if UMW knew that weaker coal producers

would be forced out of the industry because of inability to meet increased labor costs, such knowledge would supply the requisite proof of the alleged conspiracy. Singularly, while *Apex'* holding (310 U. S. 503) is expressly made accommodative to the immunity given labor unions under *Clayton's* Section 6 (15 USCA 17), the Sixth Circuit ignores both *Apex* and the immunity[19] in considering the instant point. *U. S.* v. *Hutcheson,* 312 U.S. 219, 232, teaches that whether trade union conduct constitutes a *Sherman* violation depends upon reading *Sherman* and other federal labor statutes as "interlacing statutes". This is precisely what the Sixth Circuit failed to do.[20]

The full effect then of the Sixth Circuit's holding, if a labor union is to avoid the charge of a *Sherman* conspiracy, is that wages and working conditions in a collective bargaining agreement must be restricted to those which the least efficient and the least successful coal operator in the industry could afford—a result totally inconsonant with UMW and all other legitimate unions' objectives and with national labor policy as

---

[19] The only reference the Sixth Circuit made in its opinion to the immunity provision is in its statement that since *Allen Bradley* and other cases, the exemption exists only where a union acts alone in furtherance of its own purposes, but not where it combines with a nonlabor group to restrain competition in or monopolize marketing of goods in interstate commerce (A. 9a).

[20] Only recently Mr. Justice Goldberg, in a concurrence, in which Mr. Justice Brennan joined, of *Los Angeles Meat Etc. Union, Local 626* v. *U. S.*, 371 U.S. 94, 157, 158, observed that resolution of antitrust violations concerned, "consideration of federal labor policy, the scope of the antitrust exemption afforded labor organizations by Sections 6 and 20 of the Clayton Act and the Norris-LaGuardia Act, as interpreted by United States v. Hutcheson, 312 U.S. 219 . . ." This challenges the Sixth Circuit's citation (A. 9a) of *Los Angeles Meat Union.*

provided for in the Clayton, Norris-LaGuardia, Taft-Hartley, as now amended, the Walsh-Healey and Fair Labor Standards Acts and federal decisional law implementing those statutes. Phillips' own operation demonstrates how fallacious is the Sixth Circuit's views, for, both *before and after* UMW organized Phillips' operation and it became a contract signatory, Phillips' wage rate was substantially less than the standard set for the industry by the UMW agreement (212-13a). It used this cost advantage to engage in price cutting activities to deprive unionized operations of business. Phillips, with the Sixth Circuit's imprimatur, would reestablish the right to compete upon the basis of substandard wages and working conditions in producing goods for interstate commerce. Federal legislation was enacted to eliminate that very competition. Under the Sixth Circuit's views, if permitted to stand, parties negotiating a collective agreement will not sit at the bargaining table alone. One or more invisible parties will also attend. He or they will be "smaller", "weaker" or "competing" employers; and before signing the bargainers must reckon with the fact that these invisible strangers may not be able, or indeed willing, to meet increases in labor benefits and labor costs which the bargaining may produce. Any such unwillingness or inability may become a basis for an alleged *Sherman* violation.

Since wages are a significant element of costs in virtually all industries, it is necessarily foreseeable that elimination of competition in wages will reduce the area of costs within which competition exists and will have a tendency to eliminate from an industry those competitors who, for one reason or another, are dependent for survival on preservation of a more favor-

able employment cost structure than their competitors. *Apex* took cognizance of these economic facts and held that such indirect restraint was not within *Sherman's* purview.

The Sixth Circuit's Opinion Conflicts With Congressional Intent of Legislation Following Apex and Allen Bradley Which Shows Congress' Purpose To Be That Union Activities Pertaining to Organizing and Collective Bargaining Were Not To Be Regulated by Sherman

In 1947, following both *Apex* and *Allen Bradley*, Congress enacted *Taft-Hartley*. One of its avowed purposes was to regulate union conduct which prevented "the free flow of goods . . . through strikes and other forms of industrial unrest or through concerted activities . . ." (29 USCA 151).[21] Significantly, its declaration of policy included recognition of the need for collective action because in its absence there exists inequality of bargaining power causing commerce to be burdened by "depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within . . . industries." Enforcement of this code regulating union activities was committed to the National Labor Relations Board; and for activities for which Congress determined a union should respond in damages, it made specific provisions in Sections 301 and 303 of that Act (29 USCA 185. 187) [A. 61a]. In this enactment Congress affirmed *Apex'* judicial declaration of its purpose not to regulate union behavior attendant with union organizing and collective bargaining under *Sherman*.

---

[21] The pertinent provisions of 29 USCA 151 are to be found in Appendix C hereto, A. 55a.

This Congressional intent is emphasized by *Taft-Hartley's* Section 8(b)(4) [29 USCA 158(b)(4)] making it unlawful for a union to engage in product boycotts and Section 8(e) [29 USCA 158(e)] making it unlawful for both employers and unions to agree to engage in such product boycotts, as enacted in 1959. These statutes stress the Sixth Circuit's fallacy in employing the land-lease and protective wage clauses as bases warranting the jury's conspiracy finding.[22]

The Sixth Circuit's Opinion Is Offensive to National Labor Policy in Its Failure to Concern Itself With Implementing Clayton's Immunity Provision and the Clear Proof Requirement of Norris-LaGuardia

The antitrust immunity of a union under *Clayton's* Section 6 exists for the precise purpose of preventing juries and courts alike from inferring the existence of a conspiracy on a union's part to restrain trade from sanctioned conduct. Otherwise, as the Sixth Circuit has achieved in the instant case, lawful exercise of collective employee rights would be converted into a conspiracy to restrain trade by imputing a purpose to obtain those effects on inefficient employers which are but the by-product of UMW's pursuit of its members' interests. In short, the problem is one of dual effect. When a union secures higher wages for its members, it benefits its members but may injure some employers. If its conduct can be adjudged in light of the effect on the injured employers, a union's immunity from *Sherman* is wholly illusory. So long as a union acts as agent of employees exercising collective rights guaranteed by *Taft-Hartley's* Section 7, it is not sub-

[22] These statutory provisions are found in Appendix C hereto, A. 59-60a.

ject to liability under *Sherman* whatever the forseeable economic consequences of its act.

Each of the factors before the jury falls within the scope of activities permitted or regulated by *Taft-Hartley's* Sections 7 and 8. Clearly, no inference of conspiratorial conduct may be derived therefrom. *Hutcheson's* command that a *Sherman* violation be determined only by reading *Sherman, Clayton* and *Norris-LaGuardia* as "interlacing statutes" (p. 232) and that sanctioned-conduct under *Clayton* could not serve as a predicate for a *Sherman* violation, is equally apposite to conduct which finds sanction under *Taft-Hartley's* Section 7, and thus renders unavailable the use of an inference of conspiracy from permissible activity. Indeed, *Allen Bradley* (325 U.S. 806) proclaims that conduct permitted by federal statutes "is not to be declared a violation of federal law".[23]

Attainment of industrial peace in the coal industry has been a cherished federal government objective. Yet, in its accomplishment the Sixth Circuit finds an illegal conspiracy and that which Congress mandated in protection of the public interest has become a litigation trap for UMW.

But the thrust of the Sixth Circuit's opinion does not impinge upon UMW alone. Unless it is reversed, collective bargaining on a national scale stands immi-

---

[23] More recently, Mr. Justice Black declared, "It would stretch credulity too far to say that the Railway Labor Act, designed to protect . . . workers, was somehow violated by the union acting precisely in accordance with that Act's purpose to obtain stability and permanence in employment for workers." The *Order of Rr. Telegraphers* v. *Chicago, etc. R. Co.*, 362 U.S. 330, 339-40.

nently threatened. Every industry-wide collective bargaining agreement, every labor union and every employer signatory to a multi-employer agreement is rendered a suspect for charges of violating *Sherman* by one or more disgruntled marginal employers seeking to operate at wage levels lower than those achieved in industry-wide bargaining.

To let the decision stand is to invite chaos in the existing pattern of multi-employer national bargaining agreements attained only after a long, bitter and expensive experience and currently prevalent in all major industries in this country. If the Sixth Circuit's doctrinaire is permitted to stand, the public interest will be thwarted because no labor union could hereafter safely expose itself to criminal, injunctive and monetary penalties imposed upon it by the Sixth Circuit's pattern in discharging the very duties and functions constituting the purpose of its existence and as directed by government itself.

This Court's recognition in *NLRB* v. *Truck Drivers Local Union*, 353 U.S. 87, 95-6, of Congress' intent that unions and employers in collective bargaining procedures may act in concert to equalize wages and that "Approximately four million employees are now governed by collective bargaining agreements signed by unions with thousands of employer associations" accentuates the need for review of the Sixth Circuit's judgment and opinion by issuance of the writ sought herein.

II. THE SIXTH CIRCUIT'S DECISION REPRESENTS AN INCORRECT CONSTRUCTION AND INTERPRETATION OF A PRIOR IMPORTANT DECISION OF THIS COURT CONSTRUING THE SHERMAN ACT. IT CONFLICTS TOO WITH A DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS.

The Sixth Circuit's holding (A. 20-1a) "it was a reasonable deduction which the jury could make that the wage determination for the coal industry under the Walsh-Healy Act . . . materially and adversely affected the operations of Phillips in the important TVA market, thus contributing to the elimination of the company as a competitor to the large coal producing companies operating in that area", and its use in sustaining the jury verdict conflict with this Court's prior construction and interpretation of *Sherman* in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and the District of Columbia Court of Appeals' decision in *Assn. of Western Railways* v. *Riss & Co., Inc.*, D.C. Cir., 299 F. 2d 133 (1962).

A material part of Phillips' theory, discussed at length by the Sixth Circuit (A. 20-23a), relates to Phillips' partial exclusion from the TVA market by reason of the Walsh-Healey Act which requires government contractors on contracts of $10,000 or more to pay "prevailing minimum wages" and empowers the Secretary of Labor to make that wage determination. Efforts of UMW and operators relating to the TVA and the minimum wage determinations are discussed *ante*, (pp. 21-23) Phillips' wages were well below *Walsh-Healey's* requirements, and it was thus foreclosed from the TVA markets on contracts of $10,000 or more.

Walsh-Healey's purpose "is to use the leverage of the government's immense purchasing power to raise labor standards." *Endicott Johnson Corporation* v.

Perkins, 317 U.S. 501; *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113. Yet the Sixth Circuit's opinion holds that campaigns and actions directed by a union and employers toward obtaining government action may be treated as illegal and serve as a basis for the imposition of judgments for *Sherman* violations. This is precisely what this Court rejected in *Noerr*, saying (365 U.S. 135) that no *Sherman* violation "can be predicated upon mere attempts to influence the passage or enforcement of laws", and that "the right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws *cannot properly be made to depend upon their intent in doing so*" (p. 139).

As in *Noerr*, the issue here is whether the joint efforts of UMW and certain coal operators to bring about governmental action is proscribed by *Sherman*. The district court reasoned that it was so regulated *where its purpose was to effect a trade restraint* (456-57a). The Sixth Circuit held that such joint action was lawful *only where "unaccompanied by a purpose or intent to further a conspiracy to violate a statute."* But this Court's *Noerr* rejects this view by declaring "that, at least insofar as the railroads' campaign was directed toward obtaining governmental action, *its legality was not at all affected by any anticompetitive purpose* it may have had" (365 U.S. 139-40), and that *"where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out"* (p. 136).

Though in *Noerr* the "sole purpose" of the railroads *"in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors"*

(365 U.S. 138), the Sixth Circuit would have the issue here turn on whether it was UMW's purpose "to drive small coal operators out of business".

Nor is the Sixth Circuit's decision herein reconcilable with the District of Columbia Court of Appeals' *Riss* case, which, implementing *Noerr*, declared that "joint solicitation of government action with respect to the passage or enforcement of laws does not violate the Sherman Act, *even if its purpose is to destroy competition*" (299 F. 2d 135).

III. THE SIXTH CIRCUIT'S SANCTION OF THE ADMISSION OF EVIDENCE AND THE JURY CHARGE RELATING TO UMW'S EFFORTS TO OBTAIN WALSH-HEALEY DETERMINATIONS AND TO HAVE TVA COMPLY THEREWITH IS IN CONFLICT WITH THIS COURT'S NOERR AND THE DISTRICT OF COLUMBIA CIRCUIT'S RISS CASES.

In both the trial court and the Sixth Circuit UMW urged not only that UMW's efforts to obtain a Walsh-Healey minimum wage determination and to have TVA comply therewith was lawful activity and did not constitute evidence of a conspiracy unlawful under *Sherman* but that there was reversible error in its admission. Similarly it pressed upon both courts that the district court's instruction, charging the jury that such joint activity was not violative of *Sherman unless* the jury found it was a part of a conspiracy to drive small operators out of business (1558a, 1587a), conflicted with *Noerr;* and consonant with that position UMW offered, but the trial court rejected, UMW's request No. 53 which omitted the "unless" portion of the court's instruction (1582a).[24] The Sixth Circuit rejected UMW's contentions and sanctioned both the

[24] In the Sixth Circuit, in addition to *Noerr*, UMW relied also upon *Riss* (299 F. 2d 133).

admission of the evidence and the trial court's jury instruction (A. 19-20a, 23-24a). The discussion under Reason II showing that *Noerr* rejects the subject evidence as having probative worth in establishing a conspiracy is equally apposite to these rulings of approval by the Sixth Circuit.

The Court will recall that the jury finding of conspiracy was a general one wherein the jury verdict did not explain which of the factors admitted in evidence it believed supported the verdict. Since the trial court erred under *Noerr* in the admission of evidence and in charging the jury, and because the jury verdict may have rested upon this erroneous theory, "it is unnecessary . . . to explore the legality of the other theories". *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, wherein (pp. 29-30) approval is given to the rule of *Maryland use of Markley* v. *Baldwin*, 112 U.S. 490, 493, as pertains to a general verdict: "Its generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld . . ." (370 U.S. 30).

IV. THE SIXTH CIRCUIT'S SANCTION OF THE ADMISSION OF EVIDENCE PLACING THE SECRETARY OF LABOR IN THE ROLE OF A CO-CONSPIRATOR OFFENDS THE RULE THAT THE SHERMAN ACT IS NOT APPLICABLE TO AUTHORIZED ACTIONS OF PUBLIC OFFICERS.

Under Reason II it has been shown that *Noerr* and *Riss* reject evidence of UMW's efforts in obtaining Walsh-Healey minimum wage determinations and TVA's enforcement of them. This evidence included the convention statement of Secretary of Labor Mitchell concerning these determinations and their

enforcement in connection with TVA's coal purchases.

The Sixth Circuit sanctioned the trial court's admission of Mitchell's convention speech, and its use by the jury as a "reasonable deduction" that the wage determination under *Walsh-Healey* contributed to Phillips' elimination as a competitor in TVA's spot market purchases (A. 20-1a). In so doing, the Sixth Circuit violated the rule enunciated by this and other federal courts that actions of public officials pursuant to and under authority of law do not fall within the trade restraints interdicted by *Sherman*. *Parker* v. *Brown*, 317 U.S. 341, 350; *Stroud* v. *Benson*, DC, E.D. North Carolina, 1957, 155 F. Supp. 482, vacated on other grounds, 4 Cir. 254 F. 2d 448, cert. den. 358 U.S. 817; *Miley* v. *John Hancock Mut. L. Ins. Co.*, DC, Mass., 1957, 148 F. Supp. 299, aff'd. 1 Cir., 242 F. 2d 758, cert. den. 355 U.S. 828.

V. THE NEED FOR THIS COURT'S GUIDANCE IN PENDING CASES INVOLVING SIMILAR CLAIMS IN EXCESS OF 37 MILLION DOLLARS EMPHASIZES THE IMPORTANCE OF THE WRIT'S ISSUANCE HEREIN.

Exclusive of the instant case, there are currently pending in federal district courts of Tennessee and Kentucky thirteen cases wherein coal producers seek damages against UMW in an amount exceeding $37,000,000 which are grounded in complaints either similar to or identical with that in Phillips' cross-claim herein against UMW and all involving the same issue of charged conspiracy under *Sherman*. It can be expected that, because the district courts of Tennessee and of Kentucky are within the Sixth Circuit's jurisdiction, the trial courts will deem it compulsory to use the Sixth Circuit's opinion in the instant case as a guide. In addition, two cases, one pending in Alabama (Fifth

Circuit) and another in Illinois (Seventh Circuit), amount to $1,350,000.[25]

Heretofore certiorari has been awarded "because determination of the issue raised here will guide adjustment of a large body of similar claims now pending" (*Alcoa S. S. Co., Inc.* v. *U. S.*, 338 U.S. 421, 423), or because "the incidence of the problem involved in this case is extensive and the treatment it has received calls for clarification" (*Local 761, Int. Union, etc. Workers* v. *NLRB*, 366 U.S. 667, 671), or because of the "importance of the principal question" (*U.S.* v. *Standard Oil Co.*, 332 U.S. 301, 302).

[25] The pending cases are as follows:

Name of Company	Amount Claimed
Tennco, Inc.	$ 1,200,000.00
Stansberry Coal Co.	300,000.00
Arnold Coal Co., Inc.	450,000.00
E. C. McPherson, t/a McPherson Coal Co., et al	300,000.00
Dean Coal Co.	750,000.00
George Ramsey, et al, d/b/a Walden Ridge Coal Co.	15,150,000.00
Tennessee Consolidated Coal Co. & Grundy Mining Co.	10,050,000.00
Tennessee Products & Chemical Corp.	4,500,000.00
Whitwell Coal Corporation	1,500,000.00
Chavies Mining Co., Inc.	1,425,000.00
Oscar Kelly d/b/a K & K Coal Co.	140,000.00
Ritchie Coal Co.	1,111,172.00
Coy Watts d/b/a Watts Coal Co.	166,500.00
Butler Coal Co., Inc.	600,000.00
Big Three Coal Co., Inc.	750,000.00
Total	$38,392,672.00

A detailed description of the foregoing cases is to be found in Appendix D, hereto (A. 66a).

The need for this Court's guidance in these cases should impel issuance of the writ.

CONCLUSION

For the reasons assigned, Petitioner prays that the Petition for Writ of Certiorari should be granted and that the writ issue to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit, entered in Case No. 14,809 on December 18, 1963.

Respectfully submitted,

HARRISON COMBS
900 Fifteenth Street, N. W.
Washington, D. C.

E. H. RAYSON
R. R. KRAMER
904 Burwell Building
Knoxville, Tennessee

M. E. BOIARSKY
511 Kanawha Valley Building
Charleston, West Virginia

Attorneys for Petitioner.

March 17, 1964

APPENDIX

APPENDIX A

Filed December 18, 1963

Nos. 14809-10

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14809

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admrx. of the Estate of BURSE PHILLIPS, deceased, *Cross-Plaintiffs-Appellees,*

v.

UNITED MINE WORKERS OF AMERICA, *Cross-Defendant-Appellant.*

No. 14810

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE, as Trustees of the UNITED MINE WORKERS OF AMERICA WELFARE and RETIREMENT FUND, *Plaintiffs-Appellees,*

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admrx. of the Estate of BURSE PHILLIPS, deseased, *Defendants-Appellants.*

Appeals from the United States District Court for the Eastern District of Tennessee, Northern Division

Decided December 18, 1963.

Before: CECIL, Chief Judge, MILLER, Circuit Judge, and FREEMAN, District Judge.

MILLER, Circuit Judge. This is an action by John L. Lewis, Henry G. Schmidt and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund, hereinafter referred to as Trustees,

against the defendants, James M. Pennington, Raymond E. Phillips, and Burse Phillips, individually and trading as Phillips Brothers Coal Company, a partnership, hereinafter referred to as Phillips. The Trustees seek to recover $55,982.62 as royalty payments alleged to be due and unpaid pursuant to the terms of a trust provision contained in a wage agreement between United Mine Workers of America, hereinafter referred to as UMW or the Union, and Phillips. Following the death of the defendant Burse Phillips, Lillian Goad Phillips, Administratrix of his estate, was substituted as a party defendant.

The complaint alleges that on or about October 1, 1953, Phillips and the Union entered into the National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, hereinafter referred to as the Wage Agreement, and at specified dates thereafter entered into said Wage Agreement, as amended September 1, 1955, and as amended October 1, 1956, and that pursuant to the terms of said Wage Agreement, as amended, Phillips was required to pay into the Welfare Fund the sum of 40 cents per ton on each ton of coal produced for use or sale. The parties have stipulated the amount of tonnage of coal so produced during the period of October 1, 1953, through December 31, 1958, which was subject to the 40 cents per ton royalty, that Phillips made royalty payments thereon pursuant to the Wage Agreements in the total amount of $2,227.70, and that the amount of royalty which was not paid on said total production was $55,982.62, being the amount sued for.

There is no contention by the defendants that the Wage Agreements were not executed by the partnership, but it is contended by them that they were invalid and that no liability exists for the unpaid royalties.

The answer alleges that the agreements were entered into by Phillips by reason of duress on the part of UMW, which conducted a program of terrorism in the section in

which Phillips' mine was located, with the result that the agreements were unwillingly executed because Phillips knew that they would not be permitted to operate their coal mine unless said agreements were signed.

The answer further alleges that UMW and certain large producers of coal entered into a conspiracy, the purpose of which was to place financial burdens upon Phillips and other small operators similarly situated that could not possibly be paid out of funds realized from the operation of the mine, and such mines, thus being unable to meet the demands, would be closed down, either through violence or suits such as the present one, leaving the business of shipping coal in interstate commerce and to the government agencies to the large coal operators; that UMW and the large coal companies conspired to increase such financial burdens by increasing the wage scale, both by modifications of the Wage Agreement and by having the Walsh-Healey Act apply to the coal industry and have the minimum wage determined thereunder; and that such conspiracy and the acts thereunder were in violation of Sections 1 and 2 of the Sherman Anti-Trust Act, Sections 1 and 2, Title 15, United States Code.

Section 1 of the Sherman Act provides in part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal; . . ."

Section 2 of the Act provides in part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine. . . ."

This same alleged conspiracy is the basis of a cross claim against UMW, in which the large coal producing companies were not made cross defendants, which also alleged that during the time the Wage Agreements were in effect and for the purpose of fulfilling the conspiracy, UMW forcibly closed down Phillips' mining operation and forcibly kept the mine closed over a period of time, which was accomplished by the presence of armed mobs comprised of members or agents of UMW, which intermittently marched through the countryside, closing numerous mines on their forays and creating a reign of terror.

The cross claim alleges that by reason of the conspiracy and the enforced closing down of the mine, Phillips was damaged in the amount of $100,000.00, which should be tripled under the provisions of Section 4 of the Clayton Act, Section 15, Title 15, United States Code.

By an amended answer and cross claim Phillips alleges that in contrast to the disputes which existed between the large coal-producing companies of the country and UMW during the period of World War II and the postwar period, there has been no dispute of any consequence between these parties since 1950, that the alleged conspiracy commenced in 1950, and that it has been implemented by additional understandings between the parties to make more effective the activities in restraint of trade. It specifically alleges that the Union agreed to the termination of employment for thousands of its members because of the mechanization of mines, that it would not protest the closing down of mines which could not be mechanized and that it would go along with the understanding that the coal industry would be confined to a comparatively few companies and the miners employed would be reduced drastically; that as a consequence of this understanding, membership of the United Mine Workers has decreased from 500,000 to 150,000; that the Union agreed that it would not make special agreements with the small operators in the Ken-

tucky and Tennessee region, which would give consideration to local conditions and the particular coal seams mined by the operators, but would have a standard agreement for all operators; that the Union agreed that in the planned mechanization program it would aid in the financing which would become necessary to attain the mechanization of the mines of the large companies; that the large coal-producing companies agreed with the Union that they would not protest the demands of the Union with respect to wage increases so long as the companies were able to match those increases by increased productivity through mechanization; that the companies agreed that there would be no protests from them over the Union's use of the Welfare Fund for its own purposes and in furtherance of its organizing efforts; that under the 1958 Wage Agreement it was required that all signatory operators refrain from buying or marketing nonunion coal; and that the Union and the large companies agreed that they would do all things possible to restrain the production, marketing and sale of nonunion coal.

By another amended cross claim Phillips claims damages for the period commencing four years prior to the filing of the original cross claim on February 14, 1958, the period of damage to end December 31, 1958, at which time the cross plaintiffs ceased to do business, as limited by the four-year limitation provided by Section 15b, Title 15, United States Code.

UMW moved to dismiss the cross claim on the ground that it stated no cause of action, that in so far as it alleged an unfair labor practice on the part of the Union under the provisions of Section 158(b), Title 29, United States Code, exclusive jurisdiction thereof was vested in the National Labor Relations Board, and that it stated no cause of action under the Sherman Anti-Trust Act or under Section 301 of the Taft-Hartley Act, Section 185, Title 29, United States Code. The motion was overruled, except in

so far as it challenged the jurisdiction of the District Court over any alleged unfair labor practice under Section 158(b), Title 29, United States Code, which ground of the motion was upheld by the Court.

Thereafter, UMW filed its answer in which it denies that it joined in any conspiracy in restraint of trade or commerce in violation of the Sherman Act, or that it monopolized or attempted to monopolize or conspire with any other person or group of persons to monopolize any part of the trade or commerce among the several states. Affirmatively, it alleges that by virtue of Section 6 of the Clayton Act, Section 17, Title 15, United States Code, it is exempt from the provisions of Sections 1 and 2 of the Sherman Act. It contends that it is a labor organization within the meaning of Section 6 of the Clayton Act and it acted as such for its members in the negotiations for the execution of the Wage Agreements and that during the period of time involved herein its acts were motivated by legitimate labor goals and for the purpose of securing union standards of wages and better conditions of employment for its members, thus qualifying for the exemption provided by the Act.

The claim of the Trustees against Phillips and Phillips' cross claim against the Union were consolidated for trial by jury. Following a trial of some four and one-half weeks the case was submitted to the jury.

As an aid to the jury in reaching its verdict, the Court prepared two verdict forms for the jury to answer.

Form No. 1 contained one paragraph reading as follows:

> "Did the Trustees engage in a combination or conspiracy so as to unreasonably restrain trade or commerce among the several states as alleged by the original defendant, Phillips Brothers Coal Company."

The jury answered this question yes.

Form No. 2 contained three paragraphs. The first paragraph read as follows:

> "Did the cross defendant, UMW, engage in a combination or consipracy so as to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states outside and beyond the exemption created by the anti-trust statutes to a labor organization as alleged by cross plaintiffs, Phillips Brothers' Coal Company."

The jury answered this question yes. The jury was instructed that if its answer to this first question was no, the remaining two questions need not be answered, but that if its answer to this first question was yes, it should answer the remaining two questions.

The second question read as follows:

> "If your answer to question 1 is yes, was cross plaintiff, Phillips Brothers' Coal Company, damaged in its business or property as a direct and proximate result of the conspiracy."

The jury was instructed that if its answer to this second question was no, it need not answer question 3. The jury answered the second question yes.

The third question for the jury to answer read as follows:

> "We find in favor of cross plaintiff, Phillips Brother's Coal Company, and fix its damages in the amount of _____ dollars."

The jury in answering this question fixed the damages in the amount of $90,000.00.

At the close of the evidence for Phillips, the Trustees and the Union moved for directed verdicts in their favor,

which motions were overruled. At the close of all the evidence, the Trustees and the Union moved for judgments in their favor notwithstanding the verdict and, in the alternative, that the verdict be set aside and that a new trial be granted.

The District Judge ruled that there was no material or substantial evidence to support the finding of the jury that the Trustees of the Welfare Fund, as distinguished from the Union, engaged in a combination or conspiracy to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states and ordered that the verdict of the jury in so finding be set aside. However, in entering judgment for the Trustees, he reduced the amount of the recovery from $55,982.62 to $43,424.22, ruling that the Trustees were entitled to royalties only for the period from and after April 25, 1955, to and including December 31, 1958, in that the employees of Phillips were not members of the Union until April 25, 1955. The Trustees have not appealed from this judgment, which eliminated the earlier part of their claim. Phillips has appealed from the judgment against it, which is appeal No. 14810, being one of the two appeals being herein considered.

The District Judge overruled the motion of the Union for judgment notwithstanding the verdict and, in the alternative, for a new trial, and entered judgment for Phillips against the Union in the amount of $270,000.00, being three times the amount of damages awarded by the jury, and also included in the judgment the additional sum of $55,000.00 as a reasonable amount of attorneys' fees to be awarded and assessed in accordance with the applicable statutes, thus making a total award in the favor of Phillips in the amount of $325,000.00. The Union has taken an appeal from this judgment, which is No. 14809, being the other of the two appeals herein being considered. The two appeals have been heard together on a joint appendix.

We consider first appeal No. 14809 taken by UMW from the judgment against it in favor of Phillips.

The first question presented is whether a labor organization is exempt from the provisions of the anti-trust laws under Section 6 of the Clayton Act, Section 17, Title 15, United States Code. It provides as follows:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

Although some question about this may have existed prior to 1945, the Supreme Court held in that year that although an exemption exists in cases where a labor union acts alone in furtherance of its own purposes, it does not exist in cases where a labor union combines with a nonlabor organization to restrain competition in, or to monopolize the marketing of, goods in interstate commerce. *Allen Bradley Co.* v. *Local Union No. 3, etc.*, 325 U.S. 797. See also: *United Brotherhood of Carpenters, etc.* v. *United States*, 330 U.S. 395, 400; *Los Angeles Meat & Provision Drivers Union* v. *United States*, 371 U.S. 94, 99-101. The District Judge was not in error in refusing to dismiss the cross claim or to direct a verdict for the Union on this ground, and in submitting to the jury under a proper instruction the question whether the Union acted alone in carrying out the legitimate objects of labor unions, or aided, cooperated, conspired or combined with business groups in order to accomplish purposes which the anti-trust laws prohibit.

There is evidence to the effect that UMW forcibly closed down Phillips' mine by the presence of armed mobs which intermittently marched through the countryside. Reference is made to recent decisions of this Court holding that under certain conditions damages caused by such illegal action are recoverable by the injured party. *United Mine Workers of America* v. *Meadow Creek Coal Co.*, 263 F (2) 52, C.A. 6th, cert. denied, 359 U.S. 1013; *United Mine Workers of America* v. *Osborne Mining Co.*, 279 F(2) 716, C.A. 6th, cert. denied, 364 U.S. 881; *Gilchrist* v. *United Mine Workers of America*, 290 F(2) 36, C.A. 6th cert. denied, 368 U.S. 875; *Flame Coal Co.* v. *United Mine Workers of America*, 303 F(2) 39, C.A. 6th, cert. denied, 371 U.S. 891. However, the Union is correct in its contention that these cases are not applicable to the present action against it. Those actions were not brought under the anti-trust laws. Although a cause of action may exist for such damage under the common law or the Taft-Hartley Act, it does not follow that a cause of action also exists under Sections 1 and 2 of the Sherman Anti-Trust law where a combination or conspiracy in restraint of trade or an attempt to monopolize trade or commerce among the states must be shown. *Ace Beer Distributors, Inc.* v. *Kohn, Inc.*, 318 F(2) 283, 286 C.A. 6th. The District Judge correctly charged the jury on this issue in stating to it that the activities of labor unions, which are not violative of the Sherman Act, do not become violations of the Sherman Act even if such activities are carred out by violent means, and that acts of violence in and of themselves are not material to the determination of the question of whether the anti-trust laws were violated. However, it was not error for the jury to consider such evidence as bearing on the overall issue of whether such acts were done as part of a conspiracy to restrain competition or create a monopoly. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469; *Allen Bradley Co.* v. *Local Union No. 3, etc., supra*, 325 U.S. 797, 809-811.

It must also be kept in mind in considering this appeal that we are not concerned with any alleged violation of the Taft-Hartley Act, which, as the District Judge correctly held in ruling on the Union's motion to dismiss the cross claim, is a matter within the exclusive jurisdiction of the National Labor Relations Board. *San Di go Building Trades Council* v. *Garmon,* 359 U.S. 236. We think that the Union's rights were fully protected in this respect by the charge to the jury that the Taft-Hartley Act is not one of the anti-trust laws, that the jury was not concerned with awarding damages for any violation of the Taft-Hartley Act, that it must consider simply whether there had been a violation of the anti-trust laws, not the Taft-Hartley Act, causing damage to Phillips, and that even if there was a violation of the Taft-Hartley Act, it would not on that account be a violation of the anti-trust laws.

The Union's main contention on this appeal is that the evidence was insufficient to take the case to the jury on the allegations of the cross claim that it conspired with certain large coal producing companies to restrain trade in the bituminous coal industry among the several states or to monopolize the trade in such industry among the several states, and that it was error for the District Judge to overrule its motions for a directed verdict and for judgment notwithstanding the verdict.

The evidence in these cases is voluminous. It appears that many of the basic facts are not in dispute, although there is strong disagreement between the parties about the inferences or conclusions to be drawn from these facts. A review of the evidence in detail would unduly lengthen this opinion. We think it is sufficient to discuss some of the principal factual aspects of the case, which lead us to the conclusion that, although recognizing that some factual disputes may exist, yet taking that view of the evidence, with inferences reasonably and justifiably to be drawn

therefrom, most favorable to the prevailing party, there is substantial evidence in the record to justify the submission of this case to the jury and to support the verdict. *Battjes* v. *United States*, 172 F(2) 1, 5, C.A. 6th; *Local 175, etc.* v. *United States*, 219 F(2) 431, 433, C.A. 6th, cert. denied, 349 U.S. 917. On this appeal we do not judge the credibility of witnesses or weigh conflicting evidence.

The Union contends that not only was there no direct evidence that it conspired with large coal companies, or with anyone, for the purpose of putting any operator out of business, but that there is the unchallenged testimony of its President and its Secretary-Treasurer that it at no time joined with or agreed with any coal operator for such purpose. But it is recognized that conspiracies are seldom capable of proof by direct testimony and it is settled that they may be inferred from the acts of the parties thereto. Circumstantial evidence of the existence of a conspiracy may be sufficiently strong to raise a factual question for the jury even though there is no direct evidence that a conspiracy existed. It is the function of the jury to observe the witnesses while testifying, to appraise their credibility, to draw inferences from the facts established, to resolve conflicts in the evidence and to reach ultimate conclusions of fact. *Eastern States Retail Lumber Dealers, Ass'n.* v. *United States*, 234 U.S. 600, 612; *Local 175, etc.* v. *United States, supra*, 219 F(2) 431, 433, C.A. 6th, cert. denied, 349 U.S. 917; *Loew's Inc.* v. *Cinema Amusements*, 210 F(2) 86, 93 C.A. 10th, cert. denied, 347 U.S. 976.

In support of the basic theory of the cross claim that UMW and the major coal companies conspired to eliminate the smaller and weaker companies thus leaving the industry to the major coal companies alone, the following background was given to the jury. After World War II the economics of the Bituminous Coal Industry became unstable by reason of the fact that there was more coal being produced than the markets required; that before 1950 the

major coal producers and the union were in agreement that the major problem of the industry was over-production and that the growth of smaller independent and non-union producers was contributing to the problem; that the major companies and the Union disagreed on how the problem should be handled; that on its side the Union was contending that the answer was to cut down on the working time of the producers; that the Union urged a three-day work week; that for many months before the 1950 contract was signed the Union took the initiative on this question and directed the working time of the men in the industry; that this domination of the men in the industry was interfered with by the passage of the new Taft-Hartley Act; that the Union's efforts to maintain closed shops and to maintain a Union controlled welfare fund were challenged and in some instances were defeated in the Courts by the major coal companies; that the major coal companies were opposed to the Union's dictating the working time of the men in the industry because it cut into profits.

Phillips contends that a marked change occurred in the relations of the Union and the major coal companies in 1950 as disclosed in their bargaining relations before and after that year; that the understanding at the time of the signing of the 1950 Wage Agreement was that the major coal companies were to decide on the working time for their employees; that this was a surrender on the part of the Union of its previous policy of seeking to control the economics of the industry by controlling the working time; that the understanding was that the problem of stabilizing the economies of the industry was to be taken care of by eliminating the smaller and weaker companies, leaving the industry to the major coal companies alone.

The following history of the Wage Agreements between UMW and the coal operators show the increased financial burden placed upon the operators over the period of 1945 through 1958.

UMW and mine operators have negotiated collective bargaining agreements since UMW's beginning in 1890 until the present time. Failure of collective bargaining purposes to function led to work stoppages and seizures and operations of the mines by the Federal Government on five occasions during 1943 through 1946. The National Bituminous Coal Wage Agreement of 1945 terminated pursuant to its terms on March 30, 1946. Collective bargaining between the Secretary of the Interior and UMW resulted in a contract increasing wages $1.85 per day, establishing a welfare and retirement fund of 5 cents per ton on all coal produced for use or for sale and continuing the nine-hour day with overtime for work in excess of seven hours per day and thirty-five hours per week.

Ensuing disputes thereafter resulted in UMW terminating the agreement, but negotiations were resumed and a new agreement was entered into effective July 1, 1947, which increased wages $1.20 a day, reduced the work day to eight hours and increased payments to the welfare fund to 10 cents per ton. Following the resignation of the Welfare Fund's neutral trustee and a disagreement of the remaining two trustees with respect to pension payments, the UMW announced that the operators had dishonored the contract and a nationwide strike began in March 1948. The President invoked Taft-Hartley's national emergency provisions, a Board of Inquiry held hearings and injunction proceedings to enjoin the strike were instituted.

A new agreement was executed on June 25, 1948, which provided for an increase of $1,00 per day in wages and raised the royalty payment to the welfare fund to 20 cents per ton.

Under the 1950 agreement, executed on March 5, 1950, wages were increased 70 cents a day, and Welfare Fund royalties were increase from 20 cents to 30 cents a ton.

The 1951 agreement effective February 1, 1951, which amended the 1950 agreement, raised wages $1.60 a day to $16.35.

The 1952 agreement, effective October 1, 1952, raised basic daily wages $1.90 to $18.25, and increased fund payments from 30 cents to 40 cents a ton.

The 1955 agreement, effective September 1, 1955, raised wages in two steps for a total of $2.00 per day to $20.25, the vacation period was lengthened two days and vacation pay increased to $40.00.

The 1956 agreement, signed October 4, 1956, provided a $2.00 a day wage increase to $22.25 on a two-step basis. Vacation pay was raised $40.00 and for 1956 only a Christmas vacation period of three days with a $40.00 payment was provided.

The 1958 agreement, effective December 1, 1958, provided a two-step $2.00 a day wage increase, which brought basic wages as of April 1, 1959, to $24.25 daily. Vacation pay was raised $20.00 to a total of $200.00 for a fourteen-day period.

The campaign to impose the wage contracts upon the smaller nonunion mines was intense after 1950. In areas of strong resistance mobs and terrorism were used. One or more of the major coal companies assisted in closing the operations of the principal union competitor of UMW in the bituminous coal labor field. We think the evidence supports the contention of Phillips that the Union knew that the weaker companies could not meet the increased costs of wages and welfare fund payments required by the successive wage agreements and that they would fall by the wayside by reason thereof, and that the increased costs in the successive agreements were geared to the abilities of the major coal companies to mechanize and not have their profits affected by the increased costs.

There was also evidence that before signing the Wage Agreement in October 1953 Phillips told the UMW representative that it was a new company just starting out and that it could not pay the wage scale or the 40 cents a ton

to the Welfare Fund, and that the representative told them that they could work out their own working arrangements with their employees and pay whatever they could to the Welfare Fund. To its knowledge, no employee of the partnership belonged to the Union at that time and the Union did not represent the employees, although the Union succeeded in organizing the company later.

With respect to suits against coal operators in Tennessee for unpaid royalties, two suits were filed in 1954, no suits were filed in 1955, one suit was filed in 1956, no suits were filed in 1957, thirty-nine suits were filed in 1958, thirty-eight of which were pending as of December 1, 1960, when the tabulation was made, and seven suits were filed in 1959. It was the established policy of the Trustees to make no discounts or reductions or settlements for less than the full amount owed, irrespective of the economic condition of the operator. Many of the small operators were unable to meet the increased labor costs under the Wage Agreement and the payments to the Welfare Fund, and discontinued operations. Phillips strongly stresses the heavy increase in the litigation in 1958. The present action was filed against it on January 6, 1958.

The 1952 Wage Agreement contained a so-called "land-lease" provision, under which the signatory operators agreed that the Wage Agreement covered the operation of all of the coal mines owned or held under lease by them or by any subsidiary or affiliate, or acquired during the term of the agreement. The evidence showed that there was a large reserve of coal lands owned or held under lease by the major coal companies. It is argued that this provision barred the small coal companies that could not pay the union wage and the royalties to the Welfare Fund from operating this land and that there was but little good coal land available to them as a result of this provision.

The 1952 Wage Agreement contained a clause which provided that the signatory operators would not buy, sell or deal in coal mined by companies that did not pay the

same labor costs as contained in the Wage Agreement. The major coal companies had the practice of frequently buying coal from the smaller companies to apply on their large long-term contracts. This market was eliminated for those small companies that could not operate under the provisions of the Wage Agreement.

There was evidence showing that UMW acquired outright 85,400 shares, out of 857,264 shares outstanding, of the common stock, and the entire 50,000 shares of the preferred stock of West Kentucky Coal Company, one of the major coal companies, of which the Nashville Coal Company was a subsidiary. The common stock was acquired at a price of about $25.00 per share. Later, the stock market quotation rose to about $40.00 a share and thereafter declined to about $11.00 per share. The preferred stock was acquired at about $50.00 per share. The preferred stock became voting stock when dividends were in arrears. Arrearage dates back to April 1, 1958. On June 30, 1960, it was $309,375.00. In addition to the stock owned outright, UMW held substantial blocks of the stock of the two companies as collateral on loans. Under the provisions of many of these notes, which the collateral secured, the borrower was relieved from personal liability upon surrender of the collateral. The notes were renewed annually. If the interest was not paid, usually because dividends were not paid on the stock held as collateral, it was added to the principal of the renewal note. If the stock held as collateral declined in value, there was no demand for additional collateral. One of these loans in the amount of $2,513,895.18, secured by 90,600 shares of common stock of West Kentucky Coal Company, was to Cyrus S. Eaton, Chairman of the Board of West Kentucky Coal Company and Nashville Coal Company, as well as Chairman of the Board of Chesapeake & Ohio Railway Company, Steep Rock Iron Mines, Portsmouth Corporation, and a member of the Board of Cleveland Cliffs Iron Company, Cleveland Electric Illuminating Company, Kansas City Power & Light Company, and Sherwin Williams Company. This direct and in-

direct interest in the two coal companies totaled over $25,000,000.00. The shares of common stock of West Kentucky Coal Company owned outright and held as collateral totaled more than one-half of the outstanding common stock. It was not unreasonable for the jury to conclude from these facts that it was the purpose of the UMW to have a very material voice, if not the dominant one, in determining the policies and operations of these two major coal companies, which, as is hereinafter pointed out are charged with playing an important role in the alleged conspiracy. The evidence showed the large growth of the Tennessee Valley Authority steam plants, generating electricity by steam. The use of coal by TVA increased from 500,000 tons in 1950 to approximately 20,000,000 tons in 1956. The TVA plants were designed for the use of coal only. TVA buys coal under term and spot market bids. The spot market involves small orders of coal to be delivered in a short period of time, which offers definite advantages to small companies with weak financial resources, which can thus avoid long-term commitments. About seventy-five percent of TVA coal is bought on term contracts and about twenty-five percent on spot contracts. In 1955 UMW and two of the large coal producing companies successfully sought a determination by the Secretary of Labor of a minimum wage in the coal industry under the Walsh-Healey Act. The minimum wage determined was materially higher, in most instances twice as high, than the minimum wage determined in any other industry under the Walsh-Healey Act. This minimum wage determination prevented Phillips from bidding on the TVA term market, although it left open to Phillips for the time being the TVA spot market.

We believe that the following evidence is relevant on this phase of the case. At the 1956 Convention of the Union, President John L. Lewis introduced Secretary of Labor Mitchell, who, in the course of his remarks, spoke as follows:

> "I have had occasion, as Mr. Lewis has indicated, to work with your organization in the Department of

> Labor on many fronts. . . . As you know, about a year ago the Secretary of Labor, for the first time in history, found a minimum wage in the coal industry which controlled the wages that were to be paid to workers who worked on government contracts. We purposely sought that determination in order to exclude from government bidding those nonunion mines which are a detriment to the industry. And I think by and large we have succeeded, except for certain areas of government purchasing which still have to be, shall I say, investigated. Twenty-five per cent, at the moment of the TVA purchases are made under contracts less than $10,000.00, which excepts such purchases from the determination of the Walsh-Healey Act. I have set in motion a study of the TVA purchasing policy to see if there is any evasion of the Walsh-Healey determination on the part of TVA. I don't know whether there is or not, but if there is, you can be sure that we will correct it: . . . I propose to continue this enforcement policy, because I believe it is in the interest not only of the worker but is in the interest of the fair employer to prevent the chiseling, nonunion employer from competing in the market place with fair employers who hire union labor."

President Lewis, responding at the end of the speech, said:

> "I am sure that the Chair voices the sentiments in the mind of every delegate in expressing our appreciation of the address of the distinguished Secretary of Labor. His personal assurance of his intention to fairly treat the men of the coal industry is bulwarked and borne out by his attitude in the entire period of three and a half years of his incumbency of that office."

Although this evidence was objected to by the Union, it was admitted by the District Judge with the cautionary

admonition that the Secretary of Labor couldn't say anything that would prejudice the rights of the UMW unless the UMW authorized him to say it, or unless the UMW approved what he said, or ratified what he said, or acquiesced in what he said. We are of the opinion that this evidence was not improperly received.

Contracts for less than $10,000.00 were not subject to the wage determination of the Walsh-Healey Act. Phillips sold coal on the TVA spot market under contracts for less than $10,000.00, thus avoiding the wage determination of the Walsh-Healey Act. About the end of 1956 the price of coal on the spot market began to decline, which continued through 1957 and 1958, finally reaching a very low figure in 1958. During 1956, 1957 and 1958 Pittsburg-Midway Coal Co., Peabody Coal Co., West Kentucky Coal Co. and Nashville Coal Co., four of the large coal producing companies, made large offerings of tonnage on the TVA spot market at generally declining prices, with a number of such bids being successful. There was evidence that West Kentucky coal was sold extensively in the middle western market, most of it up and down the Mississippi Valley, that the middle western utility market had held up well, but that the distress coal which was for sale by West Kentucky Coal Co. and Nashville Coal Co. was for the most part thrown into the TVA market rather than the other market. There was also evidence that West Kentucky Coal Co., Nashville Coal Co. and Peabody Coal Co. did not make an analysis of the profit on the coal sold to TVA, the President of Peabody Coal Co. stating that he was "afraid to look at some of them." There was also evidence that the heavy offerings of West Kentucky coal on the TVA spot market would have the effect of bearing down on the price heavily.

We believe it was a reasonable deduction which the jury could make that the wage determination for the coal industry under the Walsh-Healey Act and the dumping of West Kentucky coal on the TVA spot market materially

and adversely affected the operations of Phillips in the important TVA market, thus contributing to the elimination of the company as a competitor to the large coal producing companies operating in that area, including the West Kentucky Coal Company, in which the UMW had such a dominant interest.

On the question of damages, Phillips introduced evidence showing the total tonnage it shipped on the TVA steam market in 1956, 1957 and 1958, the average price Phillips received for this steam coal, and the national average for all kinds of coal for those years. This is shown by the following table:

Year	Phillips Shipments	Price Received	National Average
1956	14,128.70 tons	$3.92	$4.82
1957	19,717.67	3.20½	5.08
1958	25,603.03	3.13⅓	4.86

The difference between what Phillips would have received in each of these years if it had received the national average and the amount it actually received was $12,715.83 in 1956, $37,003.49 in 1957, and $44,207.90 in 1958, or a total of $93,927.22. The jury by its verdict awarded damages in the amount of $90,000.00.

The Union challenges the sufficiency of this evidence to sustain an award of damages on the ground that the national average price of all kinds of coal does not afford a valid base of comparison with Phillips TVA coal. In particular, it contends that Phillips was a strip mine coal operator and that the national average price of all coal is substantially above the national average price of strip mine coal; that the utility market is the lowest coal market in price and may not be compared, pricewise, with the average market for all coal; that the spot market was the lowest part of the low-price utility market and that Phillips sold its coal on this lower priced spot market rather than on the higher priced term market; and that Phillips sold

its premium (block and egg) coal separately from its utility coal well above the prices received for its utility coal, but did not include receipts for its premium coal in its average price which is compared with the national average price of all coals.

These factors, if unexplained or unaccounted for, could have the effect of reducing the amount of the difference between the national average of all coals and the average price which Phillips received on the TVA spot market for steam coal, but in the light of other factors involved and brought out by the evidence, as hereinafter pointed out, we do not think the comparison was so unfair as to reject its consideration by the jury in its entirety in determining what, if any, damage Phillips suffered by reason of the conspiracy, if it found such a conspiracy existed.

In this connection there was evidence that the quality of steam coal, rather than the fact that it was deep underground coal instead of strip mining coal, was the important factor in the price; that the national average for high volatile bituminous coal was 12,900 BTU per pound, that the average for Tennessee high volatile bituminous coal was 13,460 BTU per pound; that Campbell County, Tennessee, coal, in which county Phillips operated, had an average of 13,200 BTU; and that there was a guaranteed minimum of 13,215 BTU per pound in the Phillips coal offered on a dry basis.

There was also evidence that the market for steam coal was not restricted to the utilities but included industrial concerns and railroads, and that the higher priced coal sold at retail had fallen from 20 per cent of the total in 1940 to 8 per cent in 1958. Although the fact was a disputed one, there was evidence to the effect that the difference between the national average price for all bituminous coal and the price received by Phillips for steam coal was not materially affected by the fact that the national average price was for all bituminous coal, including so-called pre-

mium coal, and that the coal sold by Phillips on the TVA market did not include premium coal.

It is true that damages which are speculative cannot be recovered. But that does not mean that when damages have resulted from a wrongful act, they cannot be recovered because they are uncertain in amount or because the injured party cannot show with certainty the exact amount of damage incurred. It is enough if the evidence shows the extent of the damage as a matter of just and reasonable inference, although the result be only approximate. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555. We are of the opinion that the evidence in the present case brought the case within that rule. The District Judge instructed the jury at length upon the question of damages. In our opinion, the rights of the Union on the question of damages were fully protected.

UMW contends that the District Judge erred in admitting evidence with reference to the Walsh-Healey prevailing wage determination and having TVA comply therewith, and in charging the jury concerning UMW's efforts to obtain Walsh-Healey prevailing wage determinations and to have TVA enforce such wages. It relies upon *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127. It was held in that case that no violation of the Sherman Act can be predicated upon mere attempts to influence the passage or enforcement of laws, and that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly.

With respect to the Walsh-Healey Act, the District Judge charged the jury:

> "Any approach to the Secretary of Labor, which was designed to raise the minimum wages to be paid by coal operators doing business with the TVA or other

governmental agencies, was not a violation of the antitrust laws. Therefore, you will not give any consideration whatever to this approach to or meeting with the Secretary of Labor, unless you find that the approach to the Secretary of Labor was a part of the conspiracy to get the prevailing wages establish (sic) in the coal industry so high as to drive the small operators out of business."

UMW contends that although the first part of this instruction was in accordance with the ruling in the *Noerr* case, it was error to qualify the instruction by the concluding words, "unless you find. . . ."

The District Judge also instructed the jury that it was no violation of the antitrust law for the Union or the coal operators to urge the TVA to abide by the spirit and letter of the Walsh-Healey Act or to modify its methods of buying coal, "unless the parties so urged the TVA to modify its policies in buying coal for the purpose of driving the small operators out of business." The qualifying words in this instruction are likewise complained of.

We do not consttue the *Noerr* ruling as creating an unlimited exemption to Sections 1 and 2 of the Sherman Anti-trust Act. We believe that the *Noerr* ruling had reference to conduct which in good faith looked to the enforcement of the law or a modification of an existing policy, unaccompanied by a purpose or intent to further a conspiracy to violate a statute. It is the illegal purpose or intent inherent in the conduct which vitiates the conduct which would otherwise be legal. We find no error in the two instructions complained of.

Complaint is also made of the admission in evidence by the District Judge of statements of George Love, an alleged co-conspirator, before a prima facie case of the alleged conspiracy was presented. In doing so, the District Judge told the jury, "before these statements are competent as evidence and binding upon any alleged co-conspirator, the

jury will have to find that there was a conspiracy and that such statements were made in furtherance of the conspiracy." We find no error in admitting the statements before presenting a prima facie case of the alleged conspiracy, provided that the admission in evidence is conditional upon such proof of the conspiracy being later introduced, as the jury was instructed in this case. The District Judge has a wide discretion in controlling the order of proof. *United States* v. *Minton*, 107 F(2) 834, 844, C.A. 2nd, cert. denied, 309 U.S. 664; *Flintkote Company* v. *Lysfjord*, 246 F(2) 368, 378, C.A. 9th, cert. denied, 355 U.S. 835. We find no merit in the contention that without the statements of Mr. Love, the evidence was insufficient to support the allegation that a conspiracy existed.

Accordingly, the judgment in case No. 14809 is affirmed.

CASE NO. 14810

In this case the jury found that the Trustees of the Welfare Fund engaged in a combination or conspiracy so as to unreasonably restrain trade or commerce among the several states. The District Judge was of the opinion that there was no substantial evidence to support the verdict, set aside the verdict, and entered judgment for the Trustees notwithstanding the verdict, although in a reduced amount from that asserted by the Trustees.

On this appeal Phillips contends that the verdict is supported by evidence from which it could reasonably be concluded that (1) the Trustees paid benefits only to members of UMW; (2) the Trustees required the beneficiaries of the trust to picket or perform other acts for the UMW in order to obtain or retain pension benefits, or acquiesced in the doing of these things by the beneficiaries; (3) the Trustees, as a punitive measure, brought legal actions to recover royalties on coal produced; (4) the Trustees held out to the men in the industry that the Fund was under union control; and (5) the Fund, in fact, was under the domination and control of the UMW.

In setting aside the verdict the District Judge expressed the opinion that the action of a majority of the Trustees was required to bind the Fund (see *Van Horn* v. *Lewis*, 79 F. Supp. 541, D.C.D.C.); that the action of John L. Lewis, President of UMW, alone, without authorization or consent of the majority of the Trustees, was not sufficient to show that the Trustees conspired with the large coal operators to drive a small operator out of business, and that there was no evidence to support the finding that Mr. Lewis, for himself and another of the Trustees, entered into the alleged conspiracy.

We are of the opinion that the District Judge was not in error in setting aside the verdict and entering judgment for the Trustees notwithstanding the verdict. We find no direct evidence that the Trustees participated in the alleged conspiracy, and the inferences which Phillips would have us draw are not justifiable or reasonable in the light of the strong and uncontradicted testimony of the Trustees themselves. We concur in the opinion of the District Judge in his analysis of the evidence on this aspect of the case, to which we refer.

Since the District Judge ruled that the evidence was not sufficient to sustain the verdict that the Trustees engaged in a conspiracy to unreasonably restrain interstate commerce in violation of the Sherman Act, it was not necessary for him to rule upon Phillips' contention that such a violation of the Sherman Act, if it had occurred, was a bar to the right of the Trustees to recover in this action. However, should it be that that ruling and our concurrence in it is not the correct one, we are nevertheless of the opinion that, contrary to the contentions of Phillips, the verdict of the jury was not a bar to the right of the Trustees to collect the royalty payments which had accrued under the contract on the coal already mined. *Kelly* v. *Kosuga*, 358 U.S. 516; *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 549; *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U.S. 165.

Phillips also attacks the validity of the contract under which the Trustees are seeking a recovery on two other grounds. (1) It is contended that UMW had not performed the statutory requirements necessary to be performed before a valid union security clause could be inserted in the contract between it and Phillips, and since the contract contained such a union security clause, it rendered the contract invalid. (2) It is contended that since the evidence shows that the contract was forced upon Phillips through threats and violence and Phillips' employees were in like manner forced to join the Union in order to make it possible for Phillips to operate its mines, this constituted an unfair labor practice on the part of the Union under the Labor-Management Relations Act, Sections 157 and 158(b), Title 29, United States Code, which, in turn, rendered the contract void in its entirety.

We doubt that these issues are before us on this appeal. They were not submitted to the jury and no facts were found by the jury with respect thereto. On the contrary, the District Judge instructed the jury:

> "The sole question for you to decide in the suit of the Trustees is whether the plaintiff Trustees engaged in a combination or conspiracy so as to unreasonably restrain trade or to monopolize commerce among the several states as alleged by Phillips Brothers."

Twice thereafter in his charge, the District Judge repeated the substance of this instruction to the jury. Following the instructions and a consideration of the UMW's objections to the charge, counsel for Phillips stated to the Court:

> "If your Honor please, the defendants and cross-plaintiffs have no exceptions to the charge and no requests for additional charges."

Lively v. *Elkhorn Coal Co.*, 206 F(2) 396, 399, C.A. 6th. Nevertheless, we will briefly answer these two contentions.

The first contention is rejected on the authority of *N.L.R.B.* v. *Rockaway News Supply Co.*, 345 U.S. 71, and *Lewis* v. *Benedict Coal Corporation*, 361 U.S. 459, 468-470.

In support of the second contention, Phillips relies upon *International Ladies' Garment Workers' Union* v. *N.L.R.B.*, 366 U.S. 731. In that case the employer entered into a collective bargaining agreement with a union which represented only a minority of the employees. The Labor Board found that both the employer and the union were guilty of an unfair labor practice, ordered the employer to cease and desist from giving effect to the collective bargaining agreement, and directed the holding of a representation election. The Court of Appeals granted enforcement of the order. The Supreme Court affirmed. In doing so, it said:

> "On the facts shown, the agreement must fail in its entirety. It was obtained under the erroneous claim of majority representation."

We think that statement must be construed in the light of the circumstances under which it was made. The Court did not have before it the question of the validity of the contract in a common law action to enforce it. The issue which it was passing upon was whether the execution of the contract constituted an unfair labor practice, and, if so, what was the proper remedy. The remedy was to direct the parties to cease and desist from operating under it. Because of the unfair labor practices the agreement *failed* to be binding on the parties. The same might be true of the bargaining agreement in this case if this was a proceeding before the Labor Board involving an alleged unfair labor practice. But it is not that kind of a proceeding, over which the Labor Board has exclusive jurisdiction. *Portland Web Pressmen's Union* v. *Oregonian Publishing Co.*, 286 F(2) 4, C.A. 9th, cert. denied, 366 U.S. 912. Neither the District Court nor this Court has jurisdiction to find either of the parties to the bargaining agreement guilty of an unfair labor practice, and no such finding has been made. In the absence of such a proceeding and find-

ing, we are of the opinion that the ruling in *International Ladies' Garment Workers' Union* v. *N.L.R.B.*, supra, 366 U.S. 731, is not applicable.

In any event, with respect to the coal already mined and the rights accrued thereby, we are of the opinion that the Trustees' right to recover is not barred. *Lewis* v. *Benedict Coal Corporation*, supra, 361 U.S. 459; *Kelly* v. *Kosuga*, supra, 358 U.S. 516.

The judgment in case No. 14810 is affirmed.

Judgment

Filed Dec. 18, 1963

Appeal from the United States District Court for the Eastern District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

s/ SHACKELFORD MILLER, JR.
United States Circuit Judge.

CAUSE ARGUED AND SUBMITTED

October 20, 1962

Before: CECIL, Chief Judge, MILLER, Circuit Judge, and FREEMAN, District Judge.

This cause is argued by Harrison Combs and R. R. Kramer for United Mine Workers, cross-defendant-appellant, and by John A. Rowntree for James M. Pennington, et al, cross-plaintiffs-appellees, and is submitted to the Court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

CIVIL ACTION No. 3431

JOHN L. LEWIS and JOSEPHINE ROCHE, as TRUSTEES of the UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND.

HENRY G. SCHMIDT, Trustee (amended 8-11-58), *Plaintiffs,*

v.

JAMES M. PENNINGTON, RALPH E. PHILLIPS and *BRUCE PHILLIPS, Individually and trading as PHILLIPS BROTHERS COAL COMPANY, A Partnership,**

*LILLIAN GOAD PHILLIPS, Admrx, as defendant and cross plaintiff in the place and stead of Bruce Phillips (substituted 9-30-60), *Defendants,*

v.

UNITED MINE WORKERS OF AMERICA, *Cross Defendant.*

Entered August 2, 1961

Judgment

This case came on to be heard before the Honorable Robert L. Taylor, Judge, upon the verdict of the jury, the motion of the plaintiffs-trustees, John L. Lewis, et al, for judgment notwithstanding the verdict of the jury and in the alternative for a new trial, and also upon the motion of

---

** The name of "Ralph E. Phillips" was corrected to "Raymond E. Phillips" on January 16, 1961.

the cross-defendant, United Mine Workers of America, for judgment notwithstanding the verdict of the jury and in the alternative for a new trial, together with the petition and supporting affidavits of cross-plaintiffs for the allowance of attorneys' fees, and upon the entire record in the case and the Court having fully considered thereof together with the briefs and arguments of counsel is of the opinion and doth hold and adjudge for reasons stated in a memo delivered from the Bench that there is no material or substantial evidence in this record to support the finding of the jury that the Trustees engaged in a combination or conspiracy so as to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states as alleged by the original defendants, James M. Pennington, Raymond E. Phillips, and Lillian Goad Phillips, Administratrix of the Estate of Burse Phillips, deceased, and the partnership known as Phillips Brothers Coal Company.

WHEREFORE IT IS ORDERED AND DECREED that the verdict of the jury in so finding be set aside and the Court doth award the plaintiffs-trustees judgment for a portion of the claim asserted herein by them, finding and holding that said Trustees are entitled to have and recover royalty upon the quantity of coal produced for use or sale by the defendants, James M. Pennington, Raymond E. Phillips and Lillian Goad Phillips, Administratrix of the Estate of Burse Phillips, deceased, and the partnership Phillips Brothers Coal Company, only for the period from and after April 25, 1955 to and including December 31, 1958, or a total of 108,560.56 tons, at the rate of Forty Cents ($0.40) per ton, or the sum of Forty-three Thousand, Four Hundred Twenty-four and 22/100 ($43,424.22) Dollars.

The Court doth further hold and adjudge that the motion of the cross-defendant, United Mine Workers of America, for judgment notwithstanding the verdict of the jury and in the alternative for a new trial is not well made, and,

therefore, the same, and each and every ground of said motion as stated in both alternatives, is overruled.

WHEREFORE, IT IS ORDERED AND ADJUDGED that the cross-plaintiffs, James M. Pennington, Raymond E. Phillips and Lillian Goad Phillips, Administratrix of the Estate of Burse Phillips, deceased, and the partnership Phillips Brothers Coal Company, have and recover of the cross-defendant, United Mine Workers of America, in accordance with the applicable statutes, the sum of Two Hundred Seventy Thousand ($270,000.00) Dollars, being three times the amount of damages awarded by the jury, and also that they have and recover the additional sum of Fifty-five Thousand ($55,000.00) Dollars which the Court finds to be a reasonable amount of attorneys' fees to be awarded and assessed in accordance with the applicable statutes, thus making a total award in favor of said cross-plaintiffs and against the cross-defendant, United Mine Workers of America, in the amount of Three Hundred Twenty-five Thousand Dollars ($325,000.00).

It is further ordered and adjudged pursuant to the previous order of the Court that the counterclaim filed in this case against said Trustees by the defendants and cross-plaintiffs be, and the same hereby is, dismissed.

It is also ordered and adjudged that the costs in this cause shall be taxed after the time for appeal expires or after the disposition of the cause on appeal.

It is further ordered that execution issue in favor of the plaintiffs-trustees, John L. Lewis, et al., against the defendants, James M. Pennington, Raymond E. Phillips and Lillian Goad Phillips, Administratrix of the Estate of Burse Phillips, deceased, and Phillips Brothers Coal Company, for the said sum of Forty-Three Thousand, Four Hundred Twenty-four and 22/100 Dollars ($43,424.22), and that execution issue in favor of the cross-plaintiffs, James M. Pennington, Raymond E. Phillips, and Lillian Goad

Phillips, Administratrix of the Estate of Burse Phillips, deceased, and Phillips Brothers Coal Company, against the said cross-defendant, United Mine Workers of America, for the said sum of Three Hundred Twenty-five Thousand Dollars ($325,000.00).

Filed July 31, 1961

Opinion Rendered From the Bench

This case was tried to a jury and the Court and consumed approximately five weeks of trial time. The jury returned a verdict on May 19, 1961 in response to two verdict forms, the pertinent parts of which read as follows:

"1. Did the cross-defendant, U.M.W., engage in a combination or conspiracy so as to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states outside and beyond the exemption created by the anti-trust statutes to a labor organization as alleged by cross-plaintiff, Phillips Brothers Coal Company?"

The jury answered "yes".

"2. If your answer to Question 1 is Yes, was cross-plaintiff, Phillips Brothers Coal Company, damaged in its business or property as a direct and proximate result of the conspiracy?"

The jury answered "yes".

"3. We find in favor of cross-plaintiff, Phillips Brothers Coal Company, and fix its damages in the amount of $90,000.00."

The other verdict form is as follows:

"1. Did the Trustees engage in a combination or conspiracy so as to unreasonably restrain trade or monopolize commerce among the several states, as alleged

by the original defendant, Phillips Brothers Coal Company?''

The jury answered ''yes''.

For convenience the International Union will be referred to as U.M.W.; James M. Pennington, et al, as Phillips Brothers; and Messrs. John L. Lewis, Henry G. Schmidt and Miss Josephine Roche as Trustees.

U.M.W. has moved the Court to set aside the verdict of the jury and render a judgment in its favor, and has urged in its support three separate grounds which, for practical purposes, raise the question of the sufficiency of the evidence to support the verdict of the jury.

U.M.W., in the alternative, has moved for a new trial and urged in its support 68 separate grounds. Several of the grounds set forth in the alternative motion are directed to the question of the sufficiency of the evidence.

The effect of the finding of the jury is that the U.M.W. conspired with large coal companies to stabilize prices in the coal industry around the year 1950 in violation of Sections 1 and 2 of the Sherman Anti-Trust Laws.

Some of the circumstances relied upon by Phillips Brothers to support their contention that the parties combined and conspired to fix the cost of production of coal so high that the small operators could not operate successfully are: That the large operators and the union agreed to make every effort to put all producers of coal under union contract with the U.M.W. That after 1950 wages were increased without waiting for the previous contract between the union and the operators to expire. That the increases were geared to meet the abilities of the major companies to pay. That the increases were forced on the small companies with knowledge that they could not pay them. That the large coal companies contested controversial provisions in the wage agreements prior to 1950, for example, those on

union security, welfare, days of work, labor costs, rates of pay, while the large operators subsequent to this period permitted the Union to write these provisions into the wage provision contracts without protest. That one purpose of the unlawful agreement between U.M.W. and the large coal operators was to drive Phillips Brothers and other small operators out of business.

It is claimed that the Union was given control of the Welfare Fund; that Union membership clauses in the contract which were legal prior to 1950 continued to be observed by U.M.W. and by the large coal operators; that the Union used its funds to finance some of the major companies; that it purchased stock in one or more coal companies and advanced large sums of money to Mr. Eaton to invest in the West Kentucky Coal Company and accepted stock in that company as a collateral security for such advancements; that the U.M.W. worked hand in hand with this company and other large companies to drive small operators out of business.

It is claimed that the Union and the large coal operators knew that the small operators could not pay the wages and royalties stipulated in the wage agreement of 1950 and amended from time to time during the material period involved in this lawsuit.

The question for decision by this Court is whether there is any evidence to support the verdict of the jury that U.M.W. combined with business groups to restrain trade and monopolize the coal industry in interstate commerce. The principle is so well-established as not to require citation of authority that it is a violation of the law for a union to combine with employer groups to suppress competition or to monopolize an interstate industry. *Allen Bradley Co.* v. *Local 3, Electrical Workers*, 325 U.S. 797 (a case which has been referred to often today in the course of argument); *Carpenters* v. *U. S.*, 330 U.S. 395.

There is some proof in the record that Union representatives and large coal operator representatives discussed stabilization of prices at one time or another during the critical periods referred to in the cross-claim.

In passing upon a motion of this character, the Court is required to follow certain rules, some of which will be mentioned.

First, a conspiracy may be inferred from things done by the alleged conspirators. *Loew's, Inc.* v. *Cinema Amusements, Inc.*, 210 F. 2d 86, 93.

The Supreme Court, in discussing the subject of conspiracy, has stated:

> "A conspiracy is to be viewed by the Court as a whole; the integral parts thereof are not to be weeded out and inquired into separately." *U. S.* v. *Patten*, 226 U.S. 525 (This case has also been referred to by counsel during the argument today.)

Second, it is the duty of the Court to take the view of the evidence most favorable to Phillips Brothers and to sustain the verdict if there is substantial evidence to support it. *Lavender* v. *Kurn*, 327 U.S. 645; *Magnolia Petroleum Co.* v. *Howard*, (C.A. 10), 193 F. 2d 269.

It is rare for a conspiracy to be established by direct evidence. *Eastern State Retail Lumber Dealers Assn.* v. *U.S.*, 234 U.S. 600.

Conspiracies are ordinarily proved by circumstances. *Loew's, Inc.* v. *Cinema Amusements, Inc.*, supra, 93.

Third, damages may not be recovered in a conspiracy case unless they are shown with reasonable certainty to have resulted from the wrongs of the conspirators but the injured party will not be deprived of damages because of uncertainty as to the amount. *Story Parchment Co.* v. *Patterson Paper Co.*, 282 U.S. 555.

Fourth: The question of the amount of damages is for the jury provided the injured party has established by the preponderance of the proof with reasonable certainty that he has sustained damages as a direct and proximate result of the wrongful acts of the alleged conspirators.

> "... raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150.

Fifth: It is not necessary to find specific intent to restrain trade or to build a monopoly in order to find that the antitrust laws have been violated. It is sufficient that a restraint of trade or monopoly results as a consequence of the wrongs of the alleged conspirators. *U. S.* v. *Patten, supra,* 543; *U. S.* v. *Masonite,* 316 U.S. 265, 275.

Our Sixth Circuit has stated that the trial judge does not sit as a 13th juror as does the trial judge in the state courts of Tennessee. In discussing this subject, the Court quoted from the case of *Tennant* v. *Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35, as follows:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Then follows the statement that,

> "It would be a usurpation of judicial authority, in the absence of any showing of bias, prejudice, passion, corruption or caprice upon the part of the jury where there is in the record substantial evidence to support the amount awarded by a jury as damages to the plaintiff, should the trial judge presume to set aside the verdict, or to reduce it, merely because the judge himself would not have awarded so large an amount had the

case been tried to him without a jury." *Werthan Bag Corp.* v. *Agnew*, 202 F. 2d 119. See *Spero-Nelson* v. *Brown*, (C.A. 6), 175 F. 2d 86.

Counsel for Phillips Brothers have reviewed the evidence in their briefs in detail and have undertaken to point out various parts of the evidence which they claim support their theory that a conspiracy was shown.

Counsel for U.M.W. have likewise reviewed the evidence in detail and have pointed out certain portions of the evidence which they claim sustain their contention that the evidence is insufficient to support the charge of conspiracy.

The Court has given careful consideration to these briefs. As stated at the outset of the hearing, the briefs cover some 366 pages. At this point the Court will digress from the main subject to state that although the jury verdict was returned on May 19, 1961, and the last brief was not filed until July 28, 1961, and the case was not set for argument until today, namely, July 31, 1961, the Court had a purpose in not pushing or prodding the attorneys in the early filing of their briefs. The Court granted numerous extensions of time in which to file the briefs. The purpose was to give counsel plenty of time to prepare thorough briefs, as the Court recognizes that the case presents complex issues of fact and of law.

As previously indicated, the briefs have been given careful consideration. We have heard extended oral arguments and from the record as a whole, the Court is of the opinion, and finds, that there is substantial evidence to support the verdict of the jury in the cross-claim against the U.M.W. and, therefore, overrules the motion of U.M.W. for a judgment nothwithstanding the verdict of the jury.

Only brief mention will be made of the U.M.W.'s motion for a new trial because what the Court has previously said is sufficient to dispose of a number of the grounds urged in support of the motion for a new trial.

The first six grounds of this motion again raise the question of the sufficiency of the evidence. Nothing further need be said concerning this question.

Grounds 7 through 61, inclusive, complain of the rulings of the Court on various questions of evidence. It is the opinion of the Court that it did not commit prejudicial error against the U.M.W. in its rulings on the objections to certain portions of the evidence. We do not believe that it is either proper or necessary at this time to take up separately the various rulings and repeat the reasons given by the Court for its action during the course of the trial. These rulings have been thoroughly discussed by the parties in their briefs and they were thoroughly discussed during the trial.

Ground No. 62 complains of the action of the Court in failing to submit to the jury U.M.W.'s Requests No. 37, 49, 50, 53, 53A, 58 and 63. The Court believes that it charged revised Request No. 53A verbatim. The court further believes that it gave Requests No. 50 and 53 as supplements to its original charge.

The other charges, Nos. 37 through 63, were charged in substance, except Request No. 58, and as to that request the Court was of the opinion, and is now of the opinion, that it would not have been proper to charge that request.

The Court is of the opinion that Ground No. 63 is without merit and is therefore overruled.

Ground No. 64 is general and does not require a discussion.

Grounds No. 65 and 66 also complain of certain portions of the charge. It is the opinion of the Court that these grounds are without merit and are, therefore, overruled.

Ground No. 67 asserts that the Court erred in permitting the consolidation for trial of the Trustee's action against Phillips Brothers with the cross-action of Phillips Brothers against U.M.W. It is claimed that U.M.W. was

improperly joined in the action under Rule 13(h) of the Federal Rules of Civil Procedure. That the original answer raised the defense of the contract being made pursuant to a conspiracy in violation of the anti-trust laws. That a counterclaim was filed against the Trustees and a cross-claim was filed against the U.M.W. That the Court granted the motion for an order under Rule 13(h) to bring the U.M.W. into the case as a cross-defendant. That service was bad upon U.M.W. and the Trustees moved to quash the service of process. That amendments and motions to amend the answer, the cross-claim and counterclaim were filed in which the conspiracy was described and set up as a defense to the original claim of the Trustees. That it was also the basis of the counterclaim against the Trustees and the basis of the cross-claim against the U.M.W. That under these circumstances the Court had no right to allow the case to be continued against U.M.W. after the claim for affirmative relief against the Trustees had been withdrawn. Rule 15(c) of the Federal Rules of Civil Procedure relates amendments back to the date of the original pleading. The motion to quash the service of process was denied.

It is the opinion of this Court that inasmuch as the cross-claim charged U.M.W. with being a co-conspirator in the same conspiracy raised as a matter of defense against the Trustees' claim, the Union was properly brought into the case under Rule 13(h). *Lesnik* v. *Public Industrials Corp.*, 144 F. 2d 968.

Where there is service of process and where federal jurisdiction is present, the Court may try the ancillary claim regardless of the disposition made of the original claim. *Pierce* v. *Perlite Aggregates*, 110 F. Supp. 684; *Switzer Bros., Inc.* v. *Chicago Card Board Co.*, 252 F. 2d 407. See *Emmerich* v. *May*, 130 F. Supp. 426; *U. S.* v. *Milhan*, 15 F.R.D. 459.

Rule 13 contemplates bringing in third parties where the subject matter raised is to qualify or defeat the original

claim of the plaintiff against the original defendant. The purpose of the rule is to avoid circuity of action and to dispose of the entire matter at one time. *Blair* v. *Cleveland Twist Drill Co.*, 197 F. 2d 842.

Rule 20(a) provides:

> "All persons may be joined in one action as defendants if there is asserted against them jointly, severally or in the alternative, any right to relief in respect thereof or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action."

Rule 21 provides:

> "Parties may be dropped or added by order of the Court on motion of any party or of its own initiative at any stage of the action and on such terms as are just."

The purpose of these rules is to require that all disputes relating to the same subject matter be settled in one lawsuit.

As previously indicated, it is the contention of U.M.W. that the dismissal of the counterclaim brought about a dismissal of the cross-claim. This contention seems to run counter to Rule 20(a), which is as follows:

> "A plaintiff or defendant need not be interested in obtaining or defending against all of the relief demanded. Judgment may be given for one or more of the plaintiffs, according to their respective rights to relief and against one or more defendants according to their respective liabilities."

Rule 54(b) provides:

> "When more than one claim for relief is presented in an action, whether as a claim, or counterclaim, cross-claim, or third-party claim, the Court may direct the

entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated which adjudicates less than all of the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of the judgment adjudicating all of the claims."

Aside from the aforementioned rule, it is the opinion of the Court that it had the right to treat the cross-claim against the U.M.W. as an original suit. The question of conspiracy was involved in both of the suits. That is, the question was involved in the defense to the claim of the Trustees and it was involved in the claim of Phillips Brothers against U.M.W. It does not seem feasible to this Court to have a five weeks trial in the U.M.W. phase of the case and also a five weeks trial on the Trustees phase of the case when the matter of conspiracy could just as well have been settled in one trial.

Ground No. 68 asserts that there is no material evidence that U.M.W. conspired with each of the coal companies which are alleged to be co-conspirators, and the Court erred in failing to sustain U.M.W.'s motion for a partial directed verdict as to each of the alleged co-conspirators.

It is to be observed that it was not necessary for the proof to show that U.M.W. conspired with all of the coal companies named in the complaint in order for Phillips Brothers to establish a cause of action but only one or more of them. This ground of the motion, in the opinion of the Court, is also without merit.

Mention should be made at this time of the claim of U.M.W. that the Court erred in admitting evidence bearing

on the question of conspiracy before the damage period and subsequent to the damage period. Specific mention should be made of this question because of the repeated insistence of U.M.W. that the Court committed prejudicial error in admitting this character of testimony. The jury was told that such evidence was admitted for whatever bearing, if any, it had on the alleged conspiracy but that it was not admitted as bearing on the question of damages and the jury should not consider it on the question of damages.

It is the opinion of the Court that since a general conspiracy was charged such evidence was clearly competent as bearing on the question of whether a conspiracy existed during the crucial period. *Buckeye Powder Co.* v. *Hazard Powder Co.*, 205 F. 827, 830; *Hillside Amusement Co.* v. *Warner Bros Pictures*, 7 F.R.D. 260; *Wellman* v. *U. S.*, (C.A. 6), 227 F. 2d 757; *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683.

For the reasons indicated, the Court is of the opinion and holds that the motion of U.M.W. for a judgment notwithstanding the verdict of the jury and the alternative motion of U.M.W. for a new trial, and all of the grounds urged in support of these motions, are without merit and are therefore overruled.

This brings us to the Trustees' motion to set aside the verdict of the jury and to enter judgment in their favor for $55,982.62 with interest. The motion is based upon the proposition that the evidence is insufficient in law to sustain the verdict of the jury that the Trustees engaged in the conspiracy charged in the counterclaim.

The overt acts charged against the Trustees are:

(a) The Trustees paid benefits only to members of U.M.W.

(b) The Trustees required the beneficiaries of the trust to picket or perform other acts for the U.M.W. in order

to obtain or retain pension benefits, or acquiesced in the doing of these things by the beneficiaries.

(c) The Trustees, as a punitive measure, brought legal actions to recover royalties on coal produced.

(d) The Trustees held out to the men in the industry that the Fund was under Union control.

(e) The Fund, in fact, was under the domination and control of the U.M.W.

The Court charged the jury that these acts standing alone were not sufficient to establish that the Trustees were co-conspirators.

The Court further charged the jury that the acts of individuals, unless the Trustees actually authorized the unlawful acts, if any, or ratified such acts, if any, after actual knowledge thereof, would not bind the Trustees so as to make them parties to the alleged conspiracy.

The Court further charged that the Trustees, in their official capacity, had no legal right to require or not to require the beneficiaries of the Fund to picket on behalf of U.M.W. in labor matters; that the Trustees were legally obligated to collect all monies due the Fund and to use reasonable means to make such collection, including the bringing of suits; that the Fund "was created by a trust instrument contained in the National Bituminous Coal Wage Agreement of 1950 pursuant to Section 302 of the Taft-Hartley Act, and the wording of the trust agreement was in accordance with the requirements of the Taft-Hartley Act. The trust instrument provides for payment of benefits to employees of signatory operators. . ."

Action of a majority of the Trustees is required to bind the Fund. See *Van Horn* v. *Lewis*, 79 F. Supp. 541.

In the opinion of the Court there is no substantial evidence to support the verdict of the jury that a majority of the Trustees participated in the alleged conspiracy.

There is no evidence that either Miss Josephine Roche or Mr. Henry G. Schmidt or Mr. Charles A. Owen, now deceased, (those parties being the only parties, except Mr. John L. Lewis, who served the trust fund after 1950), had any dealings with large coal operators from which it could be inferred that they agreed, combined, or conspired to stabilize coal prices in the bituminous coal industry in interstate commerce.

The actions of Mr. Lewis alone without authorization or consent of a majority of the Trustees would not be sufficient, in the opinion of the Court, to bind the Fund or to show that the Trustees conspired with the large coal operators to drive a small operator out of business. If it had been shown that Mr. Lewis controlled the actions of the other Trustees at the time this alleged conspiracy was formed, this might present a different question.

In the opinion of the Court there is no evidence to support the verdict of the jury that Mr. Lewis, for himself and another of the Trustees, entered into the conspiracy so as to bind the Trustees either individually or in their capacity as trustees or to bind the Trust Fund.

The charge that the Trustees were conspirators seems to have been directed at Mr. Lewis. This can very well be understood inasmuch as Mr. Lewis served in a dual capacity. He was president of the U.M.W. during the material period and also chairman of the Fund during this period.

Counsel for Phillips Brothers pointed out in their brief that Mr. Lewis made certain statements in his testimony given on discovery to the effect that the U.M.W. and some of the large coal operators decided to stabilize prices, but some of his testimony during the trial was not entirely consistent with that testimony. If there is a sound basis for such contention, we do not believe that this is sufficient to sustain the verdict of the jury that the Trustees participated in the conspiracy.

The evidence is reasonably clear that Union membership was not a prerequisite for obtaining benefits from the Fund after 1950. In that connection, it must be recalled that in 1951 the Trustees published a brochure setting forth in detail the requirements of pension benefits, not one of which was Union membership. Trustees Roche, Schmidt and Lewis each testified that benefits from the Fund have been paid to non-Union members as well as to Union members. Such was also the testimony of counsel Mitch.

The evidence is insufficient to show that the Trustees instituted suits for the purpose of eliminating small operators. Trustees Roche and Schmidt testified that the matter of institution of suits was left in the hands of counsel Mitch for the most part.

The evidence is insufficient to show that the Trustees required pensioners to picket for the U.M.W. in order to obtain or retain benefits of the Fund.

The evidence is insufficient to show that the Trustees held out to industry empolyees that the Fund was under Union control. The Trustees testified positively that the Union did not dominate or control the Fund. The evidence is insufficient to show the contrary.

It is true that there are some suspicious circumstances in the record not only as to these matters but also as to other charges against the Trustees. However, a juror's verdict cannot be based upon suspicion alone. *N.L.R.B.* v. *Sun Shipbuilding & Dry D. Co.*, (C.A. 3), 135 F. 2d 15, 31.

Substantial evidence means more than merely the suspicion of the existence of a fact. *Hazel-Atlas Glass Co.* v. *N.L.R.B.*, (C.A. 4), 127 F. 2d 109, 117.

Having found that there is no substantial evidence to support the verdict of the jury that the Trustees engaged in the conspiracy as charged by Phillips Brothers, it follows as a matter of contract that the Trustees are entitled to

recover unpaid royalties due them under the contract signed by Phillips Brothers, but the Trustees are not entitled to recover the royalties that accrued before a majority of the employees of Phillips Brothers became members of the Union. At the time Phillips Brothers signed the National Bituminous Coal Wage Agreement of 1950, the U.M.W. did not represent a majority of their employees and therefore was not the bargaining agent for the employees. We think that a fair interpretation of the record shows that a majority of the employees of Phillips Brothers joined the Union on April 25, 1955. The Trustees, therefore, are entitled to recover unpaid royalties that accrued after that date. The Court bases this conclusion on the principles announced in the case of *International Ladies Garment Workers' Union, AFL-CIO* v. *N.L.R.B. and Bernhard-Altmann Texas Corporation*, U. S. Supreme Court, June 5, 1961.

In view of the foregoing conclusion, it is not necessary for the Court to determine the question of whether the Trustees would be deprived of recovery if there had been evidence to support the verdict of the jury that the Trustees joined in the conspiracy, as charged by Phillips Brothers.

* * * * * * * * * *

The record in this case shows that Mr. Jerome Taylor, associate of Mr. Templeton, performed ten hours of work; Mr. Harley G. Fowler, a partner of Mr. Rowntree, 200 hours; Mr. Templeton 370 hours; Mr. Robertson 1,189 hours, and Mr. Rowntree, 2,792 hours, making a total of 4,461 hours. A part of this work was necessarily performed in the defense of the claim of the Trustees against Phillips Brothers.

* * * * * * * * * *

APPENDIX C

15 USCA:

§ 1. TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL; EXCEPTION OF RESALE PRICE AGREEMENTS; PENALTY

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the

court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

§ 2. Monopolizing Trade a Misdemeanor; Penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

§ 3. Trust in Territories or District of Columbia Illegal; Combination a Misdemeanor

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 3, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

§ 15. Suits By Persons Injured; Amount of Recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

§ 17. Antitrust Laws Not Applicable to Labor Organizations.

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraints of trade, under the antitrust laws. Oct. 15, 1914, c. 323, § 6, 38 Stat. 731.

---

29 USCA Sec. 52 (Sec. 20 of the Clayton Act):

§ 52: Statutory Restriction of Injunctive Relief

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for

which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. Oct. 15, 1914, c. 323, § 20, 38 Stat. 738.

---

29 USCA Sec. 102 (Sec. 2 of the Norris-LaGuardia Act):

§ 102: Public Policy in Labor Matters Declared

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners

of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted. Mar. 23, 1932, c. 90, § 2, 47 Stat. 70.

---

29 USCA Sec. 104 (Sec. 4 of the Norris-LaGuardia Act):

§ 104: Enumeration of Specific Acts Not Subject to Restraining Orders or Injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless

of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, § 4, 4 Stat. 70.

---

29 USCA Sec. 106 (Sec. 6 of the Norris-LaGuardia Act):

§ 106: RESPONSIBILITY OF OFFICERS AND MEMBERS OF ASSOCIATIONS OR THEIR ORGANIZATIONS FOR UNLAWFUL ACTS OF INDIVIDUAL OFFICERS, MEMBERS, AND AGENTS

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable

in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof. Mar. 23, 1932, c. 90, § 6, 47 Stat. 71.

Labor Management Relations Act, 1947 (29 USCA):

§ 141: SHORT TITLE; CONGRESSIONAL DECLARATION OF PURPOSE AND POLICY

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. June 23, 1947, 3:17 p.m., E.D.T., c. 120, § 1, 61 Stat. 136.

§ 151: Findings and Declaration of Policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 136.

§ 157. Right of Employees as to Organization, Collective Bargaining, Etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 140.

§ 158. UNFAIR LABOR PRACTICES

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 159 (f), (g), (h) of this title, and (ii) unless following an election held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for

nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

* * * * *

July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601.

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization

or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

* * * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreeement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided*, That nothing in this subsection shall apply to an agreeement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b) (4). (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception. As amended September 14, 1959; Pub. L. 86-257, Sec. 704(b).

* * * * *

§ 185. Suits by and Against Labor Organizations—Venue, Amount, and Citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * * * *

(b) . . . Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. . . . June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title III, § 301, 61 Stat. 156.

* * * * *

§ 187. Boycotts and Other Unlawful Combinations; Right to Sue; Jurisdiction; Limitations; Damages

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title. As amended Sept. 14, 1959, Pub. L. 86-257, Title VII, § 704(e), 73 Stat. 545.

(b) Whoever shall be injured in his business or property by reason or[1] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit. June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title III, § 303, 61 Stat. 158.

---

[1] So in original. Probably should read "of."

29 USCA (Fair Labor Standards Act of 1938):

§ 201. SHORT TITLE

This chapter may be cited as the "Fair Labor Standards Act of 1938". June 25, 1938, c. 676, § 1, 52 Stat. 1060.

* * * * *

§ 202. CONGRESSIONAL FINDING AND DECLARATION OF POLICY

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interfers with the orderly and fair marketing of goods in commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power. June 25, 1938, c. 676, § 2, 52 Stat. 1060; Oct. 26, 1949, c. 736, § 2, 63 Stat. 910.

* * * * *

41 USCA (Walsh-Healey Act):

§ 35. CONTRACTS FOR MATERIALS, ETC., EXCEEDING $10,000; REPRESENTATIONS AND STIPULATIONS

In any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District

of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

* * * * *

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

* * * * *

(e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection. June 30, 1936, c. 881, § 1, 49 Stat. 2036; May 13, 1942, c. 306, 56 Stat. 277.

* * * * *

§ 38. Same; Administration; Officers and Employees; Appointment; Investigations; Rules and Regulations

The Secretary of Labor is authorized and directed to administer the provisions of sections 35-45 of this title and to utilize such Federal officers and employees and, with the

consent of the State, such State and local officers and employees as he may find necessary to assist in the administration of said sections and to prescribe rules and regulations with respect thereto. The Secretary shall appoint, without regard to the provisions of the civil-service laws but subject to the Classification Act of 1949, an administrative officer, and such attorneys and experts, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to time find necessary for the administration of sections 35-45 of this title. The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as provided in sections 35-45 of this title, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of sections 35-45 of this title. June 30, 1936, c. 881, § 4, 49 Stat. 2038; Oct. 28, 1949, c. 782, Title XI, § 1106 (a), 63 Stat. 972.

* * * * *

§ 39. Same: Hearings by Secretary of Labor; Witness Fees; Failure to Obey Order; Punishment

Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of sections 35-45 of this title, and on complaint of a breach or violation of any representation or stipulation as provided in said sections, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory

or possession, or the United States District Court for the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of sections 35-45 of this title. June 30, 1936, c. 881, § 5, 49 Stat. 2038; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

* * * * *

§ 45. Same; Effective Date; Exception as to Representations with Respect to Minimum Wages

Sections 35-45 of this title shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from June 30, 1936: *Provided, however,* That the provisions requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor. June 30, 1936, c. 881, § 12, 49 Stat. 2039, renumbered June 30, 1952, 9:36 a.m., E. D. T. c. 530, Title III, § 301, 66 Stat. 308.

* * * * *

APPENDIX D

Style	Civil Action No.	Court	Amount	Date Filed
*Tenneco, Inc. v. U.M.W.A., et al	3493	U.S.D.C. E.D. Tenn. Northern Division	$1,200,000.00	May 23, 1958
*Harry P. Stansberry, individually and T/A Stansberry Coal Co. v. U.M.W.A.	3432	U.S.D.C. E.D. Tenn. Northern Division	300,000.00	Jan. 1959
*Arnold Coal Co., Inc. v. U.M.W.A.	3446	U.S.D.C. E.D. Tenn. Northern Division	450,000.00	Jan. 3, 1961
*E. C. McPherson, et al v. U.M.W.A.	3591	U.S.D.C. E.D. Tenn. Northern Division	300,000.00	Nov. 30, 1961
Dean Coal Co., a corporation, organized under the laws of the State of Tennessee v. U.M.W.A.	4463	U.S.D.C. E.D. Tenn. Northern Division	750,000.00	May 21, 1962
George Ramsey, Elmer D. Studer, Walter H. Studer and Dale Studer, d/b/a Walden Ridge Coal Co., et al v. U.M.W.A., John L. Lewis, Henry Schmidt and Josephine Roche, as Trustees of the United Mine Workers of America Welfare and Retirement Fund, West Kentucky Coal Company, Inc., Cyrus W. Eaton, Tennessee Valley Authority, G. O. Wessenauer, Manager of Power for Tennessee Valley Authority and the Louisville and Nashville Railway Company, Inc.	3667	U.S.D.C. E.D. Tenn. Southern Division	15,150,000.00	Feb. 6, 1961
Tennessee Consolidated Coal Co. and Grundy Mining Co. v. U.M.W.A. and West Kentucky Coal Co.	4178	U.S.D.C. E.D. Tenn. Southern Division	10,050,000.00	Sept. 27, 1963

* Cases so marked were initially instituted against the Company indicated by Trustees of the UMWA Welfare & Retirement Fund and in each instance the Company then filed a cross-claim against UMW.

APPENDIX D (continued)

Style	Civil Action No.	Court	Amount	Date Filed
Tennessee Products & Chemical Corp. v. U.M.W.A. and West Kentucky Coal Co.	4189	U.S.D.C. E.D. Tenn. Southern Division	4,500,000.00	Oct. 17, 1963
*Whitwell Coal Corp. v. Lewis, et al., U.M.W.A., West Kentucky Coal Co. and L. & N. Railroad Co.	605	U.S.D.C. E.D. Tenn. Winchester Division	1,500,000.00	Aug. 4, 1962
Chavies Mining Co., Inc. v. U.M.W.A.	412	U.S.D.C. E.D. Ky. Jackson	1,425,000.00	Feb. 27, 1963
Oscar Kelly d/b/a K & K Coal Co. v. U.M.W.A.	413	U.S.D.C. E.D. Ky. Jackson	140,000.00	Feb. 27, 1963
M. W. Ritchie, Sr., Mark Cann, B. C. McClanahan and Henry C. Kelly, d/b/a Ritchie Coal Co. v. U.M.W.A.	414	U.S.D.C. E.D. Ky. Jackson	1,111,172.00	Feb. 27, 1963
Coy Watts, d/b/a Watts Coal Co. v. U.M.W.A.	415	U.S.D.C. E.D. Ky. Jackson	166,500.00	Feb. 27, 1963
Butler Coal Co., Inc. a corporation v. U.M.W.A.	CA63-125	U.S.D.C. N.D. Ala. Southern Division	600,000.00	Mar. 26, 1963
Big Three Coal Co. v. U.M.W.A.	5173	U.S.D.C. E.D. Ill.	750,000.00	Nov. 27, 1962
	TOTAL—		$38,392,672.00	

* Cases so marked were initially instituted against the Company indicated by Trustees of the UMWA Welfare & Retirement Fund and in each instance the Company then filed a cross-claim against UMW.



LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 15 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963

No. 48

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admx. of the Estate of Burse Phillips, Deceased.

REPLY TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

JOHN A. ROWNTREE,
CLAUDE K. ROBERTSON,
1412 Hamilton Bank Building,
Knoxville, Tennessee,
Attorneys for Respondents.

FOWLER, ROWNTREE & FOWLER,
1412 Hamilton Bank Building,
Knoxville, Tennessee,
TAYLOR & TEMPLETON,
Bank of Knoxville Building,
Knoxville, Tennessee,
Of Counsel for Respondents.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

TABLE OF CONTENTS.

	Page
Counter-Statement of Questions Presented	1
Statement of Facts	2
Reasons for Denying the Writ	15
I. No Purpose Would Be Served by Issuing the Writ With Respect to Petitioner's First Question. The Question as Presented Is Academic in This Case	15
II. The Second Question Presented by Petitioner, With Respect to the Proof on Activities of Petitioner in the Business Group With Which Petitioners Dealt in Obtaining Minimum Wage Determinations on the TVA Market, Incorrectly Treats This Phase as Being the Whole Conspiracy and Ignores the Significance of Such Proof on the Question of Purpose and Intent to Restrain Trade and Monopolize as to This Largest of the Markets for Coal, Which Was Respondents' Principal Market; the Question Also Ignores the Fact That the Damages Awarded Respondents Were Not Attributable to This Particular Phase of the Proof	18
III. Question Three is Merely a Restatement of Petitioners' First Question With the Addition of Certain Evidentiary Matters Presented to the Jury	22
IV. Petitioner Has Not Undertaken to Give Any Reason for the Issuance of the Writ With Respect to the Fourth Question Presented by Petitioner	24
Conclusion	25

Table of Cases Cited.

Allen Bradley Company v. Local Union No. 3 (1945), 325 U. S. 797, 89 L. ed. 1939 15
Anderson-Friberg, Inc. v. Justin R. Clary & Son (1951, S. D. N. Y.), 98 Fed. Supp. 75 16
Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc. (1961), 365 U. S. 127, 5 L. ed. 2d 464 ..... 19, 20
Local 175 Brotherhood Electrical Workers v. United States (1955, 6th C.), 219 Fed. 2d 431 16
Los Angeles Meat and Provision Drivers Union v. United States (1962), 371 U. S. 94, 9 L. ed. 2d 150 .. 16
Perkins v. Lukens Steel Company (1940), 310 U. S. 113, 84 L. ed. 1108 20
Pfotzer v. Aqua Systems (1947, 2nd Cir.), 162 Fed. 2d 779 21
Philadelphia Record Company v. Manufacturing Photo-Engravers Assoc. of Philadelphia (1946, 3rd Cir.), 155 Fed. 2d 799 16
United Brotherhood of Carpenters v. United States (1947), 330 U. S. 395, 91 L. ed. 973 ..... 16, 23
United States v. Gasoline Retailers Association, Inc. et al. (1961, 7th Cir.), 285 Fed. 2d 688 16

Statutes Cited.

Norris-LaGuardia Act, Sec. 6, 29 U. S. C. A., Sec. 106 ..... 16, 24
National Labor Relations Act 22, 24
Sherman Antitrust Act 1, 15, 17, 22, 24, 25
Taft-Hartley Act (Labor Management Relations Act, 1947) 4, 5
Walsh-Healey Act 7, 18, 19, 20, 21

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 927.

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admx. of the Estate of Burse Phillips, Deceased.

REPLY TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

1. Because of the National Labor Policy and the exemption of labor unions under the Sherman Anti-Trust Act, should this Court upset a jury verdict, sustained by the Trial Court and the Court of Appeals, finding that a labor union has conspired and combined with a business group for the purpose of promoting the interests of the business group in restraining competition in, or to monopolize the marketing of, goods in interstate commerce, where (a) the formation of such combination was directly

related to discussions about the means of stabilizing prices and production in the industry, (b) the combination has adopted, to carry out its purposes, not only the imposition of industry wide terms pertaining to wages and employee benefits which create unfair and unreasonable advantages to the business group as against competitors because of geographically induced disparity in methods of production, but also boycotts and predatory price-cutting practices directed at the principal market of Respondents, (c) the Union participated in the business group as owner and investor with respect to one of the principal companies composing the business group, supporting that company financially while it was engaged in the aforesaid predatory price-cutting practices, and (d) all of the damages awarded Respondents resulted from the effect of such predatory pricing practices?

2. Was it error for the Trial Court to admit evidence on the question of Petitioner's purpose and intent, which evidence showed that the Petitioner and members of the business group worked together to obtain a minimim wage determination in the industry under the Walsh-Healey Act, for the purpose of benefiting the business group and restraining the competition of Respondents and other similarly situated with respect to Respondents' principal market, the TVA coal market, where such activity related to only one phase of the conspiracy and damages awarded Respondents did not result from this particular phase?

STATEMENT OF FACTS.

Respondents cannot agree with the statement of facts presented in the petition, pages 7 through 23. The statements there contained represent only isolated fragments of the facts proven at the trial and limited extracts from the Opinion of the Court of Appeals. No attempt what-

soever is made by Petitioner to discuss the full scope of the case, particularly the heart of the case wherein Petitioner involved itself on the economic or commercial side of the industry, other than a bare reference to the fact that it had made some investments in the industry.

Petitioner would have a case for the issuance of the writ were the real questions and facts simply as stated by Petitioner. It would shift the burden upon Respondents to incur considerable expense in presenting a fair statement of facts, as occurred in the Court of Appeals where Respondents needed seventy-three printed pages to set the facts straight as to the nature of the conspiracy charged and proven. Respondents feel justified in setting forth below a portion of the statement of conspiracy contained under Respondents' theories in the Pre-Trial Order (50a-56a), which statement was read to the jury in the Court's charge as being the conspiracy charged by Respondents (1538a-1543a). Since Petitioner has not seen fit to go into the facts in its petition, suffice it to say here that each portion of this statement is abundantly supported by facts in the record:

> "A. Background of the Conspiracy.
>
> "After World War II the economics of the bituminous coal industry became unstable by reason of the fact that there was more coal being produced than the markets required; before 1950 the major coal producers and the Union were in agreement that the major problem of the industry was over-production and that the growth of small, independent and non-Union producers was contributing to the problem; the major companies and the Union disagreed on how the problem should be handled in the period immediately subsequent to World War II; on its side the Union was contending that the answer was to cut down on the working time of all producers; the UMW

urged a three-day work week; for many months before the 1950 contract was signed the UMW took the initiative on this question and directed the working time of the men in the industry, the Union Officials setting on some weeks three-day work weeks and at other times no-day work weeks; domination of the men in the industry was an essential part of the Union's effort to dictate the economics of the industry and this domination was interfered with by the passage of the new Taft-Hartley Act; the Union's efforts to maintain closed shops and maintain a Union controlled Welfare Fund were challenged and in some instances were defeated in the courts by the major coal companies; the major coal companies were opposed to the UMW's dictating the work time of the men in the industry because it cut into their profits.

"B. Formation of the Conspiracy.

"A marked change occurred in the relations between the UMW and the major coal companies in 1950, as disclosed in their bargaining relations before and after that year; the express understanding at the time of the signing of the 1950 National Bituminous Coal Wage Agreement was that the major coal companies, themselves, were to decide on the working time for their employees; this was a surrender on the part of the UMW of its previous policy of seeking to control the economics of the industry by controlling the working time; the understanding was that the problem of stabilizing the economics of the industry, the problem recognized by both the UMW and the major coal companies, was to be taken care of by eliminating the smaller and weaker companies in great numbers, leaving the industry to the major coal companies alone.

"C. Use of the National Bituminous Coal Wage Agreement in the Conspiracy and Evasion of the Taft-Hartley Act.

"The conspiracy involved the use of the National Bituminous Coal Wage Agreement of 1950, and its successive amendments as an instrument in accomplishing the purposes of the conspiracy; the accomplishment of the purposes of the conspiracy was furthered by the domination of the UMW over the men in the industry and in 1950, by the express statement of the representatives of the major coal companies the Welfare Fund was turned over to the Union's control and rather than opposing the UMW's efforts to evade the Taft-Hartley Act as they had before, the major coal companies have fostered the UMW's domination of the men of the industry so that the terms of the National Bituminous Coal Wage Agreement would be imposed upon the small mines; by successive amendments to the Uniform National Bituminous Coal Wage Agreement's terms the wage scale and the Welfare Fund royalties per ton were raised to exceedingly high levels; the mechanization program of the major coal companies was to go ahead rapidly and the successive increases in the wage scale and Welfare Fund payments were designed and tailored to meet the abilities of the major coal companies to mechanize and not have their profits affected by the increasing labor costs in the successive amendments; the successive amendments to the labor contract were made after careful consideration of the abilities of the major coal companies to make the increases without affecting their profits; the Union had no concern as to whether the weaker companies could pay; the UMW displayed knowledge that the weaker companies could not pay and that they would fall by the wayside by reason of the in-

creased terms; the Union favored the taking over of the industry by the combines of coal producers and the Union worked toward this end; the campaign to impose the wage contracts upon the smaller, independent and non-union mines was intense after 1950; in areas of strong resistance mobs and terrorism were used; . . . the finances of the Union and the finances of the major coal companies have been used to further the drive to bring all production under the National Bituminous Coal Wage Agreement; one or more major coal companies have assisted in crushing the opposition of the principal competitor of the UMW in the bituminous coal labor fields; the result of this conspiracy and these activities has been that large numbers of small companies have been driven out of the industry and that thousands of men in the industry have been driven into unemployment; when these men are put out of the industry they cease to participate in Welfare Fund benefits and the Fund remains as a source of benefit for the employees only of those companies that survive.

"D. Use of Boycotts.

"To accelerate the demise of the smaller companies devices were inserted into later amendments of the National Bituminous Coal Wage Agreement to further restrain their trade; companies which could not afford to pay the wage scale in terms of the contract were barred from operating on the lands of signatories to the contract; the major companies have acquired great tracts of the coal lands of the country and there is little good coal land left for the small companies to operate upon; the small companies were prohibited from selling coal to the signatories to the contract, including the major companies which supplied coal to the large markets under large contracts.

"E. The TVA Market.

"The development of the Tennessee Valley Authority as the principal coal purchaser of the entire country called the attention of the conspirators to the Southern Appalachian region when TVA opened up many of its coal-using generating units in 1954, 1955 and 1956; in 1955 the conspirators manifested their intent and purpose to take over the TVA market by working together with the Secretary of Labor to obtain a determination of a minimum wage in the bituminous coal industry under the Walsh-Healey Act; the purpose was to drive out of the government market, particularly the TVA market, the small coal producers; this determination imposed a wage rate upon a producer of coal supplying coal to a government market twice as high as the wage rate determined by the Secretary of Labor in any other industry; in accordance with this design this determination of a minimum wage effectively barred Phillips Brothers from participating in the term market of the TVA because they could not pay the kind of wages set forth in that determination; because contracts for less than $10,000 were exempted from the minimum wage determination, Phillips Brothers was able to ship coal on TVA spot orders; the conspirators set about to eliminate or drastically reduce the spot market of TVA; when this effort failed to bring results the conspirators adopted the practice of predatory pricing to drive the spot coal market price down to a price which a small producer could not meet at a profit; in this phase of the campaign the West Kentucky Coal Company and its subsidiary Nashville Coal Company, took the most prominent part; the Union had over $25,000,000 of risk capital invested in these companies; large amounts of tonnage were

dumped upon the spot coal market of TVA at constantly reduced prices; the spot coal price was beaten down to such extent that Phillips Brothers suffered large losses in trying to retain their position in that market and finally had to abandon their sale of coal to that market and it became necessary for them to abandon the partnership business.

* * * * * * * *

"The Union in carrying on the foregoing activities pursuant to its understanding and agreement with the major coal companies was not acting alone to further its own interests as an organization of wage earners but was aiding, abetting and cooperating with business men in an effort to restrain trade of small coal companies and to monopolize the industry for the major coal companies; the conspiracy involved boycotts and a purpose to stabilize the prices of coal in the industry; the practices used pursuant to the conspiracy particularly the imposition of the constantly increasing terms of the National Bituminous Coal Wage Agreement upon the small coal companies, such as that of Phillips Brothers, and the price-cutting practices of the conspirators on the markets supplied by Phillips Brothers were unreasonable."

Respondents take particular exception to certain of the isolated "facts" that Petitioner has included in its statement. At the top of page 14, Petitioner states that the employees of Respondents "voluntarily joined UMW." The error in this statement may be seen by referring to pages 50-53 of Respondents' petition in Case No. 867, now before this Honorable Court.

At page 14, Petitioner states "undisputed are the denials" of UMW officers of any understanding or agreement pertaining to pricing of coal or operation of mines.

Particular reliance has heretofore been placed by Petitioner on the statement of Mr. Lewis in reply to the question of whether he had been a party to any agreement with reference to the pricing of coal (1139a-1140a):

> "I have not, neither in an individual capacity nor in an official capacity, as representative of the Union, nor other labor organizations when I was representing other labor organizations."

On the record this denial was not correct. UMW sponsored, and was responsible for, the stabilization agreement in the anthracite industry between UMW and major anthracite operators (312a-313a). In 1948 Mr. Lewis viewed with alarm the then tendency of the bituminous industry to over produce for the existing market. UMW having made over-production an issue in the anthracite industry and having sponsored the stabilization of production agreement in that industry, Mr. Lewis stated in 1948 that it was a matter of prime importance that the bituminous industry follow suit. Mr. Lewis stated:

> "If the operators of this country can't give any leadership on the commercial side of this industry, the United Mine Workers of America can and will.
>
> "So next year, in 1949 or at any other time, when evil days come upon this industry, you will find the United Mine Workers of America moving in, and if there are only three days' work in this industry we will all have the three days' work" (313a).

In the first sessions of the bargaining conferences of 1949-50 in bituminous, Mr. Lewis urged the anthracite plan upon the bituminous operators. Mr. Lewis stated:

> "The Mine Workers have gazed at some degree with admitted apprehension at the tendency of the industry to reduce their prices in the face of in

creasing competition. Frankly, we think the industry has been too hasty" (314a-315a).

UMW imposed the limited work weeks in 1949-1950 for one reason:

> "The equitable distribution of work opportunity in the coal industry and the desire of the United Mine Workers to have the work opportunity more equitably distributed" (314a-317a).

In 1949 UMW declared:

> "'Divide the orders, share the work program, is now a must in the soft coal industry. Since the coal industry of its own accord cannot get together and exhibit the business acumen necessary to protect its employees and the business and population of the mining communities, the duty of performing this public service devolves upon the only stabilizing force the industry has ever known—the UMWA" (24-25 of the Supplemental Appendix Volume in Case No. 867).

The major coal operators bitterly opposed the Union's method of stabilizing production in the industry because it hurt them in their pocketbooks (387a-388a). This was part of the background of the 1950 Agreement.

At pages 11-12 Petitioner states that the conclusions of the lower courts with respect to the investment of Petitioner in West Kentucky Coal Company and Nashville Coal Company and its use of those investments were "contradicted by undisputed facts." Petitioner does not take up any consideration of the factual matter pertaining to this question in its petition and supposedly it is not seeking a writ of certiorari upon this question. However, this was a matter that occupied a very large portion of the record.

Petitioner obtained possession of all of the preferred stock of West Kentucky Coal Company and 480,000 shares of a total outstanding issue of 857,264 common shares (499a, 591a, 1639a). For a substantial part of the case Petitioner insisted that most of these investments constituted loans and the coal company stocks were merely security for these loans. After a considerable amount of probing of the witnesses Lewis, Eaton and Colton, and because of the peculiar character of the notes evidencing the advancement of Union funds, Mr. Lewis conceded that Petitioner had entered into a joint business enterprise with Mr. Eaton in connection with these coal company investments and that Mr. Eaton was not requested to risk any of his own money and that it was expected that Petitioner would share in the profits from this venture the same as a partner in any joint business enterprise (1125a). Mr. Lewis conceded that UMW expected to make an immense profit from these investments (493a).

The oft repeated statements by UMW officers that the investments in these coal companies were made to give employment in the coal industry and to lift the employees of the companies out of their previous servitude were cancelled by the testimony of the president of the company who testified that, since the Union investments were made, the employment of the companies has constantly declined and further that, before the Union contract was signed upon UMW's acquisition of the company, the wage scale and welfare benefits paid by the Company were equal to or greater than that under the UMW contract (615a-618a). Mr. Lewis had no logical response when asked about this testimony (1164a-1165a).

Under UMW's ownership these companies switched from operations at substantial profits to loss operations while engaged in price-cutting practices on the TVA market (590a, 609a, 1461a, 1652a-1655a). The damage to

Respondents was manifest (858a-862a). In the course of these dealings and at the request of the West Kentucky Coal Company, United Mine Workers obtained a bank loan for the company in the amount of $5,200,000 with the pledge of Union assets to secure the loan (501a).

After the lengthy struggle between the major coal companies and Petitioner in the period prior to 1950, the changes were made in the 1950 contract and in the amendments thereafter, which an abundance of proof shows were slanted and tailored to give overwhelming advantage to the intensely mechanized mines over the thin-seamed small mines in which intense mechanization was impossible. There was the plainly expressed knowledge of Petitioner that these smaller operators would fall by the wayside so that the major coal combines would take over the production of coal in the country.

Petitioner resorts at pages 14-18 of the petition to the argument that a court injunction required Petitioner to deal with the major coal companies in collective bargaining in 1950. The courts and the federal agencies which initiated those proceedings cannot be held responsible. They were concerned solely with the employer-employee relationship between an organized group of employers and a bargaining representative of their employees. It is not reasonable to say that these public agencies were apprised of all understandings reached by the negotiating parties in 1950, or of how those understandings would be implemented in the succeeding years. These agencies were concerned with the making and the validity of the written agreement executed in 1950. They were not authorized or empowered to determine if there were any other understandings or agreements not expressed in that collective bargaining agreement.

Petitioner's contention at pages 16-17 that mechanization was inevitable in the industry and that UMW did

not and could not oppose mechanization because of the free enterprise system and the recognition of management prerogatives does not reply to the obvious fact that UMW was forcing rapid, intense mechanization in spite of the inabilities of the thin-seam mines in the Appalachians, particularly in Tennessee, to attain such mechanization.

The effect of UMW's drive to force mechanization is reflected in the statistics of employment in the industry. In 1949 there were 433,698 men gainfully employed in the bituminous coal industry (1724a). In 1960 there were 160,200 men employed in the industry (1217a).

Respondent was a mechanized company, engaged in strip-mining. But its methods of operation in the seams of coal and in the terrain of East Tennessee could hardly be compared with the type of operations found elsewhere (478a-479a, 484a-485a, 735a, 476a, 477a, 735a, 736a-737a, 487a, 599a, 1136a). The impossibility of using high productive equipment on the mountainous terrain and thin seams of East Tennessee is evident even from the statistics of the Bureau of Mines (1315a, 1664a, 1665a, 1666a, 1721a, 1722a).

The scarcity of thick, mechanically workable coal in Tennessee (1664a) and the application of the "land-lease" clause in UMW's contract (680a) leaves little coal land to the small operator in this part of the country. Respondent operated at small profits in its first years but operated at substantial losses in 1957 and 1958 (1591a, 206a-207a, 218a-219a).

Petitioner states at pages 17-18 that its settlements with Bituminous Coal Operators Association have promoted industrial peace on a national basis. But, as pointed out in the Opinion of the Court of Appeals in its discussion of the violence attendant upon UMW's drives in the Southern Appalachian region, there has been no peace here, as

UMW polices its thousands of hungry former members to keep them out of mines that cannot possibly pay the terms of the national contract. The UMW is compelled to take these police actions by the protective wage clause in its contract (1205a) to keep the men out of mines in the whole area where the contract cannot be met and to see that the coal from those mines will not find a market. From the standpoint of virtually all of the miners of the area this could hardly be called a traditional labor union policy by the Union which represents, or formerly represented, them.

Multi-million ton long term contracts acquired by large coal companies now supply the bulk of the coal market (404a-405a, 408a, 715a-716a, 1271a, 487a-488a). As an example, the most important market today, the electric utility market, makes such large contracts in order to fix and determine costs (a) to sell debentures needed to pay for new steam plants and (b) to govern the establishment of electricity rates (1357a-1358a). The practice of major coal companies buying coal from smaller companies to apply on term contracts with the major markets is barred by the protective wage clause unless the small company has the ability to pay the labor cost in the UMW contract. Mr. Lewis demonstrated the dependence of smaller companies on sales to major companies as far back as 1949 (320a-323a). The major companies have had the practice of frequently buying coal from other companies (1264a, 1360a). This market has been eliminated for those companies that operate under conditions that make it impossible to live up to the UMW contract.

REASONS FOR DENYING THE WRIT.

I. No Purpose Would Be Served by Issuing the Writ With Respect to Petitioner's First Question. The Question as Presented Is Academic in This Case.

The first question posed in the petition is: May a labor union be held a conspirator under the Sherman Anti-Trust Act where it has achieved an industrywide, multi-employer collective bargaining agreement, negotiated in accordance with procedures established by law, which results in stabilizing wage rates and working conditions at levels above the ability of some employers to pay?

By this question Petitioner seeks to put the whole case into a simple proposition which answers itself automatically in the negative. But the question has no application in this case because it omits all phases of the case which would result in an affirmative answer. The first counter-question which we have set forth above should be compared with this question.

It is the position of Respondents that if the Union does the things described for the purpose of promoting the interest of a business group and with full expectancy that the trade of competitors outside of the business group will be seriously restrained or utterly destroyed by reason of severe differences in methods of production; then the acts of the Union would constitute a violation of the Sherman Act. Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services. The same labor union activities may, or may not, be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups. **Allen Bradley Company v.**

Local Union No. 3 (1945), 325 U. S. 797, 89 L. Ed. 1939; **United Brotherhood of Carpenters v. United States** (1947), 330 U. S. 395, 91 L. Ed. 973; **Los Angeles Meat and Provision Drivers Union v. United States** (1962), 371 U. S. 94, 9 L. Ed. (2) 150; **United States v. Gasoline Retailers Association, Inc. et al.** (1961, 7th Cir.), 285 Fed. 2d 688; **Local 175 Brotherhood of Electrical Workers v. United States** (1955, 6th Cir.), 219 Fed. 2d 431; **Philadelphia Record Company v. Manufacturing Photo-Engravers Assoc. of Philadelphia** (1946, 3rd Cir.), 155 Fed. 2d 799; **Anderson-Friberg, Inc. v. Justin R. Clary & Son** (1951, S. D. N. Y.), 98 Fed. Supp. 75. If these factors are present (as they are in this case), then merely calling the act of the Union an effort to stabilize wage rates would not remove the Sherman Act prohibitions.

We believe that this is the exact situation that was presented to the Court in **United Brotherhood of Carpenters v. United States**, 330 U. S. 395. As shown in that case, the purposes and the background of the combination and a great divergence in the methods of production of the parties affected by the agreement can make a great deal of difference. But, Petitioner completely ignores and refuses to confront these factors in its petition.

It will be noted that the protective wage clause in the **Carpenters** case is almost identical with the protective wage clause in the National Bituminous Coal Wage Agreement (1205a).

With respect to the portion of the Opinion in the **Carpenters** case dealing with the clear proof rule of Section 6 of Norris-LaGuardia, the clear proof charge was given by the Trial Court in this case (1555a).

The statement made at page 27 of the petition that the contentions made by Respondents in this case would mean that UMW's collective bargaining agreement must be re-

stricted to those terms which the least efficient and the least successful coal operator in the industry could afford, is a much over-simplified argument. A Union with a national contract that bars a single employer or a handful of employers would certainly have no problem under the anti-trust law. But, when a Union designs a national contract which would drive a whole area out of the industry, to which it has been traditionally tied for decades and when the work force suddenly declines from 433,000 men to 160,000, it would seem to be a matter of broad human concern that the Union have the realization that there are "invisible strangers" at the bargaining table (Petition, p. 28) and that a court may very well scrutinize its actions under the Sherman Act.

The exercise of the asserted right to engage in national collective bargaining is the exercise of tremendous power. With such power comes responsibility in preserving, rather than destroying, the free flow of commerce. This should be particularly true in industries where there have been a great number of competing companies, operating in all kinds of different conditions with all sorts of methods of production, and where there arises a tendency, favored by the Union, for the concentration of production into fewer units (408a) "to take over the production" (450a-451a).

We do not undertake to say in this case that Petitioner does not have the power to engage in national collective bargaining. But we do say that Congress has not expressly authorized it to the exclusion of the limitations contained in other statutes such as the Sherman Act. We believe these questions are firmly settled.

II. The Second Question Presented by Petitioner With Respect to the Proof On Activities of Petitioner in the Business Group With Which Petitioner Dealt in Obtaining Minimum Wage Determinations On the TVA Market, Incorrectly Treats This Phase as Being the Whole Conspiracy and Ignores the Significance of Such Proof On the Question of Purpose and Intent to Restrain Trade and Monopolize as to This Largest of the Markets for Coal, Which Was Respondents' Principal Market; the Question Also Ignores the Fact That the Damages Awarded Respondents Were Not Attributable to This Particular Phase of the Proof.

The Tennessee Valley Authority is the largest coal buying consumer in the United States (800a). The TVA steam plant system was developed in the 1950's and the Kingston Plant, the largest in the world, was completed in the vicinity of Respondents' mine in late 1955 (1643a).

The first determination of minimum wage under the Walsh-Healey Act for the coal industry occurred in 1955 and this wage was increased by a determination made in 1958 (1625a-1638a). The desire of UMW that the "established operators" take the TVA coal business and the desire of those major coal combines to get the TVA coal contracts were plainly expressed (992a, 458a, 1636a). These "established operators" did subsequently obtain the largest TVA term contracts (1658a).

The purposes and intents of the proponents of the Walsh-Healey determination were expressed in the speech by the Secretary of Labor in which Mr. Lewis plainly concurred.

This phase of the proof is not related to, nor does the petition discuss, the effort of UMW to eliminate the TVA spot market upon which the Respondent was bidding, and upon which Respondent depended, nor does

the petition discuss the price cutting practices of these "established operators", including the UMW-owned companies, West Kentucky Coal Company and Nashville Coal Company, on the TVA spot market which occupied a very substantial part of the record and from which Respondent suffered its damages.

It would seem to be fundamental fairness and justice that all proof showing the purpose and intent of the alleged conspirators with respect to Respondents' market should be admissible. Because in a conspiracy case such as this, a natural question that arises is, if there was a conspiracy, how did it manifest itself, and what was its effect upon the market being supplied by the complaining party? The activity of the UMW and the major coal producers with respect to this Walsh-Healey minimum wage determination is very pertinent to this very natural question.

The market concerned is a federal government market, just as scores of steam electric generating plants over the country are city government markets. But, being a government market does not make it any the less the objective of those who would monopolize or who would restrain the competition of competitors. The government markets for all industries must be a substantial part of all markets in this day and time, and if the transactions involving the officials who control the buying of goods for those markets do not come under the protection of the anti-trust law and its prohibitions, then there is open invitation to many sorts of conspiratorial and corrupt practices.

The case of **Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.** (1961), 365 U. S. 127, 5 L. ed. 2d 464, upon which Petitioner relies, involved a situation where "all of the evidence in the record, both

oral and documentary, deals with the railroads' efforts to influence the passage and enforcement of laws" (P. 142).

In the **Noerr** case there is a complete absence of any of the restrictive practices which normally characterize a Sherman Act case such as price-fixing or price-cutting arrangements, boycotts and other similar arrangements (P. 136).

The **Noerr** case did not deal with a market afforded by government purchase and consumption of goods. Where the effort is to capture a market afforded by government consumption, as in the case at bar, one encounters the impossibility of distinguishing the government market from the ordinary private market as far as anti-trust protections are concerned.

The Walsh-Healey Act does not pertain to the regulatory power over private business. Thus in **Perkins v. Lukens Steel Company** (1940), 310 U. S. 113, 84 L. ed. 1108, concerning the Walsh-Healey Act, this Court said at pages 128 and 129:

> "The Act does not represent an exercise by Congress of regulatory powers over private business or employment. In this legislation Congress did no more than instruct its agents who were selected and granted final authority to fix the terms and conditions under which the Government would permit goods to be sold to it. The Secretary of Labor is under a duty to observe those instructions just as a purchasing agent of a private corporation must observe those of his principal."

We do not believe that there is any distinction in anti-trust law between the effort of conspirators to induce the purchasing agent of a private contractor to boycott

the goods of a competitor and the situation where the Secretary of Labor is approached by the conspirators to impose a boycott on the goods of competitors in a government market.

We did not offer the proof with respect to the combination of conspirators to obtain the minimum wage determination under Walsh-Healey for the purpose of challenging the validity of the Walsh-Healey determination or for the purpose of proving any corrupt bargains between the Secretary of Labor and the conspirators. But we did offer it to throw light upon the purpose and intent of the conspirators to restrain competitors and to obtain a monopoly of the TVA market. The case at bar is like **Pfotzer v. Aqua Systems** (C. A. 2d, 1947), 162 Fed. 2d 779. There the plaintiff contracted to install a gasoline aqua distribution system at the Naval Air Station at Pensacola, Florida. The defendant, having a patent upon a particular kind of hydraulic distribution system, sought to force the plaintiff to purchase the defendant's system to install on this job, and it also sought to influence the Naval authorities to keep out any other hydraulic gasoline distribution system besides the one upon which the defendant had a patent. The Trial Court excluded communications between the defendant and Naval authorities which tended to show the effort of the defendant to influence the Naval authorities in this respect. Judge Learned Hand said, at page 785:

> "The correspondence between Kaestner and Wrightson (the Naval purchasing authority), coupled with the Sullivan report, were rationally relevant to the question whether Kaestner and the Aqua Company were trying to influence the Naval authorities to keep out any other hydraulic gasoline distribution system. It was not necessary to prove that there was any corrupt bargain between them; it was enough, if the

correspondence threw light upon the efforts of the Aqua Company, and served to prove they had acquired control, and meant to keep it. That made the correspondence admissible on the issue of monopoly."

III. Question Three Is Merely a Restatement of Petitioner's First Question With the Addition of Certain Evidentiary Matters Presented to the Jury.

We believe that the third question presented by Petitioner is a restatement of the first question, with the addition of certain evidentiary phases of the case inserted in the proof by Petitioner and argued to the jury. The jury rejected the contentions of Petitioner founded upon these matters under a charge which fairly placed these matters in proper focus.

We refer to the material above with respect to the first question in reply to the basic contention that a labor union can never be found in violation of the Sherman Act when it is acting as a collective bargaining agent under the Labor Law.

The third question adds four areas of proof presented in the trial court by Petitioner: (a) that there was an injunctive order requiring Petitioner to bargain at the time of the agreement on March 5, 1950; (b) that the Union officers had denied conspiracy in this case; (c) that there is no direct evidence proving the conspiracy, and (d) that some of the Union's activities were conducted under the procedures and under the jurisdiction of the National Labor Relations Act.

Petitioner does not say that these matters were not properly charged to the jury by the Trial Court. It must be assumed that the jury took these matters into consideration and having done so, found contrary to the position of Petitioner.

We again refer to our counter-statement of question number one to place these various matters in proper context within the overall conspiracy.

We have referred above in the Statement of Facts to the background of the conspiracy and the relationships between the Petitioner and the major coal companies prior to 1950. The injunctive order of the Federal District Court, referred to in Petitioner's Question 3, is part of this background. We believe that our comments under the Statement of Facts above upon this matter are appropriate and correct.

Likewise, we have referred above in the Statement of Facts to the claim of Petitioner that proof of conspiracy has been contradicted by denials of Petitioner's officers. As shown above, these denials were overreaching and were contrary to proven facts in the record. The jury was acting within its prerogative in rejecting such denials contrary to proven facts.

We do not believe that it advances the case of Petitioner to contend that there is no direct evidence of conspiracy in this case. There was just as much direct evidence of conspiracy in this case as there was in the **Carpenters** case, supra.

It is submitted that the following portion of the Opinion of the Court of Appeals (Petition, App., p. 12a) is a correct statement of basic anti-trust law:

> "But it is recognized that conspiracies are seldom capable of proof by direct testimony and it is settled that they may be inferred from the acts of the parties thereto. Circumstantial evidence of the existence of a conspiracy may be sufficiently strong to raise a factual question for the jury, even though there is no direct evidence that a conspiracy existed. It is the

function of the jury to observe the witnesses while testifying, to appraise their credibility, to draw inferences from the facts established, to resolve conflicts in the evidence and to reach ultimate conclusions of fact (citing cases)."

The fourth phase of the proof raised by this question pertains to the circumstance that Petitioner was acting as a collective bargaining agent under the National Labor Relations Act. It is believed that this is merely a restatement of the position taken in the first question by Petitioner and we have responded to that proposition above.

One further point is raised in this question and that is with respect to the clear proof requirement of Section 6 of the Norris-LaGuardia Act. We have already commented upon this above and pointed out that the clear proof charge was given by the Trial Court (1555a).

IV. Petitioner Has Not Undertaken to Give Any Reason for the Issuance of the Writ With Respect to the Fourth Question Presented by Petitioner.

Petitioner does not seriously undertake to discuss the proof or to make any analysis thereof. Petitioner does state that there are a number of other cases which have been brought under the Sherman Act against Petitioner and we do not believe that the fact that other companies have brought such suits can indicate other than that there has been widespread injury resulting from the conduct of Petitioner and that such injury has been such that a number of these companies are willing to undertake the long arduous and expensive road afforded by the Sherman Act. As to whether or not the proof of conspiracy in this case will have any materiality or bearing upon those other cases is, of course, problematical. It is self-evident that each of those cases must stand on the record made

up in each such case. We can state from our own experience in this case that it is a long journey between filing a complaint under the Sherman Act and obtaining a favorable final decree.

In the meantime, it is reasonable to assume that there are a number of parties, employers and employees alike, who are being affected by Petitioner's policies and dealings with the major coal companies. A denial of the writ will make the Petitioner sooner realize the need to give more humane consideration to the "strangers at the bargaining table."

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN A. ROWNTREE,

CLAUDE K. ROBERTSON,
1412 Hamilton Bank Building,
Knoxville, Tennessee,
Attorneys for Respondents.

FOWLER, ROWNTREE & FOWLER,
1412 Hamilton Bank Building,
Knoxville, Tennessee,

TAYLOR & TEMPLETON,
Bank of Knoxville Building,
Knoxville, Tennessee,
Of Counsel for Respondents.

INDEX

	Page
Interest of the AFL-CIO	1
Summary of Argument	3
Argument	5
I. The Sherman Act Is Inapplicable To Labor Standards Or The Elimination Of Competition Based On Differences In Labor Standards, And So A Union's Wage Equalization Program Cannot Constitute An Unlawful Restraint Of Trade	5
A. Legality of Seeking Uniform Wages and Working Conditions throughout an Industry	5
B. Scope of the Rule in Other Circumstances	17
II. The National Labor Relations Board Should Have Exclusive Primary Jurisdiction Over Conduct Arguably Subject To The National Labor Relations Act Even Though That Conduct Is Alleged To Be An Antitrust Violation	21
III. Restrictions On A Union's Efforts To Secure Uniform Wages And Working Conditions Would Serve No Valid Purpose Of The Competitive Economy And Would Jeopardize Widely Accepted Bargaining Arrangements	28
Conclusion	32

Citations

CASES:

Alco-Zander Co. v. *Clothing Workers*, 35 F. 2d 203 E.D. Pa. 1929) 14-15

Apex Hosiery Co. v. *Leader*, 310 U.S. 469..... 3, 6-8, 10

Allen Bradley Co. v. *IBEW Local 3*, 325 U.S. 797..... 8-9

Bituminous Coal Operators Assn., 144 NLRB No. 29, 54 LRRM 1037 (1963)..... 23

Bituminous Coal Operators Assn., 148 NLRB No. 31, 56 LRRM 1471 (1964)..... 23

Coronado Coal Co. v. *Mine Workers*, 268 U.S. 295..... 3

Delaware Valley Marine Supply Co. v. *American Tobacco Co.*, 297 F. 2d 199 (3d Cir. 1961)..... 2

Duplex Printing Press Co. v. *Deering*, 254 U.S. 443.... 2, 16

Eastern Railroad Presidents Conference v. *Noerr Motor Freight*, 365 U.S. 127..... 2, 18

Page

Endicott Johnson Corp. v. *Perkins*, 317 U.S. 501..... 11
Ford Motor Co. v. *Mondragon*, 271 F. 2d 342 (8th Cir. 1959) 2
Garment Workers v. *NLRB*, 366 U.S. 731..... 22
Garner v. *Teamsters Local 776*, 346 U.S. 485..... 25-26
Grunewald v. *United States*, 353 U.S. 391..... 21
Hunt v. *Crumboch*, 325 U.S. 821 17
Jewel Tea Co. v. *Associated Food Retailers*, 331 F. 2d 547 (7th Cir. 1964)..... 22
Kennedy v. *Long Island R. Co.*, 319 F. 2d 366 (2d Cir. 1963) 8
Mine Workers v. *Coronado Coal Co.*, 259 U.S. 344..... 3
NLRB v. *Stafford*, 206 F. 2d 19 (8th Cir. 1953)..... 2
NLRB v. *Wooster Div. of Borg-Warner Corp.*, 365 U.S. 342 ..... 22, 23
New York Times Co. v. *Sullivan*, 376 U.S. 254..... 21
Pennsylvania R. Co. v. *Chamberlain*, 288 U.S. 333..... 2
San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 25
Standard Oil Co. of California v. *Moore*, 251 F. 2d 188 (9th Cir. 1957), *cert. den.* 356 U.S. 975..... 3
Teamsters Local 20 v. *Morton*, 377 U.S. 252..... 26-27
Teamsters Local 24 v. *Oliver*, 358 U.S. 283..... 25, 28
United States v. *Hutcheson*, 312 U.S. 219..... 8
Weber v. *Anheuser-Busch*, 348 U.S. 468..... 13, 25-26

STATUTES:

Clayton Act (38 Stat. 731, 738, 15 U.S.C. §17, 29 U.S.C. §52), secs. 6, 20 8
Fair Labor Standards Act (52 Stat. 1060, 29 U.S.C. 202(a)), sec. 2(a) 11
Labor Management Relations Act, as amended (61 Stat. 158, 73 Stat. 545, 29 U.S.C. §187), sec. 303.....26, 27
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 543, 29 U.S.C. §151 *et seq.*):.....
Section 1 10
Section 7 22
Section 8(a)(5) 22
Section 8(b)(3) 22
Section 8(b)(4)(A) 23
Section 8(b)(4)(B) 23

Page
Section 8(d) 22
Section 8(e) 23
Norris-LaGuardia Act (47 Stat. 71, 29 U.S.C. §106), sec. 6 ..... 3, 21
Sherman Act (26 Stat. 209, 15 U.S.C. §§1, 2), secs. 1, 2.... 6

CONGRESSIONAL:

105 Daily Cong. Rec. 11045-46 (June 29, 1959), 2 Leg. Hist. 1507-08 25
H. Conf. Rep. No. 510, 80th Cong., 1st Sess. (1947) 24
H. Rep. No. 741, 86th Cong., 1st Sess. (1959)..... 24
S. Rep. No. 105, 80th Cong., 1st Sess. (1947)..... 24
S. Rep. No. 187, 86th Cong., 1st Sess. (1959)..... 24

MISCELLANEOUS:

77 American Bar Association Reports (1952)..... 12
Attorney General's National Committee to Study the Antitrust Laws; Report of the (1955)..... 11
Bernhardt, "The *Allen Bradley* Doctrine: An Accommodation of Conflicting Policies," 110 Univ. Pa. L. Rev. 1904 (1962) 14
Chamberlain, *Collective Bargaining* (1951)..... 31
Cox, "Labor and the Antitrust Laws—A Preliminary Analysis," 104 Univ. Pa. L. Rev. 252 (1955)..... 2, 12-13, 20, 30
Douglas, *Real Wages in the United States, 1890-1926* (1930) 29
Independent Study Group, *The Public Interest in National Labor Policy* (1961) 14
Kerr, "Labor's Income Share and the Labor Movement," in Taylor and Pierson, eds., *New Concepts in Wage Determination* 260 (1957) 29
Lester, "Reflections on the 'Labor Monopoly' Issue," 55 J. Pol. Econ. 513 (1947) 29
45 LRRM 11-20 (1960) 31
49 LRRM 13-19 (1962) 31
Meyers, "Price Theory and Union Monopoly," 12 Ind. and Lab. Rel. Rev. 434 (1959) 29
Peltzman, "The Relative Importance of Unionization and Productivity in Increasing Wages," 12 Lab. L. J. 716 (1961) 29

Page

Reynolds, *Labor Economics and Labor Relations* (3d ed., 1959) 29, 30
Slichter, *The Challenge of Industrial Relations: Trade Unions, Management, and the Public Interest* (1947).. 29
Sovern, "Some Ruminations on Labor, the Antitrust Laws and Allen Bradley," 13 Lab. L. J. 957 1962).... 16, 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 48

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

JAMES M. PENNINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

INTEREST OF THE AFL-CIO

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The AFL-CIO is a federation of national and international unions representing about thirteen million members, by far a majority of the organized working people in the United States. Although the petitioner in this case is not a Federation affiliate, the issues in the litigation are of profound concern to the AFL-CIO. The conclusion below that a union's program of wage equalization in an industry may constitute a restraint of trade in violation of the antitrust laws strikes at the very existence of a meaningful labor

movement. As former Professor Archibald Cox has noted, trade union philosophy since its early days "has consistently held that a union cannot be effective unless organization is coextensive with the market and eliminates price competition based on differences in labor standards."[1]

The AFL-CIO is therefore directly interested in presenting to the Court its views on this latest endeavor to regulate the traditional activities of American labor organizations through the application of laws whose entire concept is alien to those organizations' nature and purposes.[2]

---

[1] Cox, "Labor and the Antitrust Laws—A Preliminary Analysis," 104 Univ. Pa. L. Rev. 252, 276 (1955). See also Brandeis, J., dissenting in *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 480-82.

[2] Because of the overriding importance of the question raised by the holding that a union's attempt to secure uniform labor standards may be an antitrust violation, we concentrate on that issue alone. But we also agree with petitioner that predicating an antitrust violation upon union and employer efforts to obtain a particular Walsh-Healey prevailing wage determination from the Secretary of Labor (see R. V, 1758-59, 1763-64) is directly contrary to this Court's decision in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight*, 365 U.S. 127, 136, 138 ("the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly," even if the "sole purpose in seeking to influence the passage and enforcement of laws was to destroy *** competitors").

We furthur agree that even assuming *arguendo* the courts below were correct that a jury could infer the existence of a union-employer conspiracy if it found the union's "purpose" in seeking uniform wages was to help the major coal producers eliminate the smaller and weaker firms (see R. III, 1550a-52a, 1556a, 1558a-62a, 1564a-65a; V, 1752-56), there was insufficient evidence to send the present case to the jury because, as the trial judge himself realized (though he failed to act on that realization): "Before a fact sought to be established *** can be said to have been proved by circumstantial evidence alone, such as the alleged conspiracy, it is necessary not only that the circumstances proved by the evidence shall reasonably give rise to an inference of such facts, but also that no other equally reasonable inferences to the contrary can be drawn from the same circumstances" (R. III, 1560a). See *Pennsylvania R. Co.* v. *Chamberlain*, 288 U.S. 333, 339-40; *NLRB* v. *Stafford*, 206 F.2d 19, 23 (8th Cir. 1953); *Ford Motor Co.* v. *Mondragon*, 271 F.2d 342, 345 (8th Cir. 1959); *Delaware*

SUMMARY OF ARGUMENT

Two decades ago this Court laid down the principles which can dispose of this case. First, the concern of the Sherman Act is the product market, not the labor market; the elimination of wage competition among workers, and the elimination of price competition among employers based on differences in labor standards, are not the types of restraints upon commercial competition at which the Act is aimed. Secondly, a labor organization acting alone is immunized by statute from antitrust liability even if it operates directly on the product market to fix prices, allocate markets, or otherwise restrict commercial competition; only if a union acts in combination with a nonlabor group

---

Valley Marine Supply Co. v. *American Tobacco Co.*, 297 F.2d 199, 205-07 (3d Cir. 1961); *cf. Standard Oil Co. of California* v. *Moore*, 251 F.2d 188, 210 (9th Cir. 1957), *cert. den.* 356 U.S. 975. See also §6 of the Norris-LaGuardia Act, 47 Stat. 71, §6 (1932), 29 U.S.C. §106: "*** no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon *clear proof* of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." (Emphasis supplied.)

In the present case there was no direct evidence that the union's wage standardization drive was undertaken pursuant to a union-employer agreement to eliminate competition, and there was undisputed testimony by the union's principal officers that no union-employer conspiracy to restrain trade existed (R. V, 1753; I, 392a; III, 1139a-40a, 1189a, 1224a-25a). Even if the law of union antitrust liability were still in the primitive state represented by the *Coronado* cases, it would apparently be recognized that a campaign for unionization and for uniform labor standards was at least as consistent with the purpose of improving employees' working conditions as with the purpose of interfering with interstate commerce, and that in the absence of other evidence establishing the union's unlawful intent, no purpose to restrain trade could be inferred. See *Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344, 408-09, 411; *Coronado Coal Co.* v. *Mine Workers*, 268 U.S. 295, 308, 310. *Cf. Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 485-87, 509. The District Court therefore erred in allowing the jury to speculate about the union's "purpose," even if that subjective purpose were material in this case—which, as the text demonstrates, it is not.

to achieve such a direct commercial restraint does it become subject to regulation under the antitrust laws.

The Court of Appeals below erred (R. V, 1750) because it concentrated on the second proposition and ignored the first. A union's wage equalization program is activity strictly within the labor market, to which the Sherman Act has no application, and the question whether a union "combines" (*i.e.*, bargains collectively) with employers to establish labor standards is thus irrelevant. The District Court below erred (*e.g.*, R. III, 1550a-51a) because it failed to consider that any union program for wage standardization has the implicit "purpose" of eliminating *substandard* competition. One is but the obverse of the other. Since labor standards are outside the ambit of the Sherman Act, it follows as a necessary corollary that they cannot be brought within it by a jury's factual finding which merely articulates one of their inherent purposes.

The issue presented by the Mine Workers' campaign for uniform terms of employment in the coal industry can therefore readily be resolved on the basis of long-established precedent. As *amicus*, however, the AFL-CIO urges the Court not only to reaffirm the inapplicability of the Sherman Act to the area of labor standards, but also to reexamine the continued appropriateness of any antitrust regulation of union conduct. Comprehensive federal legislation has been enacted during the past two decades to deal specifically with this subject. Both the Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959 contain provisions expressly designed to cover many types of union activity once controlled through the antitrust laws. To preserve uniformity in national labor policy, and to avoid an incongruous overlap of rules and remedies under the various statutes, we submit the NLRB should have the exclusive primary jurisdiction to pass upon the legality or illegality of union conduct arguably falling within the regulatory scheme of the amended National Labor Rela-

tions Act. Part II of the Argument will develop this latter point.

ARGUMENT

I. The Sherman Act Is Inapplicable To Labor Standards Or The Elimination of Competition Based on Differences In Labor Standards, And So A Union's Wage Equalization Program Cannot Constitute An Unlawful Restraint Of Trade.

A. Legality of Seeking Uniform Wages and Working Conditions Throughout an Industry

Whether the Sherman Act can be used to thwart the establishment of uniform labor standards in an industry is of such paramount importance to organized labor that our brief will be devoted almost entirely to this one issue, even though several other significant questions are also presented.[3] The single point we will treat is enough in itself to require reversal of the Court of Appeals' affirmance of the judgment entered in the District Court. The trial judge did not merely admit evidence of the Mine Workers' campaign for equal wages and working conditions in the coal industry as one of many items which the jury could consider in determining whether there was some broad conspiracy among the union and certain employers to restrain trade by various means. Instead, the court charged that it was "for the jury to determine whether there was a purpose among the alleged conspirators to impose the national contract upon small operators for the purpose of restraining trade, monopolizing and driving small companies out of business; or, whether the purpose was to improve working conditions, better pay, more welfare benefits, and better job security" (R. III, 1550a-51a; see also R. III, 1552a, 1556a, 1558a-62a, 1546a-65a). And if the

[3] Our accord with petitioner on other points is discussed in note 2, *supra*.

jury found the union intended "to impose a contract upon an employer" for the former purpose, then, continued the court, "*such activity* comes under the anti-trust law and is prohibited" (R. III, 1552a; emphasis supplied). The jury was thus instructed that, given the supposedly improper "purpose," a union's program for achieving uniform labor standards in an industry could, in itself, constitute a violation of the Sherman Act.[4] In this the court erred.

In *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, this Court set forth the first of two propositions which sum up the modern view toward the relationship between the antitrust laws and the labor market and labor union activities. Justice Stone, speaking for the Court, first pointed out that the Sherman Act, 26 Stat. 209, §§ 1, 2 (1890), as amended, 15 U. S. C. §§ 1, 2, with its prohibition of every "combination *** in restraint of trade" and of every attempt "to monopolize *** trade," had been enacted for the specific purpose of preventing "restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market." 310 U. S. at 493. He went on to say that the Act was not applicable to any case, "whether or not involving labor organizations or activities," unless there was "some form of restraint upon *commercial competition in the marketing of goods and services.*" *Id.* at 495. (Emphasis supplied.)

Turning to the labor market, the Court observed that a "combination of employees necessarily restrains competi-

---

[4] The union's first objection to the trial court's charge was that it failed to include a requested instruction stating: "Even if the Union and the coal companies with whom it bargained collectively realized that the wage rates and benefits provided in the agreement could not economically be met by a company unable to mechanize its production, this, of itself, would constitute no violation of the anti-trust laws. (Apex Hosiery Co. v. Leader, 310 U.S. 469 [1940]" (R. III, 1580a). The Mine Workers pursued this point in motions for a new trial (R. I, 72a, 81a). See also Question No. 1 of the petition for certiorari, p.4.

tion among themselves in the sale of their services to the employer," but such a combination did not fall within the common law meaning of "restraint of trade" incorporated by Congress into the Sherman Act. *Id.* at 498, 502. The Court further recognized that successful union activity in consummating wage agreements "may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards," and that "in order to render a labor combination effective it must eliminate the competition from non-union made goods." *Id.* at 503. But, concluded the Court, "an elimination of price competition *based on differences in labor standards*" is not "the kind of curtailment of price competition prohibited by the Sherman Act." *Id.* at 503-04. (Emphasis supplied.) Accordingly it was held that a labor organization's violent sit-down strike at a plant which had refused to accede to demands for a union contract did not constitute a violation of the antitrust laws.

The opinion in *Apex* was a realistic acknowledgment that the antitrust laws, based as they are on the philosophy of promoting commercial competition among business firms, are simply not the appropriate vehicle for regulating activities concededly carried on to eliminate wage competition among employees, particularly when those activities are approved by public policy. Justice Stone found that approval in the body of federal labor legislation enacted in the 1930s, including the Norris-La Guardia Act, the Railway Labor Act of 1934, the National Labor Relations Act, the Public Contracts Act, and the Fair Labor Standards Act, which he said "'clearly recognizes that combinations of workers eliminating competition among themselves and restricting competition among their employers based on wage cutting are not contrary to the public policy.'" 310 U. S. at 504, n. 24.

While a labor union was involved in *Apex,* it is evident that the Court was primarily concerned with the kind of

restraint, "whether or not involving labor organizations or activities." See 310 U. S. at 495.[5] The principle established by *Apex* is that only restraints on "commercial competition" in the "marketing of goods and services" are proscribed by the Sherman Act; the elimination of wage competition among employees, and the elimination of price competition among employers "based on differences in labor standards," are wholly outside the ambit of the statute. The product market, not the labor market, is the proper domain of the antitrust laws, and activity in the labor market to set wages, hours, and working conditions, whatever its indirect effect, is not within their purview.

The second basic principle reconciling the antitrust laws and the labor field was enunciated in *United States* v. *Hutcheson*, 312 U. S. 219, and *Allen Bradley Co.* v. *IBEW Local 3*, 325 U. S. 797. Sections 6 and 20 of the Clayton Act, 38 Stat. 731, 738, §§6, 20 (1914), 15 U.S.C. §17, 29 U.S.C. §52, and the Norris-La Guardia Act, 47 Stat. 71 (1932), 29 U.S.C. § 101 *et seq.*, were read together as manifesting a congressional intention to immunize a labor organization entirely from the coverage of the Sherman Act whenever, in the course of a labor dispute, it "acts alone" and not "in combination with business groups," even though its activities may directly affect the product market. *Allen Bradley*, 325 U. S. at 809-10; see also *Hutcheson*, 312 U. S. at 232. Conversely, unions have been subject to regulation under the antitrust laws if they "aid and abet manufacturers and traders in violating the Sherman Act," since a "business monopoly is no less such because a union participates, and such participation is a violation of the Act." *Allen Bradley*, 325 U. S. at 810, 811. The applicability of this second labor exemption therefore depends in any given case upon

---

[5] In our view, agreements among employers acting alone, without the intervention of a union, to fix labor standards would likewise have no antitrust implications. To this effect is *Kennedy* v. *Long Island R. Co.*, 319 F.2d 366 (2d Cir. 1963).

the parties who impose the restraint and not upon the kind of restraint imposed. But of course one never need reach the question of whether a union is entitled to rely upon its antitrust immunity as a labor organization "acting alone" unless it is first decided that there has been the kind of restraint upon commercial competition which falls within the ambit of the antitrust laws.

In *Allen Bradley*, for example, a union participated directly in devising and executing an elaborate scheme[*] whereby the entire New York City market for electrical equipment was monopolized for local manufacturers. The union, which represented employees of both manufacturers and contractors, obtained agreements from the manufacturers to sell equipment only to union contractors and agreements from the contractors to buy only from local, union manufacturers. The union in turn boycotted all equipment manufactured out of state. The business of the local manufacturers burgeoned, and the contractors, aided by a bid-rigging system, also profited through inflated prices. Plainly, this was not just conduct restraining competition in the labor market, which would have been outside the Sherman Act under the *Apex* rule. As this Court said, there were "industry-wide understandings, looking not merely to terms and conditions of employment but also to *price and market control.*" 325 U. S. at 799-800. (Emphasis supplied.)

The Court of Appeals below utterly failed to realize that in assessing antitrust liability, the kind of restraint is as significant as the nonlabor combination. It only examined the question "whether a labor organization is exempt from the provisions of the anti-trust laws under Sec-

---

[*] The full facts of the *Allen Bradley* conspiracy are set forth in the opinions of the District Court, 41 F. Supp. 727 (S.D. N.Y. 1941) and 51 F. Supp. 36 (S.D. N.Y. 1943), and of the Court of Appeals, 145 F. 2d 215 (2d Cir. 1945), incorporated by reference in this Court's opinion, 325 U.S. at 789.

tion 6 of the Clayton Act" (R. V, 1750). The principle established by *Apex* was never discussed. Having so misconstrued the law by ignoring one critical issue, the Court of Appeals then concluded it was for the jury to determine "whether the Union acted alone in carrying out the legitimate objects of labor unions" (R. V, 1751).

The trial judge's instructions evidenced awareness that a union's wage equalization program effectuated through uniform labor contracts is not by itself an antitrust violation (R. III, 1556a, 1564a), but they failed to take account of the necessary implications of that rule of law. The District Court's charge allowed the jury to transform conduct wholly outside the antitrust sphere into a Sherman Act violation simply by a factual finding that the union sought to impose the national contract throughout the industry for the "purpose" of driving out small companies unable to meet the prescribed labor standards (R. III, 1550a-52a; see also R. III, 1556a, 1558a-62a, 1564a-65a). Yet it seems obvious that any union program for achieving standardized wages and working conditions carries with it the implicit "purpose" of eliminating the substandard competition of inefficient employers who cannot conform. *Cf. Apex Hosier Co.* v. *Leader*, 310 U. S. 469, 503 ("a labor combination *** must eliminate the competition from non-union goods"). Since labor standards as such are not within the purview of the Sherman Act, they surely cannot be placed there by a jury finding which does no more than spell out one of their inherent purposes.

This view is in accord with the formal declarations of Congress. Elimination of substandard wage competition, either by collective bargaining or by statute, is an avowed goal of national labor policy. Section 1 of the National Labor Relations Act, 49 Stat. 449 (1935), as reenacted by 61 Stat. 136, § 101 (1947), 29 U. S. C. § 151, states that inequality of bargaining power burdens commerce and aggravates business depressions "by preventing the stabili-

zation of competitive wage rates and working conditions within and between industries." Section 2(a) of the Fair Labor Standards Act, 52 Stat. 1060 (1938), 29 U.S.C. § 202(a), says that the existence of "labor conditions" insufficient for a "minimum standard of living *** constitutes an unfair method of competition in commerce." And in the Walsh-Healey Act Congress brought to bear "the leverage of the Government's immense purchasing power to raise labor standards" by eliminating substandard producers from eligibility for public contracts. See *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 507.

The numerous commentators who have wrestled with the problem of union antitrust liability have almost invariably accepted as their point of departure the proposition that components of the labor market like wages, hours, and working conditions are, and ought to be, beyond the reach of the Sherman Act. Even critics taking issue with the *Hutcheson-Allen Bradley* rule that a union acting alone is totally immune from the antitrust laws regardless of whether its activities directly affect the product market have endorsed the *Apex* rule that labor standards are outside the ambit of those laws. Thus, the Attorney General's National Committee to Study the Antitrust Laws recommended "appropriate legislation" in this area, but strictly confined its scope:

> "It should cover only specific union activities which have as their direct object *direct control of the market*, such as fixing the kind or amount of products which may be used, produced or sold, their market price, the geographical area in which they may be sold, or the number of firms which may engage in their production or distribution. By 'object' this Committee means only the immediate concession demanded from an employer as a condition precedent to halting coercive action against him."[1]

[1] *Report of the Attorney General's National Committee to Study the Antitrust Laws* 304-05 (1955). (Emphasis supplied.) The House of

We are in accord with former Professor Archibald Cox's understanding that, under the Committee's recommendation, union demands "phrased in the *conventional terms of wages, hours and conditions of employment* could be pressed legitimately even though their practical effect was to reduce competition in the sale of the employer's product." [8] Professor Cox himself seems to have come to something like the same conclusion. In discussing the three-day work week once used by the Mine Workers to spread available employment, he recognized that often "a beneficent limitation on hours of work will affect production or sales." [9] But after noting that some definite line must be drawn "unless the law is to interfere with normal collective bargaining about the length of the work week," he decided that "[p]ossibly the best solution is to deal with the clear abuses by outlawing only restrictions *phrased in terms of volume* [of production or sales], leaving close cases untouched in order to avoid the interference." [10]

The courts below did not suggest that the Mine Workers' national contract was phrased other than in terms of wages, hours, or working conditions. In their willingness, and particularly in the willingness of the trial court, to go beyond the contract to scrutinize its "purpose," they have ignored what seems the most practicable test for ensuring that restraints in the labor market are not mistaken for restraints in the product market: the agreement itself.

Both "purpose" and "effect" are inappropriate tests for

Delegates of the American Bar Association once went on record in favor of amending the antitrust laws to extend their coverage over labor organizations, but said the field it wished to have regulated was that defined in *Apex* as "commercial competition." See 77 American Bar Association Reports 454, 479 (1952).

[8] Cox, *supra* note 1, 104 Univ. Pa. L. Rev. at 253-54. (Emphasis supplied.)

[9] *Id.* at 282.

[10] *Ibid.* (Emphasis supplied.)

classifying union conduct, as Professor Cox emphasizes: "Motivation is a slippery guide, for a man can always be found to, and in a sense does, intend any consequence which foreseeably follows from his conduct. Did the Machinists intend to limit commercial competition or only to spread their membership when they negotiated contracts with the St. Louis breweries requiring new machinery to be installed by contractors who had collective agreements with the Machinists' rather than the Millwrights' Union? If proof of an adverse 'effect' on consumers is enough even though the union confines itself to the labor market, then the act *** might also affect bargaining demands which have an impact on price competition or the level of production." [11] He sums up as follows:

> "In my opinion, a case can be made out for applying the Sherman Act only to those union imposed restraints which fall in the category discussed previously in this article—tampering with the product market for the sake of sheltering employers from competition *otherwise than by organizing the employees of competitors and raising their labor standards.*[12]

Recently, a study group of leading labor scholars, headed by President Clark Kerr of the University of California, reiterated the distinction between the product market and the labor market, and found antitrust concepts relevant only in the former. Said the group:

> "This proposed application of the anti-trust concept is, of course, a limited one, and should be made part of national labor legislation rather than of existing

[11] *Id.* at 263-64. The St. Louis case was *Weber* v. *Anheuser-Busch*, 348 U.S. 468.

[12] *Id.* at 280. (Emphasis supplied.) Professor Cox was talking about a prospective extension of antitrust coverage. He continued:

> "Even here the issue turns on balancing the practical need for legislation—which has never been demonstrated—against the difficulties in writing prohibitions which would neither charge the courts with making labor policy nor cast doubt on organizational activities and collective bargaining."

law regulating business behavior. The recommendation does not interfere with union activities in labor markets, such as union efforts *to establish uniform wage levels and to control the size of wage differentials.* These are among the principal economic activities of market-wide unions. If they are prohibited, effective unionism is destroyed." [13]

In the instant case the Mine Workers, in seeking to enforce their national agreement throughout the coal industry, were acting in the classic pattern. Their conduct was traditional labor market activity to eliminate competition among the industry's employees by establishing *uniform* standards of wages, hours, and working conditions. In the next section we shall consider whether another question might be presented if the union had done something like demanding of certain employers a substantially different wage level. But in the present situation no such issue arises. The very uniformity of the terms sought is in itself a warrant that the union could not possibly have been endeavoring to bar from the market competitors as such, but only, in the strictest sense, *substandard* competitors. Put in another writer's terms, this is the plainest case of where "marginal competitors are being excluded by the imposition of labor union standards," and not a case where favored employers "are being sheltered from all competition." [14]

To apply in these circumstances the "purpose" doctrine which was evolved below is to allow the fact-finding process to make a mockery of long-established and well-accepted rules of law. The pitfalls are amply demonstrated by *Alco-Zander Co.* v. *Clothing Workers,* 35 F.2d 203 (E. D. Pa. 1929). The unionized garment industry of New York was

---

[13] Independent Study Group, *The Public Interest in National Labor Policy* 130 (1961). (Emphasis supplied.)

[14] See Bernhardt, "The *Allen Bradley* Doctrine: An Accommodation of Conflicting Policies," 110 Univ. Pa. L. Rev. 1094, 1116 (1962).

being undersold by the lower-priced, nonunion garment industry of Philadelphia. The union, fearing for the future of the New York industry, started a broadscale organizing drive in Philadelphia. Strikes at Philadelphia factories were enjoined as violations of the Sherman Act. The court declared that "the primary *purpose* of the campaign for the unionization of the Philadelphia market was the protection of the unionized markets in other states," and that "the *object* of the strikes was to put an end to all production in Philadelphia under nonunion conditions and only to permit it to be resumed if and when the manufacturers were willing to operate upon an union basis and under union wage scales." 35 F. 2d at 205. (Emphasis supplied.) That *Alco-Zander* is bad law, in the light of *Apex*, can hardly be doubted. Yet the precise description of the union's purpose there encompasses everything that could accurately be said of the union's purpose here. It would be a contradiction in terms to assert that a union demanding the same national contract of all employers is seeking to eliminate competition as such. By definition it is only seeking, like the union in *Alco-Zander*, to eliminate competition "based on differences in labor standards." And that, under *Apex*, it has every right to do.

The right is also a necessity. As *Alco-Zander* demonstrates, and as this Court recognized in *Apex*, a union cannot maintain labor standards in organized firms if those firms are consistently outbid by unorganized firms operating with cheap, nonunion labor. If the union cannot equalize wages, its own employers may be forced out of business. In this sense it is a truism to say that the union and the organized employers may share a common "purpose," implicitly, explicitly, or even by agreement, to see that substandard competitors are eliminated if they cannot or will not meet the union wage scale. (Purposes of course may be mixed. The employers for their part may well have in mind a purpose which is likely to be in the

background of almost any business decision—the desire to disadvantage competitors generally.) But so long as the conduct is limited to activity in the labor market—to agreements or efforts to secure agreements covering wages, hours, or working conditions—the purpose of either unions or employers, or the sharing of a common purpose, is irrelevant to the antitrust laws. Any other conclusion partakes of the fallacy we have already discussed: it allows unregulated conduct to become subject to regulation through the mere articulation of a purpose which, in one way or another, inheres in all such conduct.

Perhaps the deepest practical objection to the "purpose" doctrine is that it would enable trial courts and regionally minded juries to become once again the shapers of our national labor policy. Justice Brandeis long ago exposed the inadequacies of the theory whereby union conduct "became actionable when done for a purpose which a judge considered socially or economically harmful, and therefore branded as malicious and unlawful." *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 485 (dissenting opinion). Now, as Columbia's Professor Michael Sovern has warned, "under the guise of applying *Allen Bradley*, the courts could conceivably grab back a considerable measure of the power taken from them by the Clayton and Norris-LaGuardia Acts." [15] The present case illustrates this well. The judge charged that there was no violation of the Sherman Act in the establishing of wages and welfare payments through the national contract, "provided" the Mine Workers and the major coal producers had not agreed to fix "high" rates "in order to drive the small coal operators out of business" (R. III, 1556a). Such an instruction in effect invited twelve jurymen to become arbiters of the propriety of the wage scale in the nation's coal industry. If the jury found the wage scale too "high," it

[15] Sovern, "Some Ruminations on Labor, the Antitrust Laws and *Allen Bradley*," 13 Lab. L. J. 957, 962 (1962).

could impute the unlawful purpose. Apart from every other legal defect in the theory relied on below, the devastating practical implications of subjecting the institution of collective bargaining to the whims and speculations of local juries are alone enough to condemn it.

B. Scope of the Rule in Other Circumstances

Important as it is, the present case is at bottom an easy one. The Mine Workers sought to obtain throughout the coal industry an authentic national contract establishing uniform terms of employment, so the only purpose of eliminating competition which could conceivably be inferred would be the purpose of eliminating *substandard* competition in the most technical meaning of that term. A different case might arguably be presented if a union refused outright to deal with certain employers, or if it demanded of some employers terms and conditions of employment substantially more costly than it demanded of others.

The decisions of this Court indicate, however, that there would be no difference. If a particular restraint is not the kind of restraint encompassed by the Sherman Act, it is not drawn within the Act whether imposed uniformly, arbitrarily, purposelessly, or purposefully. Although we can rely upon the most narrow reading of the phrase "labor standards" to support the conclusion there was no antitrust violation in this case, this Court has never suggested that a union's activities in the labor market retain their Sherman Act immunity only so long as they are limited to securing uniform terms of employment from all employers alike.

On the contrary, in *Hunt* v. *Crumboch*, 325 U.S. 821, decided the same day as *Allen Bradley*, this Court held that a union could, without violating the antitrust laws, refuse flatly to provide any union employees to a trucking firm because of personal antagonism, and then, for the purpose

of destroying the trucker's business, have union employers cancel their hauling contracts on the ground the firm was nonunion. The Court pointed out that the Sherman Act was concerned with such restraints as "refusing to sell goods and services." 325 U. S. at 824. Laborers, on the other hand, "can sell or not sell their labor as they please, and upon such terms and conditions as they choose, without infringing the Anti-trust laws." *Ibid.* The reason or purpose of the union's activity was immaterial, since "Congress in the Sherman Act and the legislation which followed it manifested no purpose to make *any* kind of refusal to accept personal employment a violation of the Anti-trust laws." *Id.* at 824-25. (Emphasis in the original.)

The conjunction of a nonlabor combination and a purpose to eliminate competition adds nothing relevant. In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight,* 365 U. S. 127, 138, this Court held that a campaign carried out by a combination of railroads to solicit governmental action did not violate the Sherman Act, even if the railroads' "sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors." The antitrust laws were aimed at "business activity," not "political activity." 365 U. S. at 137. This being so, not even the anticompetitive "purpose" of the business combination "could transform conduct otherwise lawful into a violation of the Sherman Act." *Id.* at 138-39. So too, the antitrust laws are aimed at the "marketing of goods and services," not at "terms and conditions of employment." This being so, not even an anticompetitive "purpose" on the part of a union-employer combination should be able to transform into a Sherman Act violation any kind of restraint upon terms and conditions of employment. Accordingly, it would appear that even the imposition of substantial wage differentials to eliminate competition would have no more antitrust connotations than the seeking of legislation for the same end.

Practical considerations support this logic. Although union contracts tend to establish substantially similar terms of employment in an industry or area market, labor standards are by no means always identical. Contracts may expire at different times, and in these instances wage levels among various employers must necessarily be moved ahead alternately. Employees at one firm may want more cash benefits, employees at another more fringes. Job classification systems will differ from company to company. The respective bargaining strengths of a union and employers will vary from time to time, and the union may seize an opportunity to press its advantage against one or more individual employers. A union may even, as has happened in the auto industry among others, accede to a settlement significantly below the general industry standard, in an effort to tide a particular firm over a period of economic difficulties and thereby preserve the employees' jobs. Allowing a jury to infer sinister purposes from any of these variations would have the same essential vice as allowing a jury to infer a conspiracy from a union's insistence upon a uniform industry-wide contract: it would place an intolerable strain upon the normal processes of free collective bargaining.

Finally, and most simply, workers who are banded together in a union, unless they meddle directly with the product market, are dealing in only one "commodity": their own personal services. On occasion they may refuse to "sell" their services at any price. They may pick and choose among the employers to whom they will sell. They may agree with certain employers to establish a uniform selling price for all comers—or cut the rate for a favored few. But whatever they do, for whatever purpose, it all comes down to one thing: the only item they have to sell is their own labor. That is all they can "monopolize," and the only trade they can "restrain." It is late in the day to deem that fit matter for control under the Sherman Act.

As Professor Cox and the Attorney General's Committee have suggested, the most feasible test to apply is one which looks to the terms of the labor agreement sought or executed, and draws the line between provisions imposing direct restraints on the product market, and provisions dealing with the customary subjects of wages, hours, or working conditions.[16] Professor Cox would state the rule differently in cases where a particular firm is allegedly being eliminated from competition. If the antitrust laws were to apply at all, they should be confined "to situations where a trader is excluded from the market without assurance of readmission upon the union's prevailing in some controversy over the association or representation of employees or their conditions of employment." [17] As long as the conduct engaged in by a union is restricted to the conventional activity of seeking wages, hours, or working conditions, it should remain wholly outside the ambit of the Sherman Act, as *Hunt* v. *Crumboch* and *Noerr* indicate, even if a substantially different wage scale is demanded of certain firms for the purpose of hampering the competitors of favored employers.

We can propose no other workable test. A rule admitting of any exceptions would almost necessarily involve a jury in speculating on the "purpose" of a union's bargaining tactics and demands. The formulation of such a rule would require this Court to make the most sensitive policy judgments regarding the value of traditional collective bargaining, as weighed against the possibility of damage to our competitive economy. It would require the application of

---

[16] See text accompanying notes 7 through 10, *supra*. Even this test on occasion would require some careful judgments. For example, the employees' legitimate interest in defining their job content and working hours may find expression in a clause spelling out the employer's operating hours. See discussion of the *Jewel Tea* case in part II, *infra*.

[17] Cox, *supra* note 1, 104 Univ. Pa. L. Rev. at 282-83. Professor Cox at this point was considering possible amendments to the existing law.

business conspiracy doctrines to an area which Congress has deemed peculiarly in need of stiff evidentiary standards.[18] Furthermore, no demonstrated abuses call for such a Herculean, and potentially destructive, exercise. The lack of cases or criticisms on the point indicates that labor organizations do not, even allegedly, follow the practice of juggling differentials in wage scales to favor one competitor over another.

The principles which should be controlling can therefore be summed up briefly. Only direct restraints (not imposed by a union acting alone) upon prices, the volume of goods or services which may be sold, and other elements of the product market are the concern of the Sherman Act. Agreements or demands for agreements on wages, hours, and working conditions fall totally outside the antitrust laws, whatever may be their purpose.

II. The National Labor Relations Board Should Have Exclusive Primary Jurisdiction Over Conduct Arguably Subject To The National Labor Relations Act Even Though That Conduct Is Alleged To Be An Antitrust Violation.

---

[18] Sec. 6 of the Norris-LaGuardia Act requires "clear proof" to implicate a labor organization in the unlawful acts of individual officers or members. This formal recognition that union activity is unusually susceptible to faulty inferences or interpretations combines with this Court's warning that it will "view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions," *Grunewald* v. *United States*, 353 U.S. 391, 404, to urge the tightest safeguards in any possible extension of the concept of "conspiracy in restraint of trade" in the labor field. If the time should ever come when it is felt necessary to make an exception to the rule that restrictions phrased in terms of wages and working conditions are outside the antitrust laws, *e.g.*, to cover the improbable case where artificial "labor standards" are used as a mere instrument to freeze out certain competitors, there should be no hesitancy in insisting upon "clear proof" that those labor standards are indeed just shams, in order not to imperil the federally protected institution of collective bargaining by making it vulnerable to highly dubious attack. *Cf. New York Times Co.* v. *Sullivan*, 376 U.S. 254.

Throughout part I of this Argument has run the distinction between wages, hours, and working conditions, on the one hand, and components of the product market, on the other. The former are exempt from regulation by the antitrust laws. In the present litigation we do not understand anyone to contend that the standard wage rates in the Mine Workers' national contract in themselves are not traditional subjects of collective bargaining. But in *Jewel Tea Co.* v. *Associated Food Retailers*, 331 F.2d 547, 549 (7th Cir. 1964), pending on petition for certiorari in No. 240, this Term, the question whether a union-sought limitation on market operating hours was or was not a "condition of employment" became, in the eyes of the Court of Appeals, the critical inquiry. The court concluded that the setting of marketing hours was a managerial prerogative, not a condition of employment, and held the union had violated the antitrust laws in insisting upon a limitation. Yet if the marketing hours were "terms and conditions of employment" within the meaning of the NLRA (as we think they were), they would have been a mandatory subject of collective bargaining; if they were not, the union's insistence on them would have amounted to an unlawful refusal to bargain. 61 State. 141-42, §§8 (a)(5), 8(b)(3), 8(d)(1947), 29 U.S.C. §§158(a)(5), 158(b)(3), 158(d); see *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349.

The instant case bristles with potential unfair labor practices of other kinds. The Mine Workers allegedly imposed the national wage agreement on the small coal operator at a time when the union did not represent its employees (R. V, 1756). For a minority union to enter into a collective bargaining contract covering all the employees in a unit infringes the rights of employees under section 7 of the Act. *Garment Workers* v. *NLRB*, 366 U.S. 731. A "protective wage clause" in the national wage agreement provided that signatory companies would not buy

coal mined under less favorable terms and conditions, and this eliminated a market for small producers unable to meet the agreement's standards (R. V, 1757). The NLRB has held the protective wage clause in the 1958 agreement violated section 8(e) of the NLRA, as amended by the Landrum-Griffin Act. 73 Stat. 543 (1959), 29 U.S.C. §158(e); *Bituminous Coal Operators Assn.*, 144 NLRB No. 29, 54 LRRM 1037 (1963); see also *Bituminous Coal Operators Assn.*, 148 NLRB No. 31, 56 LRRM 1471 (1964). And coercing any employer to enter into an agreement forbidden by section 8(e) is itself a separate unfair labor practice under section 8(b)(4)(i)(A) of the amended Act.

From all this, two conclusions follow. First, the crucial issue of whether a particular contract proposal or provision involves "terms and conditions of employment," and is thus outside the scope of the antitrust laws, is the same question which the NLRB must answer in deciding whether a particular item is a mandatory subject of collective bargaining.[19] Secondly, both the Taft-Hartley Act of 1947 and the Landrum-Griffin Act of 1959 have introduced comprehensive regulation under the National Labor Relations Act of the very kind of union conduct which might formerly have been subjected to regulation under the Sherman Act.

Congress did this deliberately. In reporting out the Taft bill, the Senate Labor Committee had the following to say about what was to become in substance section 8(b)(4)(A) (now section 8(b)(4)(B)) of the amended NLRA:

> "This paragraph also makes it an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New York City by

[19] We naturally do not suggest that a matter which is *not* a mandatory subject of collective bargaining is necessarily regulated or prohibited by the Sherman Act. See *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U. S. 342, 349: "This does not mean that bargaining is to be confined to the statutory subjects. Each of the two controversial clauses is lawful in itself."

> local No. 3 of the IBEW, whereby electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organization other than local No. 3 [citing *Allen Bradley*]." S. Rep. No. 105, 80th Cong., 1st Sess., p. 22 (1947).

The Conference Report on Taft-Hartley in its final form was still more explicit regarding the congressional decision to deal with union conduct under the labor rather than antitrust laws:

> "Secion [sic] 301 of the House bill contained a provision amending the Clayton Act so as to withdraw the exemption of labor organizations under the antitrust laws when such organizations engaged in combinations or conspiracies in restraining of commerce where one of the purposes or a necessary effect of the combination or conspiracy was to join or combine with any person to fix prices, allocate costs, restrict production, distribution, or competition, or impose restrictions or conditions upon the purchase, sale, or use of any product, material, machine, or equipment, or to engage in any unlawful concerted activity (as defined in sec. 12 of the National Labor Relations Act under the House bill). Since the matters dealt with in this section have to a large measure been effectuated through the use of boycotts, and since the conference agreement contains effective provisions directly dealing with boycotts themselves, this provision is omitted from the conference agreement." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 65 (1947).

By 1959, when the Landrum-Griffin Act was passed, even strong advocates of stricter curbs on union activities were thinking in terms of amending the labor relations statute to tighten up the restrictions on secondary boycotts and "hot cargo" clauses, and not in terms of bringing to bear the antitrust battery of treble damages and criminal sanctions. See, *e.g.*, S. Rep. No. 187, 86th Cong., 1st Sess., pp. 78-80 (1959) (Minority Views); H. Rep. No. 741, 86th Cong., 1st Sess., pp. 97-98, 100 (1959) (Dissenting Views;

Additional Statement); *cf.* 105 Daily Cong. Rec. 11045-46 (June 29, 1959), 2 Leg. Hist. LMRDA 1507-08 (NLRB ed.) (Rep. Alger).

So we come to the critical quesiton: Has the comprehensive regulatory scheme governing labor union activity which Congress constructed after this Court decided *Allen Bradley* in 1945 displaced the antitrust laws in this area, or has it merely been superimposed upon them? Surely, for several compelling reasons, it has displaced them.

1. The presumption must be that Congress did not intend the same conduct to be regulated simultaneously by two different statutes, with varying substantive rules, varying procedures for enforcement, and varying remedies. In *Weber* v. *Anheuser-Busch,* 348 U.S. 468, this Court held that a state restraint of trade statute could not be applied to conduct which might be either protected or prohibited under the NLRA and thus subject to the exclusive primary jurisdiction of the Labor Board. See also *Teamsters Local 24* v. *Oliver,* 358 U.S. 283. The Court's strictures in *Weber,* 348 U.S. at 479, against having two "similar remedies *** brought to bear on precisely the same conduct" seem equally pertinent whether those remedies are provided by one federal and one state law, or by two different federal laws. For even if it is assumed the federal laws are likelier to be in harmony with one another, a "multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner* v. *Teamsters Local 776,* 346 U.S. 485, 490-91. *Cf. San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, 245: "When an activity is arguably subject to §7 or §8 of the Act, the States *as well as the federal courts* must defer to the exclusive competence of the National Labor Relations Board." (Emphasis supplied.)

Avoidance of a crazy quilt of inconsistent or overlapping remedies, however, is not all that militates against dual

regulation. Both *Weber* and *Garner* go much further in suggesting that when Congress enacted Taft-Hartley it was laying down a definitive and exclusive set of substantive rules to govern conduct in the labor relations field. Thus, in *Weber*, the Court declared: "Congress formulated a code whereby it outlawed some aspects of labor activities and left others *free for the operation of economic forces.*" 348 U.S. at 480. (Emphasis supplied.) And in *Garner* it was stated: "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be *free of other methods and sources of restraint.*" 346 U.S. at 499. (Emphasis supplied.) The even more detailed regulation in the Landrum-Griffin Act of secondary boycotts, hot cargo clauses, and similar means whereby a union might effectuate the type of restraint formerly held subject to the Sherman Act strengthens the implication that other "methods and sources" of regulation are no longer applicable.[20]

2. The imposition of treble damages and other penal sanctions under the Sherman Act for union activity regulated by the federal labor law goes directly counter to the policy embodied in that law. Section 303 of Taft-Hartley permits a private party to sue in federal or state court to recover "the damages by him sustained" as a result of a union's violation of section 8(b)(4) of the NLRA. 61 Stat. 158, §303 (1947), as amended by 73 Stat. 545 (1959), 29 U.S.C. §187. In *Teamsters Local 20* v. *Morton*, 377 U.S. 252, 260, this Court set aside an award of punitive damages, declaring: "Punitive damages for violations of §303 conflict with the congressional judgment, reflected both in the language of the federal statute and in its legislative his-

[20] Professor Michael Sovern, for one, has emphasized that such former targets of the antitrust laws as secondary boycotts and organizational efforts are now adequately dealt with under the labor relations law, and that "many of the proposals for applying the antitrust laws to unions merely call for needless, and perhaps even confusing, duplication of existing remedies." Sovern, *supra* note 15, 13 Lab. L. J. at 958-59.

tory, that recovery for an employer's business losses caused by a union's peaceful secondary activities proscribed by §303 should be limited to actual, compensatory damages." Although the punitive damages at issue in *Morton* were grounded on state common law, the Court's rationale would seem at least as applicable to the treble damage remedy and other penal sanctions available under the federal antitrust laws.

Moreover, language in the Court's opinion in *Morton* indicates that section 303(a) not only forecloses punitive damages for activity proscribed by it; it also marks the outermost limits of the kind of union organizational or boycott activity which can be the basis of any private suit for damages. Said the Court: "The type of conduct to be made the subject of a private damage action was considered by Congress, and §303(a) comprehensively and with great particularity 'describes and condemns specific union conduct directed to specific objectives.'" 377 U.S. at 258. This reinforces the view that Taft-Hartley and the amendments to it have totally displaced other law in the area it occupies.

3. Antitrust suits over union activities would force the courts to usurp the function of the NLRB in regulating the subject matter of collective bargaining. As previously discussed, "wages, hours, and other terms and conditions of employment" are mandatory subjects of bargaining under the NLRA, and beyond the sweep of the Sherman Act. But as *Jewel Tea* shows, exactly what is embraced within "terms and conditions of employment" is not at all self-evident. This means that any time a court undertakes to consider whether a particular union agreement, or union efforts to get a particular agreement, run afoul of the Sherman Act, it must first take over the Labor Board's job of deciding whether the agreement or the proposal involves "terms and conditions of employment." Plainly, the preferable course is to leave that issue to the initial determina-

tion of the agency Congress specifically entrusted with the task, the NLRB.

The purposes and activities of labor organizations are avowedly, and rightly, anticompetitive. To continue regulating them under laws based upon a directly contrary philosophy, and aimed primarily at business activities, cannot but frustrate the "goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts," which is "the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." *Cf. Teamsters Local 24* v. *Oliver*, 358 U.S. 283, 295.

We respectfully ask this Court to reconsider this question, and to rule that where union conduct is subject to comprehensive regulation under the Taft-Hartley Act and its amendments, the Sherman Act has no place.

III. Restrictions On A Union's Efforts To Secure Uniform Wages And Working Conditions Would Serve No Valid Purpose Of The Competitive Economy And Would Jeopardize Widely Accepted Bargaining Arrangements.

We have established that under past precedent union activity dealing with wages, working conditions, and other elements of the labor market is completely outside the Sherman Act. We have argued further that no union activity regulated by the federal labor laws should now be regulated by the antitrust laws. Having made that legal presentation, we wish to add a few remarks on the practical effects of union efforts to stabilize wages and working conditions in a competitive economy.

Since the pioneering studies of the then Professor Paul Douglas it has become a much-debated point among labor

economists whether the spread of unionism has brought any substantial long-term shift in the distribution of income in favor of the wage-earning class.[21] What concededly has been accomplished by union pressures, however, is a greater uniformity in wage levels from firm to firm, from region to region, and from business cycle to business cycle. Princeton economist Richard Lester has thus observed that "the wage structure in American industry now is probably less 'distorted' than it was in all nonunion industry during the 1920's."[22] In addition, the hiking of rates in former low-wage areas has been cited as a frequent spur to increased labor productivity.[23]

Comments by Professor Cox on the economic aspects of union wage equalization programs are especially relevant in the present instance. He says:

> "A casual observer is struck by the fact that the international unions which impose the most uniform wage patterns upon competing employers are usually found in two environments. One group is the oligopolistic industries—basic steel, meatpacking and rubber—where there appears to be little competition in basic prices. ***
>
> "The other environment is characterized by competition so intense as to raise serious problems during

---

[21] See, *e.g.*, Douglas, *Real Wages in the United States, 1890-1926* (1930); Kerr, "Labor's Income Share and the Labor Movement," in Taylor and Pierson, eds., *New Concepts in Wage Determination* 260, 280-87 (1957); Reynolds, *Labor Economics and Labor Relations* 467-75 (3d ed., 1959); Peltzman, "The Relative Importance of Unionization and Productivity in Increasing Wages," 12 Lab. L. J. 716, 725 (1961). It has also been said that "even within the framework of price theory and assuming unions to be monopolies, it is not necessarily true that under unionism wages are higher but employment is less." Meyers, "Price Theory and Union Monopoly," 12 Ind. and Lab. Rel. Rev. 434, 445 (1959).

[22] Lester, "Reflections on the 'Labor Monopoly' Issue," 55 J. Pol. Econ. 513, 523 (1947).

[23] See, *e.g.*, Slichter, *The Challenge of Industrial Relations: Trade Unions, Management, and the Public Interest* 34, 69, 72-73 (1947).

any slackening of business activity. The bituminous coal and garment industries are the best examples. In the garment industry, competition was formerly so intense, and wages were so large a part of total cost, that individual firms were driven to hire at rates which the management knew to be inadequate, and a union could not exist without market-wide organization. The history of the coal industry is similar. No one seriously suggests that putting wage scales back into competition would be in the public interest in this environment."[24]

Measured even by the criteria of a competitive economy, there is no proof that union efforts to achieve uniform terms of employment have deleterious effects upon wage or price structures. The most marked tendency is to smooth out the peaks and troughs during business fluctuations in fiercely competitive industries, not to pitch wage rates at abnormally high, inflationary levels. The result is salutary for both employers and employees.

Labor contracts establishing more or less standardized rates in a given industry or market area are generally secured either through bargaining with multi-employer associations or through bargaining with market leaders that sets a "pattern" for agreeements with other firms. Between 80 and 100 percent of the workers under union agreement are covered by multi-employer contracts in such important industries as men's and women's clothing, coal mining, building construction, hotels, longshoring, maritime, trucking, and warehousing. Between 60 and 80 percent of unionized workers are under multi-employer pacts in baking, book and job printing, canning and preserving, textile dyeing and finishing, glass and glassware, malt liquor, pottery, and retail trades. Professor Lloyd Reynolds of Yale, after citing these figures, adds: "There seems also to be a clear tendency for the proportion of unionists cov-

[24] Cox, *supra* note 1, 104 Univ. Pa. L. Rev. at 277.

[25] Reynolds, *Labor Economics and Labor Relations* 170 (3d ed., 1959).

ered by multi-employer agreements to increase over the course of time."[25] In some other major industries relatively uniform terms of employment are obtained through the negotiation of a contract with one leading employer and the subsequent acceptance of that contract's key provisions, with only minor modifications, by the other employers in the industry.[26]

Any decision casting doubt on the legality of a union's insistence upon a standard contract, or on the legality of a union-employer association agreement that a particular contract will be the standard for an industry, would therefore jeopardize widespread, increasingly used bargaining procedures. It would do so despite much testimony that such procedures benefit an industry and its workers, and despite no showing that they harm the long-range interests of any substantial group in our society. The decisions below are thus not just legally wrong; they make no economic sense.

---

[25] See Chamberlain, *Collective Bargaining* 275 ff. (1951). The steel industry until recently supplied a classic example of pattern bargaining. Now negotiations partake more of the nature of multi-employer bargaining, with the union and a committee representing the larger producers agreeing on an "economic package" and certain other critical terms of employment, the substance of which is then incorporated into the various individual labor contracts. See 45 LRRM 11-20 (1960); 49 LRRM 13-19 (1962).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the brief for petitioner, the judgment of the court below should be reversed.

Respectfully submitted,

J. Albert Woll
General Counsel, AFL-CIO
Robert C. Mayer
Theodore J. St. Antoine

736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D. C. 20005

Thomas E. Harris
Associate General Counsel, AFL-CIO

815 Sixteenth Street, N. W.
Washington, D. C. 20006

September 1964

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 15 1964
JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1964

No. 48

UNITED MINE WORKERS OF AMERICA,
Petitioner

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, *Admx. of the Estate of* BURSE PHILLIPS, deceased,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S BRIEF

HARRISON COMBS,
900 Fifteenth Street, N. W.,
Washington, D. C.

E. H. RAYSON,
R. R. KRAMER,
904 Burwell Building,
Knoxville, Tennessee

M. E. BOIARSKY,
511 Kanawha Valley Building,
Charleston, West Virginia

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
A. The Kind of Action and the Judgment Appealed	3
B. The Alleged Conspiracy: Theories, Facts and the Lower Courts' Opinions Thereon	5
1. Collective Bargaining in the Bituminous Coal Industry	5
(a) Operator-Union Disputes and Government Seizures of the Industry Prior to 1949	5
(b) The 1950 Agreement and the 1949-50 Negotiations and Federal Court Decrees Antedating Its Execution	5
The Injunctions of February 11, 1950 and UMW's compliance therewith	6
(c) Mine Mechanization Was An Existent Fact Prior to the 1949-50 Negotiations and Was Not an Issue in Those Negotiations	7
(d) Increased Labor Costs and the Pattern of Collective Bargaining in the Post-1950 Agreement Period	9
2. Phillips' Mining Operations; Its Execution of the UMW Agreement	10
3. Phillips' Theories of the Alleged Conspiracy	11

Page

4. UMW Officials Deny Any Conspiracy 12

5. The Jury Rendered a General Verdict 12

6. The Trial Court's Opinion and Doubt 12

The Trial Court Declared That 1950 Court Proceedings and Negotiations Accordant Therewith Weakened, If Not Destroyed, Phillips' Conspiracy Allegations. Its Opinion Ignores That Evidence 13

7. The Sixth Circuit's Opinion Ignores the District Court's Assigned Reason. The Elements the Sixth Circuit Employed to Sustain the Jury's Finding as to Conspiracy, and the Facts Pertaining Thereto 14

(a) Violence and UMW's Knowledge of the Effect of Increased Labor Costs on "Weaker" Companies 14

(b) The "Land-Lease" and "Protective Wage" Clauses in the National Agreement 16

(c) UMW Investments in West Kentucky Coal Co. and Nashville Coal Co. 18

(d) UMW Efforts to Have the U. S. Secretary of Labor Establish Minimum Wage Rates for the Coal Industry Under Authority of the Walsh-Healey Act and to Have TVA Comply With Them in Government Coal Purchases 19

(e) West Kentucky's Bidding and Sales on the TVA Market 22

The TVA Coal Market 23

TVA Coal Prices in 1956 Resulted From Extraordinary Circumstances. The Decline From This Price Resulted From Forces Unrelated to the Alleged Conspiracy 23

Bids of the Alleged Conspirators on the TVA Market 25

Page

C. The Issue of Damages: The Jury's Award and the Sixth Circuit's Opinion Pertaining Thereto .. 27

1. The Evidence Is Positive That the National Average Price of Coal Does Not Afford a Valid Basis of Comparison With Phillips' TVA Coal 28

(a) The National Average Price of All Coal Is Substantially Above the National Average Price of Strip Mine Coal 28

(b) The Utility Market Is the Lowest Coal Market in Price and That Market May Not Be Compared, Price-Wise, With the Average Market for All Coal 29

(c) Phillips Sold Coal on TVA's Lower Priced Spot Market and Not Its Higher Priced Term Market. This Further Invalidates Comparison of Phillips' Price With the National Average Price 30

(d) Phillips Sold Premium Coal Separately From Utility Coal But Excluded the Price Received Therefor in Comparing Its Average With the National Average 30

D. The Issue Relating to the Admission of Evidence and Jury Instructions Concerning UMW's Efforts to Obtain a Walsh-Healey Minimum Wage Determination and to Have TVA Comply Therewith 31

SUMMARY OF ARGUMENT 32

I. 32

II. 34

III. 35

IV. 37

Page

ARGUMENT 38

I. A Labor Union May Not Be Held a Conspirator Under the Sherman Anti-Trust Act in Achieving an Industry-Wide, Multi-Employer Collective Bargaining Agreement, Negotiated in Accordance With Procedures Established by Law, Which Results in Stabilizing Wage Rates and Working Conditions at Levels Above the Ability of Some Employers to Pay 38

A. This Court Has Recognized That Collective Bargaining Agreements Embodying Labor Standards Are Not Commercial Restraints Interdicted by Sherman 39

1. UMW's Knowledge That Marginal Coal Producers Could Not Pay Higher Labor Costs Does Not Bring UMW's Achievement Thereof in Its Collectiv Bargaining Agreement Within Sherman's Interdictions 40

2. The "Land-Lease" and "Protective Wage" Clauses Are Lawful Subjects of Collective Bargaining 43

3. Federal Legislation, Both Before and Following Apex and Allen Bradley, Shows Congress' Intent That Union Activities Pertaining to Organizing and Collective Bargaining Are Not to be Regulated by Sherman 46

4. Both Apex and Taft-Hartley's Legislative History Reject Violence Attending Organizing Activities as Conduct Falling Within Sherman's Proscriptions 49

5. The Sixth Circuit's Opinion Conflicts With Clayton's Immunity Provisions. It Ignores Hutcheson's Requirement That Sherman and Other Federal Labor Statutes Be Considered as "Interlacing Statutes" 50

Page

Conclusion on Argument I 52

II. Where a Labor Union and Employer Signatories To a Collective Bargaining Agreement Obtain From the United States Secretary of Labor, Under the Walsh-Healey Act, a Minimum Wage Rate For The Bituminous Coal Industry on Coal Purchased by Federal Agencies, and Seeks to Have TVA Comply Therewith, Such Union Activity Is Not Conspiratorial Conduct Under the Sherman Anti-Trust Act 54

A. The Sixth Circuit's Holding That Efforts to Obtain Minimum Wage Determinations Under the Walsh-Healey Act and to Have TVA Comply Therewith Constituted Evidence From Which the Jury Could Infer a Sherman Conspiracy Conflicts With a Prior Decision of This Court and With a Decision of the District of Columbia Court of Appeals 54

B. The Sixth Circuit's Sanction of the Admission of Evidence and the Jury Charge Relating to UMW's Efforts to Obtain Walsh-Healey Determinations and to Have TVA Comply Therewith Conflicts With the Noerr and Riss Cases 57

C. The Sixth Circuit's Sanction of the Admission of Evidence Placing the Secretary of Labor in the Role of a Co-Conspirator Offends the Rule That the Sherman Act Is Not Applicable to Authorized Actions of Public Officers 58

Conclusion on Argument II 59

III. The Sixth Circuit Has Erroneously Sanctioned Jury Conspiracy Finding Which, as a Matter of Law, Has No Substantial Evidentiary Predicate 59

1. UMW's Evidence Denying the Conspiracy is Unassailed 59

2. The Sixth Circuit Totally Ignored the 1950 Federal Court Proceedings 60

Page

3. The Sixth Circuit Was Not Warranted in Approving the Jury's Inference of the Conspiracy Based Upon Union Activities Sanctioned by Law or Within the Jurisdiction of the National Labor Relations Board 61

The Standard of Proof Sanctioned Herein by the Sixth Circuit Conflicts Both With Norris-LaGuardia's Standard of Clear Proof and With Clayton's Immunity Provisions 62

4. The Sixth Circuit's Use of UMW's Investments in West Kentucky and That Company's TVA Bids as Circumstantial Evidence of the Conspiracy Is Unsupported by, and Is Contrary to, Undisputed Evidence 63

5. The Jury's Conspiracy Finding Is Without Any Substantial Evidence to Support It 66

Conclusion on Argument III 68

IV. The Jury Award Was Without Substantial Evidence to Support It. The Standard Sanctioned by the Sixth Circuit For Its Assessment Is Unwarranted by the Undisputed Evidence and Is Erroneous as a Matter of Law 69

Conclusion 72

TABLE OF CASES

Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797, 806, 808 ..... 33, 39, 42, 47, 48, 51, 67

American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 209 ..... 40, 41

Apex Hosiery Co. v. Leader, 310 U.S. 469, 488 ..... 33, 34, 39, 40, 41, 42, 43, 46, 47, 48, 49

Assn. of Western Railways v. Riss & Co., Inc., D.C. Cir., 299 F. 2d 133 (1962) 35, 55, 56, 57, 58, 62

Balian Ice Cream Co. v. Arden Farms, D.C., S.D. Calif. 1952, 104 F. Supp. 796, 801, aff. 9 Cir. 231 F. 2d 356 (1955), cert den. 350 U.S. 991 66

Page

Ben Hur Coal Co. v. Wells, 10 Cir., 242 F. 2d 481, 486 (1957) 66
Delaware Valley Marine Supply Co. v. American Tobacco Co., 3 Cir., 297 F. 2d 199, 202, 203 (1961) ... 66
Eastern Rr. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135, 139, 140 (1961) ..21-22, 35, 55, 56, 57, 58, 62
Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 507 ..... 19, 55
Fibreboard Paper Prod. Corp., 138 NLRB 550, 551 (1962), enforced D.C. Cir., 322 F. 2d 411 (1963), cert. granted, 375 U.S. 963 ..... 44, 45
G. & P. Amusement Co. v. Regent Theater Co., DC, N.D. Ohio, 1952, 107 F. Supp. 453, 461 69
Hazel Atlas Glass Co. v. NLRB, 4 Cir., 127 F. 2d 109, 115 59
Int. Union, UMWA, et al., 83 NLRB 916 (1949) 5
Int. Union, UMWA v. NLRB, D.C. Cir., 184 F. 2d 392 (1950) 5
Int. Union, UMWA, and H. C. Frick Coke Co., et al., NLRB Cases Nos. 5-CB-43 through 47 [1950] (Unreported) 7
Local 24, Teamsters v. Oliver, 358 U.S. 283, 295, 296 (1959) 45, 46, 48
Los Angeles Meat Etc. Union, Local 626 v. U.S., 371 U.S. 94, 105 51
Manners v. Morosco, 252 U.S. 317 44
Maryland Use of Markley v. Baldwin, 112 U.S. 490, 493 58
Miley v. John Hancock Mut. L. Ins. Co., D.C. Mass., 1957, 148 F. Supp. 299, aff'd. 1 Cir., 242 F. 2d 758, cert. den. 355 U.S. 828 58
Moore v. C. & O. Ry. Co., 340 U.S. 573, 576, 578 ....36, 37, 59, 64, 69
NLRB v. Truck Drivers Local Union, 353 U.S. 87, 95 ..... 41, 54
Parker v. Brown, 317 U.S. 341, 350 58
Penello, Regional Director, etc. v. Int. Union, UMWA, DC, D.C., 1950, 88 F. Supp. 935 7
Pennington et al. v. UMWA, 6 Cir., 325 F. 2d 804 (1963) 1
Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 343 ..... 59, 65
Perkins v. Lukens Steel Co., 310 U.S. 113, 128 (1940) ..55, 57
Pevely Dairy Co. v. U.S., 8 Cir., 178 F. 2d 363, 370 66

Page

Ruth Elkhorn Coals, Inc. v. Mitchell, Sec'y. of Labor, D.C. Cir., 248 F. 2d 635 (1957), cert. den. 355 U.S. 953 20
San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 242 48
Stroud v. Benson, D.C., E.D. North Carolina, 1957, 155 F. Supp. 482, vacated on other grounds, 4 Cir., 254 F. 2d 448, cert. den. 358 U.S. 817 58
Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1961) 72
Sunkist Growers, Inc. v. Winekler & Smith Citrus Products Co., 370 U.S. 19, 29-30 ..... 35, 58
Sunkist Growers, Inc. v. Winckler and Smith Citrus Prod. Co., 9 Cir., 284 F. 2d 1, 32 (1960), rev. on other grounds, 370 U.S. 19 72
Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961) 26
Tennant v. Peoria & Pekin Union R. Co., 321 U.S. 29, 32 69
Texas Millinery Co. v. United Hatters, DC, N.D. Texas, March 24, 1963, 55 LRRM 2863 48
The Order of Rr. Telegraphers v. Chicago, etc. R. Co., 362 U.S. 330, 339, 340 ..... 46, 51
Town & Country Mfg. Co., Inc. v. NLRB, 5 Cir., 316 F. 2d 846 (1963) 44, 45
U.S. v. Hutcheson, 312 U.S. 219, 231, 232, 234-5, 236 ..... 33, 34, 46, 49-50, 51, 67
U.S. v. Int. Union, UMWA, DC, D.C., 1950, 89 F. Supp. 187 7
U.S. v. Int. Union, UMWA, DC, D.C., 1950, 89 F. Supp. 179 7
U.S. v. Int. Union, UMWA, D.C. Cir., 190 F. 2d 865 (1951) 7
U.S. v. Morgan, D.C., S.D.N.Y., 1953, 118 F. Supp. 621, 634 66
U.S. v. UMWA, DC, D.C. 1946, 70 F. Supp. 42 5
U.S. v. UMWA, 330 U.S. 258-385 (1947) 5
Volasco Products Co. v. Fry Roofing Co., 6 Cir., 308 F. 2d 383, (1962), cert. den. 372 U.S. 907 71
Wesson v. U.S., 8 Cir., 172 F. 2d 931, 933 66
Wolfe v. National Lead Co., 9 Cir., 225 F. 2d 427 (1955) 71
United Steelworkers, Local 4264 v. New Park Mining Co., 10 Cir., 273 F. 2d 352, 356 (1959) 44

STATUTES

Page

Clayton Act 2, 52
Section 4 (15 USCA 15) 2, 38
Section 6 (15 USCA 17) 2, 4, 12, 32, 33, 34, 38, 42, 43, 50, 51, 62
Section 20 (15 USCA 52) 2, 51

Fair Labor Standards Act of 1938 ..... 3, 46-7, 52
Section 1 (29 USCA 201) 3
Section 2 (29 USCA 202) 3, 46-7

Labor Management Relations Act, 1947 (Taft-Hartley Act) 3, 6, 7, 33, 34, 43, 46, 47, 49, 50, 52, 62, 63
29 USCA 141 ..... 3, 47
29 USCA 151 ..... 3, 43, 47
Section 7 (29 USCA 157) 3, 32, 34, 39, 48, 50, 51
Section 8 (29 USCA 158) 32, 34, 39, 48, 51
Section 8(a)(3) [29 USCA 158(a)(3)] 3
Section 8(b)(1)(A) [29 USCA 158(b)(1)(A)] 3
Section 8(b)(3) [29 USCA 158(b)(3)] 3, 10
Section 8(b)(4) [29 USCA 158(b)(4)] 3, 47
Section 8(e) [29 USCA 158(e)] 3, 47, 48
Section 301 (29 USCA 185) 3, 47
Section 303 (29 USCA 187) 3, 47

Norris-LaGuardia Act 2, 46, 51, 52
Section 2 (29 USCA 102) 2, 46
Section 4 (29 USCA 104) 2, 46
Section 6 (29 USCA 106) 2, 36, 62, 67

Sherman Antitrust Act 2, 3, 4, 32, 33, 34, 35, 38, 39, 41, 42, 43, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62, 63, 65, 66, 67, 68
Section 1 (15 USCA 1) 2, 3, 22
Section 2 (15 USCA 2) 2, 3, 22, 38
Section 3 (15 USCA 3) 2, 3, 38

Walsh-Healey Act (41 USCA 35-45) 3, 12, 19, 20, 21, 22, 31, 34, 36, 46, 52, 54, 55, 56, 57, 58, 59, 62, 63

28 U.S.C., Sec. 1254(1), 2101(c) 2

MISCELLANEOUS

	Page
"Automation and Unemployment: A Management Viewpoint", Malcolm L. Denise, Vice President—Labor Relations, Ford Motor Company [The Annals (American Academy of Political and Social Science), March, 1962, pp. 90, 96]	8-9
"Industrial Relations and Automation", Charles C. Killingsworth, University Professor Labor and Industrial Relations at Michigan State University [The Annals (American Academy of Political and Social Science), March, 1962, pp. 69-80]	9
Legislative History of the Labor Management Relations Act, 1947 (U. S. Government Printing Office, 1948), Vol. 1, pp. 158, 204-7, 219-21, 569	50
U. S. Department of Labor, Bulletin on "Bituminous Coal Mining", styled "Industry Manpower Surveys No. 106", December, 1963, p. 15	15
U. S. Department of Labor, Bulletin No. 1305, Technological Change and Production in the Bituminous Coal Industry, 1920-60, p. 118, Table 27A	9

INDEX TO APPENDIX

Appendix A (Statutes):	
15 USCA:	
Sec. 1	1a
Sec. 2	2a
Sec. 3	2a
Sec. 15	2a
Sec. 17	3a
29 USCA Sec. 52 (Sec. 20 of the Clayton Act)	3a
29 USCA Sec. 102 (Sec. 2 of the Norris-LaGuardia Act)	4a
29 USCA Sec. 104 (Sec. 4 of the Norris-LaGuardia Act)	5a
29 USCA Sec. 106 (Sec. 6 of the Norris-LaGuardia Act)	6a
Labor Management Relations Act, 1947 (29 USCA):	7a
Sec. 141	7a

Page

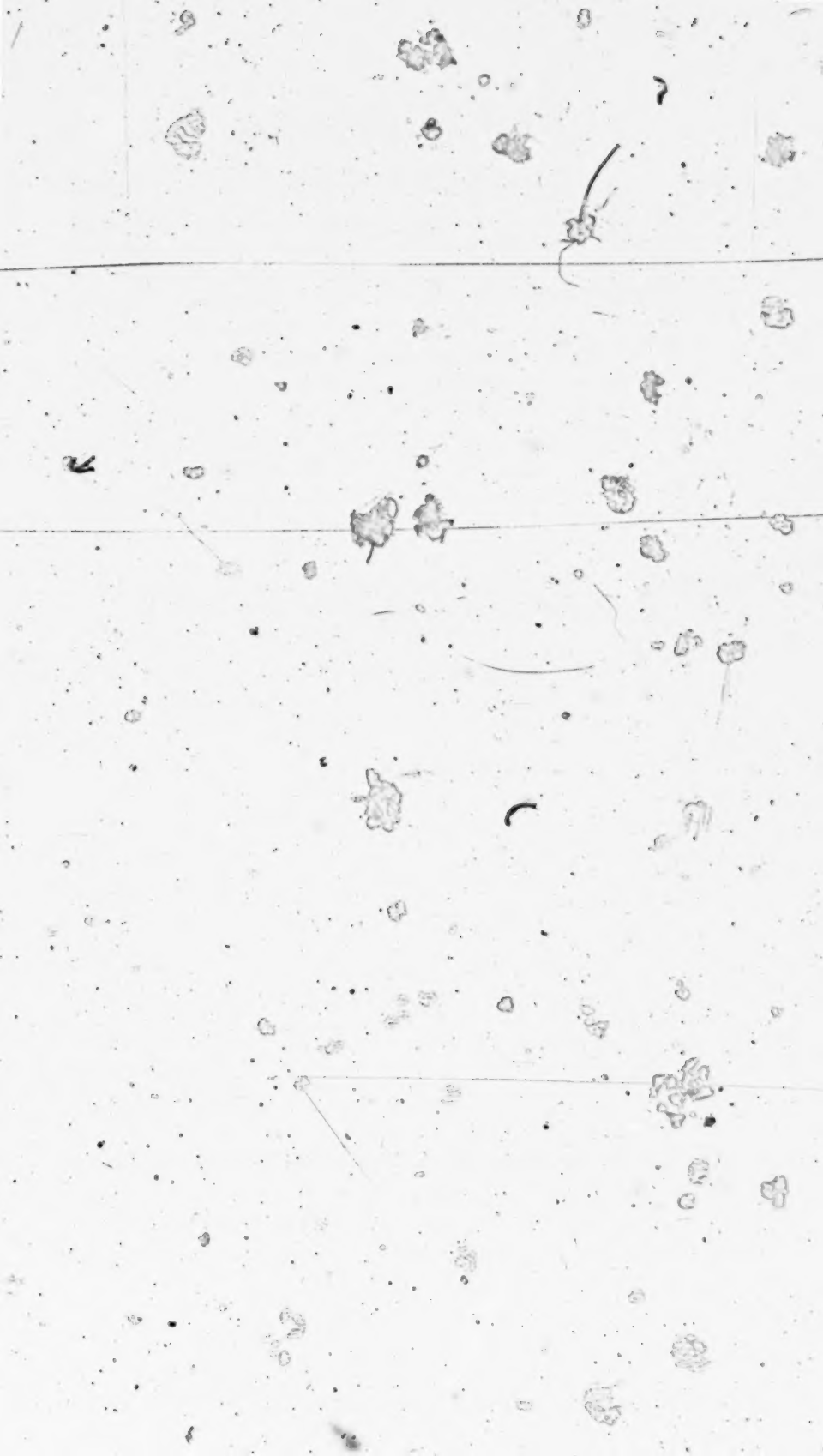
Sec. 151 ..... 7a
Sec. 157 ..... 9a
Sec. 158 ..... 9a
Sec. 185 ..... 13a
Sec. 187 ..... 14a

29 USCA (Fair Labor Standards Act of 1938): 14a
Sec. 201 ..... 14a
Sec. 202 ..... 15a

41 USCA (Walsh-Healey Act): 15a
Sec. 35 ..... 15a
Sec. 38 ..... 16a
Sec. 39 ..... 17a
Sec. 45 ..... 18a

Appendix B: Excerpts from BNA, Collective Bargaining—Negotiations and Contracts 19a

Appendix C: Chart 29a



IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 48

UNITED MINE WORKERS OF AMERICA,
Petitioner

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, *Admx. of the Estate of* BURSE PHILLIPS, deceased,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S BRIEF

OPINIONS BELOW

The district court's[1] Bench Opinion (R. 85a) is unreported. The Sixth Circuit's[2] opinion (R. 1743-68) is reported at 325 F. 2d 804 (1963).

JURISDICTION

The Sixth Circuit's judgment was entered December 18, 1963 (R. 1768). Petition for a writ of certiorari was filed March 17, 1964, and granted May 18, 1964 (R. 1769). This

[1] Reference is to the United States District Court for the Eastern District of Tennessee, Northern Division.

[2] Reference is to the United States Court of Appeals for the Sixth Circuit.

Court has jurisdiction under 28 U.S.C., Sections 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. May a labor union be held a conspirator under the Sherman Antitrust Act where it has achieved an industry-wide, multi-employer collective bargaining agreement, negotiated in accordance with procedures established by law, which results in stabilizing wage rates and working conditions at levels above the ability of some employers to pay?

2. Where a labor union and employer signatories to a collective bargaining agreement obtain from the United States Secretary of Labor, under the Walsh-Healey Act, a minimum wage rate for the bituminous coal industry on coal purchased by federal agencies, is such union activity conspiratorial conduct under the Sherman Antitrust Act?

3. Where a labor union is charged with having conspired with employer groups in violation of the Sherman Antitrust Act when it executed an industry-wide, multi-employer collective bargaining agreement in conformity with injunctive orders of a federal district court, union denials of the conspiracy are uncontradicted, and there is no direct evidence proving the conspiracy, may a court or jury infer the existence of a conspiracy from union activities either sanctioned under law or within the jurisdiction of the National Labor Relations Board. in light of the antitrust immunity of labor unions and the clear proof requirement of Section 6 of the Norris-LaGuardia Act?

4. Was there substantial evidence to warrant the jury's verdict of conspiracy and of damages under the Sherman Antitrust Act?

STATUTES INVOLVED

The statutory provisions involved are Sections 1, 2 and 3, Sherman Antitrust Act (15 USCA 1, 2 and 3); Sections 4 and 6, Clayton Act (15 USCA 15, 17); Section 20, Clayton Act (29 USCA 52); Sections 2, 4 and 6, Norris-LaGuardia

Act (29 USCA 102, 104 and 106); the Labor Management Relations Act, 1947 [29 USCA Sections 141, 151, 157, 158(a)(3), 158(b)(1)(A), 158(b)(3), 158(b)(4), 158(e), 185, 187; Fair Labor Standards Act of 1938, Sections 1 and 2 (29 USCA 201, 202); and the Walsh-Healey Act (41 USCA 35-45)].[3]

STATEMENT OF THE CASE

A. THE KIND OF ACTION AND THE JUDGMENT APPEALED

United Mine Workers of America (called "UMW") was held responsible to James M. Pennington, Raymond E. Phillips and Lillian Goad Phillips, Admx. of the Estate of Burse Phillips, deceased a partnership, doing business as Phillips Coal Company (called "Phillips") for $325,000 for having pursued legitimate and regulated bargaining activities which Phillips claimed established wage rates and other conditions of employment he could not meet.

In an action instituted by Trustees[4] of the United Mine Workers of America Welfare and Retirement Fund[5] to recover a money judgment for unpaid royalties from Phillips as a signatory to the National Bituminous Coal Wage Agreement of 1950, as amended in 1952, 1955 and 1956, Phillips filed a cross claim against UMW (R. 19a), under "Title 15, USCA, Sections 1, 2 and 3", based upon an alleged conspiracy between UMW, Fund Trustees, and major coal companies (not made parties to the cross-claim) to force small mines out of business.[6]

---

[3] These statutes are referred to herein as *Sherman, Clayton, Norris-LaGuardia, Taft-Hartley, Fair Labor Standards,* and *Walsh-Healey,* respectively. Pertinent statutory provisions are found in Appendix A to this brief (p. 1, *et seq.*).

[4] Trustees' action was originally filed by Trustees John L. Lewis and Josephine Roche. Subsequently Henry G. Schmidt was named as an additional Trustee-Plaintiff (R. 29a).

[5] Herein called "Fund"; its Trustees are collectively called "Trustees".

[6] It required an answer (filed February 14), an amendment (filed March 5), a second amendment (filed March 24) and a third amendment (filed June 26) to finalize Phillips' theory of the alleged conspiracy (R. 11a, 21a, 26a, 30a). Companies named as co-conspirators were Consolidation Coal, Peabody Coal, West Kentucky, Nashville Coal, Island Creek Coal, Pittsburgh-Midway Coal and The Pittston Co. (R. 49-50).

UMW denied the conspiracy charges, alleged that under Section 6 of the Clayton Act (15 USCA 17) negotiation and execution of the several Agreements by it as a labor organization and its conduct in their enforcement did not constitute *Sherman* violations, and asserted "all of the acts done by UMW" herein "were motivated by legitimate labor goals" to secure union standards of wages and working conditions for its members (R. 38-40a, 58-59a).

A jury[7] returned a verdict in Phillips' favor, responsive to a submitted verdict form (R. 85a)[8] that UMW had engaged in a "combination or conspiracy so as to unreasonably restrain trade . . . beyond the exemption created by the anti-trust statutes to a labor organization" as Phillips had alleged (R. 85a). UMW motions for judgment n.o.v. or for new trial (R. 64a) were overruled (R. 83a). Judgment for $270,000 (trebling the jury's damage award of $90,000) and $55,000 for attorneys' fees, favorable to Phillips, was entered (R. 82-4a).

Upon appeal the Sixth Circuit affirmed the judgment (R. 1768); and this Court awarded certiorari (R. 1769).

---

[7] The trial produced a transcript of 3,539 pages and 175 exhibits. It commenced April 11, 1961; the jury considered of its verdict from May 17 to May 19, 1961.

[8] The verdict form read (R. 1578a): "Did the cross-defendant, U.M.W., engage in a combination or conspiracy so as to unreasonably restrain trade or monopolize or attempt to monopolize commerce among the several states outside and beyond the exemption created by the anti-trust statutes to a labor organization as alleged by cross-plaintiffs, Phillips Brothers Coal Company?"

In Trustees' case (Case No. 14,810 in the Sixth Circuit), the trial court, after setting aside the jury verdict that Trustees had engaged in the conspiracy, entered judgment in favor of Trustees for $43,424.22 (R. 83a) and, upon Phillips' appeal, the Sixth Circuit affirmed (R. 1765-68). Phillips' petition for certiorari is pending as No. 39 in this Court.

B. THE ALLEGED CONSPIRACY: THEORIES, FACTS AND THE LOWER COURTS' OPINIONS THEREON.

1. Collective Bargaining in the Bituminous Coal Industry.

The bargaining history clearly demonstrates that the 1950 Agreement resulted from arms-length collective bargaining over a long period of time during which UMW was restricted in its bargaining efforts by federal court decrees and mandated to settle its bargaining dispute with coal producers. The 1950 contract was not an instrument of conspiracy.

(a) Operator-Union Disputes and Government Seizures of the Industry Prior to 1949.

From UMW's inception in 1890 its objectives have included improved standards of working and living conditions, achieved in a pattern of multiple-employer collective bargaining (R. 1097a, 1099a).

During 1943-48, UMW obtained increased wages, welfare fund benefits and other improved labor standards for its members, but only after seven work stoppages, accompanied by five federal government seizures and operations of mines (R. 262-3a), two Taft-Hartley Boards of Inquiry avowing shortages of coal, public needs and the absolute necessity that miners return to work, added to injunctive, contempt and unfair labor practice charges and proceedings against UMW by Federal officials and coal operators alike and assessments of large monetary fines against UMW.[9]

(b) The 1950 Agreement and the 1949-50 Negotiations and Federal Court Decrees Antedating Its Execution.

The National Bituminous Coal Wage Agreement of 1948 (herein called "1948 Agreement"), which had provoked operator litigation against UMW, expired June 30, 1949. A successor industry-wide, multiple-employer agreement (Na-

---

[9] Some portions of UMW's struggle with operators in the pre-1949 period are told in the following litigation: *U. S.* v. *UMWA*, DC, D.C., 1946, 70 F. Supp. 42; *U. S.* v. *UMWA*, 330 U.S. 258-385 (1947); *Int. Union, UMWA, et al.*, 83 NLRB 916 (1949); *Int. Union, UMWA* v. *NLRB*, D.C. Cir., 184 F. 2d 392 (1950).

tional Bituminous Coal Wage Agreement of 1950) was executed by UMW and operators March 5, 1950.

Meanwhile, when there was no contract, and therefore no obligation for UMW members to produce coal, UMW directed 3-day work weeks (R. 539a) as a bargaining tactic. Mine workers knew that bargaining negotiations would not terminate as long as miners worked full time during the bargaining process. Three-day work weeks would "abate the public concern as to a possible shortage of coal" (R. 1104-05a, 1151-52a) and distribute the work during negotiations. UMW did not seek or want a 3-day work week in the 1950 negotiations (R. 1105a, 1187a).

Interim bargaining negotiations focused around three issues carried over from the 1948 Agreement, namely: operator complaint that (1) the union-shop clause in the 1948 Agreement did not comply with Taft-Hartley's requirements; (2) the welfare fund could not be administered for UMW members only, as operators claimed that Agreement provided; and (3) the 1948 Agreement's "able and willing" and "memorial period" clauses, operators complained, gave UMW control over working time of the mines.

The Injunctions of February 11, 1950 and UMW's compliance therewith

These complaints, resulting in failure of collective bargaining processes to achieve a labor contract, caused NLRB to issue and process an unfair labor practice complaint against UMW and its President. Then, a Board Regional Director and the United States Attorney General, harmonious to a Presidential Board of Inquiry Report, severally sought injunctive relief, responsive to which the federal district court, in two separate orders on February 11, 1950, enjoined UMW from insisting that (1) a successor agreement require UMW membership of employees "without compliance" with Taft-Hartley's requirements, (2) the agreement provide for a welfare and retirement fund to be administered for UMW members only and (3) the agreement contain the "'able and willing" and "memorial

period" clauses, and *ordered operators and UMW* to "engage in free collective bargaining *in good faith*" to resolve their disputes and "make every effort to adjust and settle their differences" as Taft-Hartley contemplated (R. 1476-8a).

Under district court scrutiny,[10] NLRB and Attorney General surveillance, with assistance of members of the Presidential Inquiry Board, *and with UMW's bargaining abilities circumscribed by judicial restraints,* UMW and operators, bargaining in good faith, achieved the 1950 Agreement, which, obedient to the February 11, 1950 injunction, created a union-security clause to comply with Taft-Hartley, made Fund benefits available to signatories' employees *regardless of UMW* membership, and eliminated the "able and willing" clause and amended the "memorial period" clauses.

UMW's full obedience to the district court's injunctive commands is manifested in dismissal of all court proceedings upon motion of the federal agencies involved (R. 1480a, 1483-86a), and in the district court's absolving UMW and Lewis of charges they had contemned the court's injunctive mandates.[11]

(c) Mine Mechanization Was An Existent Fact Prior to the 1949-50 Negotiations and Was Not an Issue in Those Negotiations.

Mechanization was not brought about by any conspiratorial agreement between UMW and coal producers. It was the inevitable result of increased technology. It was

---

[10] During negotiations, the district court, in chambers, with some parties present, discussed negotiations and warned any negotiator leaving negotiating conferences would do so at peril (R. 1505a).

[11] UMW's struggle to achieve the 1950 Agreement is mirrored in litigation found in the following cases which show the limitations placed upon UMW by the federal court: *Int. Union, UMWA and H. C. Frick Coke Co., et al.*, NLRB Cases Nos. 5-CB-43 thru 47, 1950 (Unreported); *Penello, Regional Director, etc.* v. *Int. Union, UMWA*, DC, D.C., 1950, 88 F. Supp. 935; *U. S.* v. *Int. Union, UMWA*, DC, D.C., 1950, 89 F. Supp. 187; *U. S.* v. *Int. Union, UMWA*, DC, D.C., 1950, 89 F. Supp. 179; *U. S.* v. *Int. Union, UMWA*, D.C. Cir., 190 F. 2d 865 (1951).

decreed by the necessities of competition, not only upon coal producers but by competition from other energy sources.

Prior to 1950, mechanization was a normal procedure in the coal industry (R. 616a, 746-47a, 748a). In 1940 *mechanically loaded coal amounted to 35.4%* of all underground production and *by 1949* this had *increased to 67%* (R. 1724a). Likewise, of total production *22.2% was mechanically cleaned* and this was *increased to 35.1%* (R. 1724a) in 1949. *Indeed, Phillips' mining operations were highly mechanized* (R. 211a).

UMW never opposed mechanization (R. 1130a, 1218a), because of the free enterprise system and *UMW's belief that mechanization is a management prerogative to buy such equipment as management chooses and UMW does not "attempt to abridge it"* (R. 1214a, 1223a).

Had the coal industry not increased productivity with its attendant lowering of costs, it would have succumbed to its competitors—world competition in coal and competitive fuels such as oil, gas and diversified fuels made from coal or petroleum bases (R. 1130-1a). The 1950 Agreement was executed by operators, according to *Phillips' witness* George H. Love, because "it was our best judgment to conclude the contract and stop losing coal business to other fuels" (R. 545a).

The need of lower cost production through mechanization is shown in the coal industry's loss of markets when coal's share of the national energy market declined from 46.5% in 1945 to 36.9% in 1949 and from 34.8% in 1950 to 23.1% in 1958 (R. 1714a, 1131-34a).[12]

---

[12] "How does an enterprise become efficient and profitable? How does it stay efficient and profitable in an increasingly competitive world? First of all, it must produce a commodity that customers are willing to buy in considerable volume at a price that is in line with the prices of competitive products and that yields a profit sufficient to attract investor capital. . . . To the extent that our economy automates, we will continue to have a sound basis for rising national income and a rising standard of living. To the extent that we fail to automate, nothing else we do can protect

In the period 1950-58, when the coal industry invested heavily in new machinery and equipment, coal production increased from 6.77 tons per man day in 1950 to 11.33 tons in 1958 (R. 1724a). In the same period, wages rose from an average of $16.08 per day in 1950 to $24.16 average in 1958.[13] But, as output per man increased as a result of mechanization, UMW insisted this higher productivity justified a higher rate.[14]

(d) Increased Labor Costs and the Pattern of Collective Bargaining in the Post-1950 Agreement Period.

In the 1946-48 period miners obtained wage increases of $4.05 per day, and the establishment of a welfare fund with royalty increased from the original 5¢ per ton in 1946 to 20¢ in 1948, in addition to a reduction in hours per work day (R. 266a, 267-68a, 271a). The 1950 Agreement increased wages 70¢ a day and royalty payments to the fund to 30¢ per ton.

In the 8-year period following the 1950 Agreement's execution, wage increases amounted to $9.50 per day, with a 10¢ royalty increase in 1952 (which has since remained unchanged).

---

us from shrinking markets, economic stagnation, and difficulty in finding work for all those willing and able to work." "*Automation and Unemployment: A Management Viewpoint*", authored by Malcolm L. Denise, Vice President—Labor Relations, Ford Motor Company, and appearing in The Annals, (American Academy of Political and Social Science, March, 1962), pp. 90, 96.

[13] U. S. Department of Labor, Bulletin No. 1305, Technological Change and Production in the Bituminous Coal Industry, 1920-60, p. 118, Table 27A.

[14] In "*Industrial Relations and Automation*", The Annals, (*Ibid.*, pp. 69-80), Chas. C. Killingsworth, University Professor, Labor and Industrial Relations at Michigan State University, writes: "Labor economists generally agree that one result of collective bargaining over the past several decades has been the development of a far more systematic approach to wage structures and wage-payment systems . . . . *When output per man is sharply increased, as frequently happens in automation applications, the employees and their union may insist that this higher productivity justifies a higher wage rate . . .*" (pp. 75-76).

Phillips' theory that differences in bargaining patterns before and after the 1950 Agreement's execution show the conspiracy (*post*, p. 11) ignores undisputed facts that, while following the 1950 Agreement's execution, operators formed the Bituminous Coal Operators' Association (called "BCOA") to promote stable industrial relations on a national basis and representing coal producers and associations in Pennsylvania, Illinois, Indiana, Northern West Virginia, Ohio and Virginia (R. 394a), signatory operators include numerous other coal associations and coal producers with whom UMW bargained long prior to 1950 operators select their representatives, and UMW meet with such persons as the operators advised represented it as Taft-Hartley's Section 8(b)(3) [29 USCA 158(b)(3)] commands (R. 1247-48a).

UMW's policy committee selected its representative, whose authority came from the policy committee (R. 1248a). Following conferences between representatives of labor and management, respectively, each conferred with their respective associates; and the Agreement's consummation was effected only after additional negotiators were called in on both sides (R. 1247a). While there is no agreement to continue following this procedure, which may be changed with or without mutual agreement at any time (R. 393a), it was described as the only "vehicle . . . after 50 years, that can bring about in an orderly manner, without fanfare", a collective bargaining agreement (R. 1247a).

2. Phillips' Mining Operations; Its Execution of the UMW Agreement.

Phillips, organized in 1953 with a capital of $27,000, employing about 8 employees (R. 175a, 181-2a), and conducting a coal mine stripping operation in Campbell County, Tennessee, executed the 1952 Agreement October 1, 1953 (R. 117a, 178a). None of Phillips' employees then belonged to UMW (R. 179a).

On April 6, 1955, a caravan of coal miners visited several operations in Campbell County. Apprised thereof, Phillips ceased operations (R. 184a) and it was not operating on

April 11, 1955, when 50 or 60 men came to Phillips' operation and stated they had come to "shut us down" until all of Phillips' employees joined the Union (R. 184-87a).

Phillips again executed the 1952 Agreement in 1955, and thereafter executed the 1955 and 1956 Agreements. Its employees joined UMW on April 24 or 25, 1955 (R. 229a).

3. Phillips' Theories of the Alleged Conspiracy.

The conspiracy's formation, Phillips charged, occurred when the 1950 Agreement was executed, its purpose being to stabilize the bituminous coal industry's economics by eliminating therefrom small producers unable to pay high wages and welfare fund royalties and the conspirators knowing and intending these smaller companies would go out of business by reason of such inability (R. 1542a), thereby leaving the industry's business to major coal companies.[15]

According to Phillips, the conspiracy included UMW agreement to surrender to operators its policy of controlling working time at the mines, *although (1) production time never became a bargaining issue, since UMW was enjoined from demanding the clauses which operators contended gave UMW control over working time, and (2) operators had succeeded in enjoining UMW from bargaining concerning such clauses, thereby obviating operators' negotiating with UMW for matters they had already won in the injunction litigation.*

Despite the fact mechanization was an existent fact prior to the 1949-50 negotiations and was not an issue therein, Phillips contended the conspiracy included UMW's acquiescence for large companies to increase productivity through mine mechanization, as well as UMW's willingness that mines incapable of mechanization be closed despite the resultant loss of UMW membership (R. 31a).

---

[15] Theories advanced by Phillips are found in the certified record, pp. 49-56a, 1538-43a. Theories of UMW to defeat recovery by Phillips are found at pp. 57-60a, 1543-45a.

In exchange, as Phillips theorized, major coal companies agreed not to object to increased wages and welfare fund payments, subject to operator ability "to match those increases by increased productivity through mechanization" (R. 32a), and to permit UMW to control the Fund and dominate the industry's employees.

The conspiracy's purposes, Phillips theorized, were to be achieved through the National Agreement's use (R. 1539a). Lack of industrial strife in the industry following the 1950 Agreement with attendant increases in wages and welfare fund payments, increased UMW organizing activities, the Agreement's land-lease and protective wage clauses, UMW-operator efforts to obtain a Walsh-Healey Act minimum wage determination and to have TVA comply therewith, and mechanization of mines, and UMW investments in two major coal companies, were among the elements, Phillips contended, which proved the conspiracy Phillips alleged was formed in 1950.

4. UMW Officials Deny Any Conspiracy

UMW officials denied the charged conspiracy and denied making any agreement other than the 1950 Agreement. *These denials are not disputed.*

5. The Jury Rendered a General Verdict

The trial court permitted the jury to hear testimony pertaining to each of the elements enumerated above. In a *general verdict,* the jury found UMW had conspired outside and beyond labor's immunity under *Clayton's* Section 6.

6. The Trial Court's Opinion and Doubt

The jury did not specify upon which of the elements it premised its finding or with whom UMW supposedly had conspired. Upon post-verdict motions for judgment n.o.v. or for new trial, the trial court tacitly rejected all

of the elements noted (*ante*, pp. 11-12) as proof of the alleged conspiracy.[16]

The trial court justified the jury verdict against UMW *solely* upon its statement that "*There is some proof . . . that Union representatives and large coal operator representatives discussed stabilization of prices at one time or another during the critical periods referred to in the cross-claim*" (R. 87a).

The Trial Court Declared that 1950 Court Proceedings and Negotiations Accordant Therewith Weakened, if Not Destroyed, Phillips' Conspiracy Allegations. Its Opinion Ignores That Evidence.

On UMW's motion for directed verdict (R. 1524a), federal court proceedings which preceded the 1950 Agreement's execution (discussed, *ante*, pp. 6-7) occasioned the trial court's comment the 1950 court proceedings and negotiations pursuant thereto "*put a grave burden upon*" Phillips, expressing they "*greatly weaken, if not destroy*", Phillips' conspiracy charges (R. 1524-33a). They indicated to the trial court "*these parties were acting through regular channels*" and "*were bargaining with each other*" and "*weren't acting in concert*" but acted "*because they were made to act*" (R. 1527-8a).[16a]

The trial court's dubiety finds expression in its further statement, "*This is not an easy case*" but "*a very complex*" one, as well as its recognition that the union's motion

[16] Other elements which Phillips contended proved the alleged conspiracy were rejected by the trial court, which noted, "Trustees testified positively that the Union did not dominate or control the Fund" and "The evidence is insufficient to show the contrary" (R. 98a). Likewise, the trial court expressly rejected Phillips' contention that UMW control of the Fund and domination of the employees were to be achieved by the requirement that union membership was a prerequisite for obtaining Fund benefits after 1950, that Trustees required pensioners to picket for UMW in order to obtain or retain Fund benefits and that Trustees held out to industry employees the Fund was under UMW control (R. 98a).

[16a] Unless otherwise indicated, all emphasis herein are supplied.

for directed verdict is a *"serious motion and is a debatable motion, certainly"* (R. 1532-33a).

Notably, in denying UMW's post-verdict motions, when it assigned the sole basis for upholding the verdict, the district court failed to explain away its concern noted above.

7. The Sixth Circuit's Opinion Ignores the District Court's Assigned Reason. The Elements the Sixth Circuit Employed to Sustain the Jury's Finding as to Conspiracy, and the Facts Pertaining Thereto.

UMW's appeal was argued October 20, 1962 (R. 1743). *Fourteen months later*, on December 18, 1963, the Sixth Circuit affirmed the district court's judgment (R. 1768).

The Sixth Circuit abandoned and ignored the district court's reason for sustaining the jury verdict (*ante*, p. 13). The Sixth Circuit's opinion makes no mention of the 1950 federal district court proceedings and directives and the negotiations antecedent to the 1950 Agreement's execution which had so grossly concerned the district court, nor does it mention the trial court's concern or dubiety.

The Sixth Circuit noted, *without challenge*, UMW's contention there was no direct evidence of the alleged conspiracy (R. 1753). Notably, in avowing "the following background was given to the jury" (R. 1753-54), the Sixth Circuit stated *as facts* the *theories advanced* by Phillips and related to the jury *as theories* (R. 1538-43a). It did not undertake a "review of the evidence in detail"; instead, it chose what it regarded as some *"principal factual aspects"* which, together with inferences drawn by the jury, led to the Sixth Circuit's conclusion "there is *substantial evidence*" to support the jury verdict (R. 1752). Among these are:

(a) Violence and UMW's Knowledge of the Effect of Increased Labor Costs on "Weaker" Companies.

Pointing to wage increases of $9.50 per day during an eight-year period (1951-58 since the 1950 Agreement was executed) and the 1952 increase of welfare fund payments from 30¢ to 40¢ per ton (since which time no increase had

been had in such payments), and though there is no record basis that the wage increases were too high,[17] the Sixth Circuit, observing there was an intense campaign after 1950 to impose UMW's contract on "smaller nonunion mines" and that strong resistance was met with "mobs and terrorism", declared *"We think the evidence supports" Phillips' contention the "Union knew that the weaker companies could not meet the increased costs of wages and welfare fund payments required by the successive wage agreements and that they would fall by the wayside by reason thereof, and that the increased costs in the successive agreements were geared to the abilities of the major coal companies to mechanize and not have their profits affected by the increased costs"* (R. 1756).

Though the evidence showed Phillips had ceased operations when pickets came to its operation (*ante*, p. 10), the

---

[17] A U.S. Department of Labor bulletin on "Bituminous Coal Mining", styled "Industry Manpower Surveys No. 106", p. 15, dated December, 1963, shows that in *1947*, coal mining had the highest annual earnings among comparable industries; but by 1962 it had the lowest.

There were no increases in the coal industry from September, 1952, to September, 1955, during which period there were increases in the automobile, steel, rubber, and copper industries. See Excerpts from BNA, Collective Bargaining—Negotiations, which are found in Appendix B hereto, pp. 19-28a.

In fact from 1950 through 1958, there were fewer increases in the coal industry than in steel, automobile, copper, rubber and oil industries. See Appendix B, pp. 21-28a.

Based on published statistics of the Department of Labor, Bureau of Labor Statistics, the average weekly earnings of bituminous coal miners in 1950 and 1960, compared with three other basic industries were as follows:

Industry	1950 Average Weekly Earnings	1960 Average Weekly Earnings
Bituminous Coal	$67.46	$112.77
Petroleum Refining	$75.11	$118.78
Blast Furnace, steel works & rolling mills	$67.95	$116.13
Automobiles	$74.85	$115.21

Sixth Circuit pointed out "There is evidence to the effect that UMW forcibly closed down Phillips' mine by the presence of armed mobs which intermittently marched through the countryside"; and though the Sixth Circuit admitted that violence "in and of themselves are not material" in determining the conspiracy, inconsistently it declared that "however, it was not error for the jury to consider such evidence as bearing on the overall issue of whether such acts were done as part of a conspiracy to restrain competition or create a monopoly" (R. 1751).

(b) The "Land-Lease" and "Protective Wage" Clauses in the National Agreement.

Two other "principal factual aspects" relied upon by the Sixth Circuit to warrant the jury's inference are the so-called "land-lease" and "protective wage" clauses of the National Agreement which the *trial court* told the jury were lawful and not violative of *Sherman*, provided they were inserted at UMW's insistence for legitimate labor goals and were "not the result of an agreement with large coal operators to drive small operators out of business" (R. 1558a). Both clauses sought legitimate labor goals (R. 448a, 1109-10a, 1206a, 1207a). Both were insisted upon by UMW and resisted by operators (R. 1111a, 1201a, 1205-6a).

Under the land-lease clause, operators agreed the Agreement "covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production. The said operators agree that they will not lease out any coal lands as a subterfuge for the purpose of avoiding the application of this Agreement" (R. 445a, 1200a, 1739a).

This provision has its genesis in a 1943 Agreement when it read, "The operators agree that they will not lease *any operating mines* subject to the supplemental agreement as a subterfuge for the purpose of avoiding the provisions of

this supplemental agreement" (R. 1198a). It so appeared in the 1945 National Agreement (R. 1199a). In the 1952 Agreement and subsequent amendments the provision was expanded to cover "coal lands" owned or held under lease by operators or acquired by them. UMW officials' uncontested testimony is that its purpose was *solely* to protect "wage standards and the conditions of the working miner" (R. 1109a, 1201a), to prevent coal operators from repudiating their agreement, and to tighten up the processes of collective barganing (R. 1201a).

The Sixth Circuit declared (R. 1757), "The evidence showed that there was a large reserve of coal lands owned or held under lease by the major coal companies" and that "It is argued that this provision barred the small coal companies that could not pay the union wage and the royalties to the Welfare Fund from operating this land and that there was but little good coal land available to them as a result of this provision", although T. Reed Scollon, Chief of Division of Bituminous Coal, Bureau of Mines, U. S. Department of Interior (R.1280a) testified that at the present rate of coal consumption "there are proved reserves of coal for about *seventeen hundred years*" (R.1310a) and that *in 1958 there were in excess of 8,000 mines producing coal for consumption, of which number more than 2,000 were in Phillips' class (Class 5) and almost 5,000 small producers of less than 10,000 tons annually, all sharing in such coal reserves* (Ex.151-A, R.1719a).

The "protective wage" clause, as the Sixth Circuit stated, "contained a clause which provided that the signatory operators would not buy, sell or deal in coal mined by companies that did not pay the same labor costs as contained in the Wage Agreement" (R. 1757). Continuing, the Sixth Circuit declared (R. 1757), "The major coal companies had the practice of frequently buying coal from the smaller companies to apply on their large long-term contracts. This market was eliminated for those small com-

panies that could not operate under the provisions of the Wage Agreement."[18]

The "protective wage" clause sought, according to its terms, "to provide the maximum possible continuity and stability of employment" of UMW members, signatory operators agreeing, *inter alia*, not to deal in coal produced by other operators under labor standards lower than those provided in UMW's contract. The clause's purposes, undisputed evidence shows, had to do with "substandard mines" because of their structure and inefficiency (R. 448a). The clause "is a continuation" of UMW's efforts over years to have an agreement which would prevent operators from vitiating the agreement signed by them "by entering into some kind of a lease or by purchasing coal, closing their own mines down, from sub-standard mines that were paying sub-standard wages" (R. 1206-8a, 1110a).

(c) UMW Investments in West Kentucky Coal Co. and Nashville Coal Co.

The Sixth Circuit's opinion notes (R. 1757) UMW's investments in West Kentucky and its subsidiary, Nashville Coal, concluding "it was not unreasonable for the jury to conclude" UMW's purpose was "to have a very material voice, if not the dominant one, in determining the policies and operations of these two major coal companies" (R. 1758).

While Phillips charged the conspiracy's formation occurred when the 1950 Agreement was executed, UMW's first purchase of West Kentucky stock was not made *until 1951. Not until 1954* did West Kentucky become signatory to the National Agreement and only upon evidence

---

[18] The protective wage clause was in the *1958* Agreement executed December 3, *1958; it did not become effective until April, 1959* (R. 1207a) *which does not fall within the stipulated* (R. 63a) *damage period of time involved in this case, such period ending December 31, 1958;* hence, it could not be regarded as having any probative value of the alleged conspiracy. Pertinently, Phillips did not execute the 1958 Agreement.

that West Kentucky's employees had, by written designations, selected UMW as their bargaining representative (R. 1444a).

The Sixth Circuit's use of UMW investments and its conclusion as a basis for the jury's conspiracy finding are challenged by *undisputed facts*. UMW's ownership of stock in West Kentucky and Nashville Coal was to benefit its members and to afford them work opportunities at West Kentucky (R. 1123-24a, 1126a, 1164a). In addition, UMW held no controlling interest in West Kentucky (R. 591-94a). Six witnesses attest UMW neither made suggestions nor proposed policies with reference to the two companies' management or pricing policies (R. 1445a, 492a, 585a, 1127a, 1128a, 1211a, 1404a, 1406a). UMW has nothing to do with Kentucky's management or its Board of Directors (R. 492a, 1126a).

The Sixth Circuit also ignored the District Court's jury charge that UMW had a right to make such investments and it was not a *Sherman* violation so to do (R. 1557a).

(d) UMW Efforts To Have the U. S. Secretary of Labor Establish Minimum Wage Rates for the Coal Industry Under Authority of the Walsh-Healey Act and to Have TVA Comply With Them In Government Coal Purchases.

In 1936, Congress enacted the Walsh-Healy Act whose purpose this Court avowed is "to use the leverage of the government's immense purchasing power to raise labor standards".[19]

In 1955 and 1958 UMW, Consolidation and other coal companies petitioned United States Secretary of Labor Mitchell to promulgate a minimum wage [not prices (R. 465a)] for the bituminous coal industry on coal purchased by government agencies (R. 457-8a, 1625a, 1634a); public hearings at which both UMW and operators' representatives testified (R. 458a, 1634-8a) resulted in the Secretary

[19] (R. 1626-7a, citing *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501 and *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940).

of Labor's orders setting a prevailing minimum wage for coal industry employees (R. 466a, 1620-1a).

At the 1956 UMW Convention (R. 467a), Secretary Mitchell, introduced by John L. Lewis, in a speech, said: "As you know, about a year ago the Secretary of Labor, for the first time in history, found a minimum wage in the coal industry which controlled the wages that were to be paid to workers who worked on government contracts.[20] We purposely sought that determination in order to exclude from government bidding those non-union mines which are a detriment to the industry" (R. 466a). Mitchell noted that coal was "one of our basic resources" and determination of the minimum wage was "for the benefit of our national security" as well as benefit of the worker and the fair employer (R. 468a), and that in the national interest "it is necessary for us to see that those operations which can produce coal quickly and efficiently are kept alive to the extent possible by government purchasing in peace time" (R. 469a). Mitchell told the Convention he was investigating if TVA was evading the Walsh-Healey determination, with assurances of correction, if any, and believed the enforcement policy to be "in the interest not only of the worker but is in the interest of the fair employer to prevent the chiseling, non-union employer from competing in the market place with fair employers who hire union labor" (R. 467a). Continuing, Mitchell noted it was likewise "for the benefit of our national security" because when strip and non-union mines "which pay people a miserly wage exist and deprive union-operated mines

[20] While the Sixth Circuit points out (R. 1758) that the minimum wages so determined were "materially higher, in most instances twice as high" as those determined under Walsh-Healey in other industries, pertinently Secretary Mitchell's determination was affirmed in *Ruth Elkhorn Coals, Inc.* v. *Mitchell, Sec'y of Labor*, D.C. Cir., 248 F. 2d 635 (1957), cert. den. 355 U.S. 953. In any event, Walsh-Healey wage determinations are based upon existing prevailing minimum wage structures in a given industry. Wage rates paid in other industries, whether higher or lower, are irrelevant to the determination.

of business, you are thereby reducing your strategic potential in time of emergency. So, it is our job as government officials to see to it that the potential production is kept at the highest possible level'' (R. 468a).

In 1958, upon request of UMW and operators and after hearing thereon, the Secretary of labor raised the prevailing wage in the coal industry 50¢ an hour (R. 470-3a, 1634a).

UMW criticized TVA's paying ''lesser and lesser amounts for'' coal and using the tremendous influence of TVA's purchases of coal *''to decrease the living standards of the men''* (R. 1625a) and *''ignoring safety standards and health conditions . . .''* (R. 1627a). It was not a ''question of union or non-union mines'' (R. 1632a).

UMW criticized TVA's policy of purchasing coal on contracts of less than $10,000 (R. 474-6a). A UMW representative attended a meeting in March, 1958, as did TVA directors, representatives of Southern Coal Producers Association, Southern Coal Sales and Inter-Mountain Coals, when coal producers requested TVA obtain most of its coal on term contracts rather than the spot market (R. 781-3a).

At a March 20, 1958 meeting coal company representatives suggested TVA ''limit [its] spot purchases to approximately ten per cent of [its] total requirements'' (R. 832-3a). UMW urged TVA officials *''to patronize those concerns that paid the American standard of wages''* and that TVA comply with Walsh-Healey requirements in awarding contracts (R. 1138-9a).

The Sixth Circuit held ''it was a reasonable deduction'' for the jury to ''make that the wage determination for the coal industry under the Walsh-Healey Act . . . materially and adversely affected the operations of Phillips in the important TVA market, thus contributing to the elimination of the company as a competitor to the large producing companies operating in that area . . .'' (R. 1760-61).

The Sixth Circuit rejected UMW's contention that evidence concerning the *Walsh-Healey* determination was permissive conduct under *Eastern Rr. Presidents Conference*

v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), as UMW contended, saying (R. 1764), "We do not construe the *Noerr* ruling as creating an unlimited exemption to Sections 1 and 2 of the Sherman Antitrust Act. We believe that the *Noerr* ruling had reference to conduct which in good faith looked to the enforcement of the law or a modification of an existing policy, unaccompanied by a purpose or intent to further a conspiracy to violate a statute. It is the illegal purpose or intent inherent in the conduct which vitiates the conduct which would otherwise be legal".

Likewise the Sixth Circuit placed the Secretary of Labor, who did no more than carry out his statutory duty, in the role of a co-conspirator.

(e) West Kentucky's Bidding and Sales on the TVA Market.

The Sixth Circuit observed that in 1956-58 four of the major coal companies (which had been named as co-conspirators) which included West Kentucky, Nashville Coal, Pittsburgh Midway Coal Co. and Peabody Coal Co., "made large offerings of tonnage on the TVA spot market at generally declining prices, with a number of such bids being successful"; that there was evidence that "heavy offerings of West Kentucky coal on the TVA spot market would have the effect of bearing down on the price heavily" (R. 1760).

The Sixth Circuit concluded "it was a reasonable deduction which the jury could make that the wage determination . . . under the Walsh-Healey Act and the dumping of West Kentucky coal on the TVA spot market materially and adversely affected" Phillips' operation in that market, thus contributing to Phillips' elimination as a competitor "to the large coal-producing companies operating in that area, including the West Kentucky . . ., in which the UMW had such a dominant interest" (R. 1760-61). However, the Sixth Circuit neither states such sales were conspiratorially motivated nor points to any evidence from which a conspiracy between these companies, with or without UMW, could be inferred.

The TVA Coal Market

TVA had purchased coal for twenty years. During the 1950's, coincident with TVA's construction of major steam plants, TVA became the nation's largest purchaser of coal. Its annual consumption rose from one-half million to twenty million tons (R. 800a, 809a). TVA purchased coal by *"spot"*, *"term"* and *"negotiated"* contracts. *Spot* and *term* purchases are made after advertising for bids with awards to low bidders. *Spot* contracts call for delivery within thirty days. TVA's *spot* program is designed to gear its coal receipts to consumption, the amount purchased being established by the difference in anticipated receipts from *term* contracts and expected consumption (R. 824a, 826a, 830a). TVA awards are determined on *delivered* BTU cost, and this computation is made on consideration of tonnage price, transportation costs and by BTU content of the coal involved (R. 790-92a, 836a). TVA divided its plants into "Eastern" and "Western" Sections. Transportation charges were such that coal suppliers to TVA were competitive in either TVA's Eastern or Western Section, but not in both. Phillips sold its coal in TVA's Eastern Section.

> *TVA Coal Prices in 1956 Resulted From Extraordinary Circumstances. The Decline From This Price Resulted From Forces Unrelated To The Alleged Conspiracy.*

Phillips received a higher price for coal on the spot market in early 1956, particularly at TVA's Kingston Steam Plant. The price declined over the period 1956-58 (R. 1644a). The Sixth Circuit found this decline resulted from bids made by alleged conspirators.

The evidence shows, however, the 1956 price was the highest price on the TVA system in the five-year period 1954 through 1958 (R. 1659a). The price pattern is graphically portrayed on a chart attached hereto as Appendix C (A. 29a).

The 1956 price peak resulted from unusual circumstances. TVA demand for coal was at an all-time high (R. 1659a); nationwide demand was at a post-Korean war high (R. 1724a). Moreover, at the time of the 1956 price peak "emergency conditions" existed at the Kingston plant. Coal stock-piles fell to a 7-day supply. As a result TVA bought heavily on the spot market, buying at one point all spot coal offered at a price far above the 1955 average. TVA, to further relieve the situation, transferred coal to Kingston from normally uncompetitive western sources (R. 790a, 1327a) and negotiated contracts for additional coal (R. 811a).

TVA's total purchases of coal in 1957 declined by 1,000,000 tons and by another 2,000,000 tons in 1958 (R. 1729a). This was the period of the price decline the Sixth Circuit found resulted from the conspiracy. *TVA, in its 1957 Annual Report, took a sharply different view* (R. 1509a, 1511, 1512a), observing its decrease in coal purchases "resulted from the completion of the stockpile buildup plus the favorable hydroelectric supply situation" (R. 1509a). In its 1958 Annual Report, TVA attributed the lower cost of coal to "business recession, several freight rate reductions, reduced purchases and increased mechanization of mines" (R. 1511-12a).[21]

During the same three-year period *national production* of bituminous coal *fell* from 500,000,000 tons in 1956 to 410,000,000 tons in 1958, the lowest level of production in twenty years, save for one year (R. 1724a). *Total Tennessee production* fell from 8,847,000 tons in 1956 to 6,784,000 tons in 1958 (R. 1725a). The sale of Tennessee coal to TVA similarly fell from 6,900,000 in 1956 to 4,763,000 tons in 1958 (R. 811a, 813a). *The intensification of competitive pressure indicated by this slack in demand for coal was heightened*

[21] TVA's 1958 Annual Report records "TVA continued to encourage greater mechanization in mines and improvements of mining methods" (R. 1512a).

by an influx in 1956 of coal producers in the area.[22] Though the Sixth Circuit emphasized the price decline, it discussed neither the reasons for the 1956 price peak nor the economic factors, detailed herein, causing the decline; instead it inferred the decline was the result of the conspiracy.

Bids Of The Alleged Consiprators On The TVA Market.

The Sixth Circuit found that "About the end of 1956 the price of coal on the spot market began to decline, which continued through 1957 and 1958 . . . During 1956, 1957 and 1958 Pittsburgh-Midway Coal Co., Peabody Coal Co., West Kentucky Coal Co. and Nashville Coal Co. . . . made large offerings of tonnage on the TVA market at generally declining prices" (R. 1760).

No evidence supports the inference of UMW responsibility for the pricing practices of any of these companies or the inference that prices to TVA by these companies resulted from agreement.

But apart from this, the Sixth Circuit's conclusion is erroneous. The price decline, as is shown on the chart comprising Appendix C, started *in* May, 1956, and not "about the end of 1956". By the end of 1956, the price of coal at Kingston was nearly four cents per million BTU's below its peak. Its low in 1957 and 1958 was only one and one-half cents below the 1956 low. Significantly, during the 1956 decline, neither Pittsburgh-Midway, West Kentucky nor Nashville sold a ton of coal on the TVA spot market

---

[22] The number and classes of producers (based on annual production) in Tennessee during the years in question are as follows (R. 1720a):

	These Amounts in Tons:						
Year	Class 1 500,000 and over	Class 2 200,000 to 500,000	Class 3 100,000 to 200,000	Class 4 50,000 to 100,000	Class 5 10,000 to 50,000	Class 6 under 10,000	Total
1955	0	5	9	14	90	386	504
1956	1	7	9	21	107	388	533
1957	0	7	11	14	83	376	491
1958	0	5	2	20	97	376	500

and Peabody sold only 32,000 tons during that same period —32,000 tons on a 4,000,000-ton annual market (R. 1647-55a). Pittsburg-Midway and Peabody sales to the spot market in 1957 and 1958 continued light (R. 1647-51a).

West Kentucky sales were singled out by the Sixth Circuit (R. 1760) with the condemnation that "the dumping" thereof on the TVA spot market "materially and adversely affected" Phillips' operations in that market. Analysis of West Kentucky bids do not support the Sixth Circuit's charge.

In 1956—the year when the price decline started—none of West Kentucky's bids, which were above the market, resulted in an award (Ex. 102, R. 1652-55a). From September, 1957 through March, 1958, of twenty-two bids made by West Kentucky for its Uniontown Mine where a substantial quantity of West Kentucky coal sold to TVA was mined, it received only six awards (Ex. 169, R. 1730a). All of these successful bids were to TVA's Shawnee plant which was favorably situated to West Kentucky for barge shipment (R. 1389a, 1713a). An analysis of the bids and the awards made (Ex. 169, R. 1730a) show that on the declining spot market West Kentucky *followed but did not lead the market* and that on the few occasions it was successful as a bidder it was the highest, or nearly so, of the successful bidders.

Moreover, West Kentucky bids on the TVA spot market were a matter of business judgment lawfully motivated by a need for sales. West Kentucky sales followed termination of two contracts, both of which, because of their termination, are significant in this case. One was a three-year TVA term contract for 350,000 tons a year which expired in June, 1957 (R. 1386-87a, 1398a). The other was a twenty-year total requirements contract with Tampa Electric Company providing for at least 450,000 tons per year. In April, 1957, West Kentucky advised Tampa it would not perform the contract because, in West Kentucky's view, it was void under the antitrust laws (R. 914-15a, 1436a, 1438a).[23]

---

[23] See *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320 (1961).

These terminations intensified West Kentucky's need for a market. In 1957 and 1958 West Kentucky sales to TVA were far below its previous sales.[24]

West Kentucky's Vice President in charge of sales to TVA testified that spot bids were made "to relieve the situation at our Uniontown Mine . . . until such time as I could obtain a term contract" (R. 1404a); that bids were his responsibility and he formulated them with only occasional discussion with other West Kentucky officials; and that he had never discussed bids either with other companies or with UMW. This testimony is undisputed. It is confirmed by five witnesses (R. 1139a, 1189a, 1254a, 1339a, 1435a).

Evidence that the spot market decline substantially occurred prior to significant West Kentucky sales thereon and of West Kentucky's need for that market was not discussed by the Sixth Circuit.

C. THE ISSUE OF DAMAGES: THE JURY'S AWARD AND THE SIXTH CIRCUIT'S OPINION PERTAINING THERETO.

The Sixth Circuit approved Phillips' contention that but for the conspiracy it would have received *the national average price for coal* during the years 1956-58 and not the price it received, affirming the jury award for $90,000, which the trial court trebled in entering judgment (R. 84a). The award is predicated upon the following figures showing Phillips' TVA shipments during 1956-58 and Phillips' receipts therefor as compared with the national average:

[24]

Year	TVA Coal Receipts	West Kentucky (and Nashville Shipments)	Type Sales	Percent of TVA Market
1954	10,196,290	978,824		9.6
1955	14,377,000	1,298,923		9.0
1956	20,354,000	1,511,987	All term.	7.4
1957	19,581,879	963,384	Includes 313,000 spot	4.9
1958	17,033,466	1,094,396	198,000 spot	6.4

Year	Phillips' TVA Shipments	Phillips' Receipts	National Average
1956	14,128.70 tons	$3.92	$4.82
1957	19,717.67	3.20 1/3	5.08
1958	25,603.03	3.13 1/3	4.86

The "national average price" for coal, the evidence shows, contemplated the price received for *all* types of coal: underground and strip, premium and mine run, metallurgical, coke, industrial, commercial stoker, utility, etc. It contemplated, too, the average price on *all* markets, and not just the market relevant to Phillips.

1. The Evidence Is Positive That the National Average Price of Coal Does Not Afford a Valid Basis of Comparison With Phillips' TVA Coal

(a) The National Average Price of All Coal Is Substantially Above the National Average Price of Strip Mine Coal.

Phillips was a strip mine coal operator (R. 175a). Phillips' authority, namely, The Bureau of Mines Mineral Yearbook, to establish the national average price of *all* coal shows this comparison in national average price for all coal and the national average price for strip mine coal (R. 1468-9a, 1733a):

	All Coal	Strip Mine Coal
1956	$4.82	$3.74
1957	5.08	3.89
1958	4.86	3.80

State by state averages for 1957 and 1958, compiled by The Bureau of Mines, show the typical differential in the price of underground mine coal and strip mine coal (R. 1728a) and show, moreover, the differential was not a regional phenomenon.

This alone, UMW insists, invalidates Phillips' theory.[25]

[25] The comparison Phillips would make is further invalidated by average prices for Tennessee. In 1957 and 1958 the average price for Tennessee *underground mine coal* was $4.25 and $3 99. In the same years average Tennessee *strip mine prices* were $3.38 and $3.67 (R. 1728a).

(b) The Utility Market Is the Lowest Coal Market In Price and That Market May Not Be Compared, Price-Wise, With the Average Market for all Coal.

The evidence is uncontradicted that *the utility market for coal is the cheapest* of all major coal markets.[26] Premium coals suitable for domestic use sell for two to three dollars FOB mine higher than utility coals; commercial stoker coal is at least one dollar above utility coal; metallurgical coal commands at least two or three dollars per ton more than utility coal; and coke and industrial coals also command a greater price than utility coals (R. 1266-67a; 1341-47a).

The national average price of coal necessarily contemplates sales on these differing markets. Percentage-wise, during the years in question, coal was sold to these markets as follows (R. 1715a):

Year	Industrial	Coke	Utility	Retail	Railroad
1956	25.7%	24.5%	35.8%	11.2%	2.8%
1957	25.2	26.1	38.1	8.6	2.0
1958	26.8	21.0	42.0	9.2	1.0

Tennessee does not afford a market for quality coals comparable to the national market. During the years in question from 70.2 to 78 per cent of Tennessee coal was sold to TVA's utility coal market (R. 813a).

These facts demonstrate the legal inefficacy of comparing the average price of all coals with the average price Phillips received for strip mine coal sold only on the utility market.

---

[26] There is also a difference in utilities. TVA plants are equipped to burn the most impure coal. Some utilities burn coal of 10% ash while TVA can burn coal with 16% ash. TVA specifications have resulted in making large quantities of coal merchantable, thus the widest possible range of coals compete in the TVA market (R. 818a, 1342a).

(c) Phillips Sold Coal on TVA's Lower Priced Spot Market and Not Its Higher Priced Term Market. This Further Invalidates Comparison of Phillips' Price With the National Average Price.

Prices on TVA's *spot* market average one and a half to two cents per million BTU's [or about 50 cents per ton (R. 1396a)] less than TVA's *term* market. *The spot market,* in other words, *was the lowest part of the low-priced utility market.* The difference in price reflects the responsibility required under term contracts (R. 1334a). That Phillips received less for his coal on the TVA spot market than the national average price of coal finds obvious explanation in this fact, in positive conflict with the Sixth Circuit's affirmance of the jury's verdict.

(d) Phillips Sold Premium Coal Separately From Utility Coal But Excluded the Price Received Therefor in Comparing Its Average With the National Average.

An *additional* and *unanswerable* reason for voiding the comparison the jury accepted is found in the fact that Phillips removed its premium (block and egg) coal from its production and sold this premium coal separately from its utility coal for prices well above the prices received for its utility coal, *but did not include receipts for its premium coal in the "Phillips average price" it compared with the national average price of all* coals (R. 207-8a).

Exhibit 173 (R. 1733a) makes the same comparison but takes into account all grades of coal mined by Phillips:

	Phillips' Average Utility Coal	Phillips' Average All Coal[27]	National Average All Strip Mine Coal
1955	$3.35	$3.93	$3.48
1956	3.92	4.59	3.74
1957	3.20 1/3	3.63 1/3	3.89
1958	3.13 1/3	3.72	3.80

[27] All coal mined by Phillips—premium and utility—was mined by the strip mine method (R. 175a).

These figures not only show an improvement in the average price of Phillips' coal when all Phillips' coal and not just its utility coal is considered but they also show, during the material period, that Phillips' average price for all coal was either above or substantially equivalent to the national average price for all strip mine coal.

The Sixth Circuit agreed (R. 1762) these factors could have the effect of reducing the difference between the national average price of all coals and Phillips' average price on the TVA spot market for steam coal; but, argued the Sixth Circuit, "in the light of other factors involved, . . . we do not think the comparison so unfair as to reject its consideration by the jury in its entirety in determining what, if any, damage Phillips suffered by reason of the conspiracy" (R. 1762). Discussion demonstrating the fallacy of the Sixth Circuit's arguments as to such factors appears herein, *post*, pp. 69-72.

D. THE ISSUE RELATING TO THE ADMISSION OF EVIDENCE AND JURY INSTRUCTIONS CONCERNING UMW'S EFFORTS TO OBTAIN A WALSH-HEALEY MINIMUM WAGE DETERMINATION AND TO HAVE TVA COMPLY THEREWITH

Both the trial court and the Sixth Circuit rejected UMW's complaint (R. 453-8a) that admission of evidence concerning the *Walsh-Healey* wage determinations, public hearings thereon, the issuance of an order setting such a wage rate, and Secretary of Labor Mitchell's statements at a UMW Convention concerning the determination, as well as UMW and operators' efforts to have TVA comply with the wage rate so determined, was prejudicially erroneous under *Noerr*, as was the trial court's instructing the jury such efforts were valid *unless* they produced a trade restraint (R. 1558a, 1587a) and the refusal to give a UMW proffered instruction omitting the "unless" provision.

SUMMARY OF ARGUMENT

I.

Contrary to this Court's prior decisions, the Sixth Circuit herein accords a federal district court jury the right to infer from, and to bring within *Sherman's* ban, bargaining techniques involving traditional union objectives of improved labor standards established in an industry-wide, multi-employer agreement, resulting from collective bargaining, obedient to directives mandated by a federal district court and under its scrutiny, and accepted as lawful by other federal agencies, and under which 82 per cent of all bituminous coal is produced. Collective bargaining agreements and union activities this Court held not to be within *Sherman's* purview and which are permissive or regulated by *Taft-Hartley's* Sections 7 and 8 may now be used by juries, under the Sixth Circuit's holding, from which to infer a *Sherman* violation.

The Sixth Circuit has so held upon a marginal coal producer's complaint that its existence depends upon a continuing ability to produce coal at labor-costs levels lower than those attained in the industry-wide agreement by reviving the conspiracy concept which federal courts, prior to national labor legislation, used to prevent labor's efforts to improve labor standards. Though in such legislation Congress sought to dissipate this abuse, the Sixth Circuit again sanctions its use. If the Sixth Circuit's pattern is approved, national labor policy will be in the hands of trial courts and juries, using the conspiracy concept to frustrate Congress' purpose in enacting national labor policy legislation, to thwart collective bargaining processes and to render abortive the immunities Congress granted labor in legislation, including the Clayton Act's Section 6, as this Court recognized.

The Sixth Circuit's condemnation of (1) UMW's achievement of high labor costs because UMW knew marginal coal producers could not pay such costs and would force them

out of the industry, and (2) labor-standards provisions stabilizing work opportunities for UMW members conflicts with labor legislation and *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, holding a union's "elimination of price competition based on differences in labor standards" is not the "kind of curtailment of price competition" which *Sherman* prohibits.

Support for *Apex'* conclusion, reiterated in *Allen Bradley* v. *Local Union No. 3*, 325 U.S. 797 and *U. S.* v. *Hutcheson*, 312 U.S. 219, came, as the Court avowed, from labor legislation of the 1930's. *Apex* avowed that, since enactment of *Clayton's* Section 6 immunity to unions, "restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees are not in themselves" violative of *Sherman*.

Legislation, after *Apex* and *Allen Bradley*, shows Congress intended union activities pertaining to collective bargaining and organizing to be sheltered from *Sherman*. *Taft-Hartley* regulated union-management relationships and committed enforcement to the National Labor Relations Board's exclusive competence. For violations for which a union should respond in damages Congress made specific provisions. Amendments in 1959 emphasized Congress' intent to bring employer-employee relations within *Taft-Hartley*, rather than *Sherman*, by rendering unlawful a union's engaging in product boycotts and for employers and unions to agree to engage in such product boycotts.

Apex and *Allen Bradley* reject the Sixth Circuit's conspiracy predicate that union activities attended by violence violate *Sherman*. Also, a *Taft-Hartley* proposal that *Clayton's* Section 6 immunity be withdrawn because of violence was deleted.

The same "potential conflict of rules of law, of remedy, and of administration" which supported this

Court's refusal to permit "two law-enforcing authorities" —state and federal— to deal with matters arguably within the Board's exclusive competence requires that problems relating to collective bargaining subject matters and procedures in *Taft-Hartley* be held to be outside *Sherman's* purview.

The Sixth Circuit ignored *Apex* and kindred cases, *Clayton's* immunity to labor, and *Hutcheson's* command to read *Sherman* and federal labor statutes as "interlacing statutes", which applies to conduct either regulated or sanctioned under *Taft-Hartley's* Sections 7 and 8.

Unless the Sixth Circuit is reversed, collective bargaining on a national scale stands imminently threatened. Every signatory to a multi-employer agreement becomes a suspect for *Sherman* violations by disgruntled marginal employers seeking to operate under standards lower than those achieved in industry-wide bargaining and in time to destroy those standards. The Sixth Circuit's doctrines thwart the public interest of national policy legislation because no labor union could expose itself to criminal, injunctive and monetary penalties imposed by the Sixth Circuit's pattern in discharging its bargaining duties and functions and as directed by government itself. And, for the same reasons, management too will be deterred from engaging in collective bargaining as commanded by national labor policy.

The Sixth Circuit renders collective bargaining illusory. Reversal is both appropriate and required.

II.

The Sixth Circuit's approval of the conspiracy finding based upon efforts of UMW and signatory operators to have the federal Secretary of Labor establish minimum wage rates for the coal industry on government purchases of coal under *Walsh-Healey* and to have

TVA comply with such determinations conflicts with *Eastern Rr. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 355 U.S. 127 (1961), holding that a campaign directed toward obtaining governmental action is "not at all affected by any anticompetitive purpose" thereof and that trade restraints resulting from valid governmental action do not fall within *Sherman's* ambit.

Noerr and *Riss* (D.C. Cir., 299 F. 2d 133) condemn the Sixth Circuit's sanction of the admission of evidence, the trial court's jury charge relating to activities noted and the trial court's refusal to give a UMW proffered instruction based upon the principle enunciated in those cases.

Since the jury's general verdict was based upon an erroneous instruction and improperly admitted evidence having no probative value, *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30, requires a reversal.

The Sixth Circuit approved the trial court's admission of U.S. Secretary of Labor Mitchell's statement at a UMW Convention concerning the minimum wage determinations and his investigating if TVA was evading them, with assurances of correction of violations, if any. Its sanction of the jury's use thereof as a "reasonable deduction" that the wage determinations contributed to Phillips' elimination as a competitor in TVA's spot market purchases placed the federal Secretary of Labor in a co-conspirator status. These rulings offend the principle that actions of public officials under authority of law do not constitute trade restraints interdicted by *Sherman*.

III.

No Sherman Act conspiracy to eliminate or injure small coal producers can be inferred from the facts herein. Neither UMW's collective bargaining achievements, its efforts

to have *Walsh-Healey* minimum-wage standards established and implemented for government purchases, nor violence attending union organizing activities, singly or collectively, constitute a predicate for a conspiracy finding or a jury inference of conspiracy. The Sixth Circuit's contrary conclusion conflicts with *Norris-LaGuardia's* requirement that union liability be based upon "clear proof". The trial court expressed doubt as to the evidence's sufficiency. The Sixth Circuit based its conclusion on evidence different from that relied on by the district court. The lower courts themselves demonstrate the lack of clear proof.

The insufficiency of proof becomes more apparent by the undisputed evidence which the Sixth Circuit, to reach its conclusion, had to ignore. No evidence in the case overcomes the thrust of the undisputed facts ignored by the Sixth Circuit.

The Sixth Circuit's use of UMW investments in West Kentucky as a basis for jury conclusion that UMW's purpose was to have a material, if not the dominant, voice in determining that company's policies and operations is challenged by undisputed evidence and lacks any evidentiary support whatever.

The charged conspiracy allegedly occurred in 1950, prior to UMW's acquistion of any West Kentucky stock and its becoming a UMW contract signatory. In purchasing stock UMW sought to expand job opportunities for its members. Six witnesses testify without contradiction that UMW proposed no policies with reference to West Kentucky's management, marketing or pricing policies. Five witnesses confirm testimony of West Kentucky's Vice President that its bids were his responsibiltiy; he formulated them; he never discussed them with UMW. The Sixth Circuit's contrary statement is "speculation run riot", condemned in *Moore* v. *C & O Ry. Co.*, 340 U.S. 573,

which makes clear that disbelief of the six witnesses' testimony "would not supply a want of proof" (p. 576).

Absent conspiratorial conduct, UMW could not be held accountable for West Kentucky's bidding on the TVA market. However, undisputed evidence shows the price decline resulted from forces unrelated to the alleged conspiracy. TVA's Annual Reports sustain this contention. West Kentucky bids on the TVA market were a matter of business judgment, lawfully motivated by a need for sales.

"Speculation cannot supply the place of proof". *Moore v. C & O Ry. Co.*, 340 U.S. 578. No substantial evidence supports the jury's conspiracy finding or the Sixth Circuit's justification therefor. Judgment should be entered for UMW.

IV.

Even were UMW guilty of the conspiracy charged, and it is not, the Sixth Circuit's sanction of the national average price of *all* types of coal in *all* markets as a standard for the assessment of damages is unwarranted under the undisputed evidence. Since the standard used was erroneous, the jury's award of damages was without substantial evidentiary support, was wholly speculative, and should be set aside.

ARGUMENT

I. A LABOR UNION MAY NOT BE HELD A CONSPIRATOR UNDER THE SHERMAN ANTI-TRUST ACT IN ACHIEVING AN INDUSTRY-WIDE, MULTI-EMPLOYER COLLECTIVE BARGAINING AGREEMENT, NEGOTIATED IN ACCORDANCE WITH PROCEDURES ESTABLISHED BY LAW, WHICH RESULTS IN STABILIZING WAGE RATES AND WORKING CONDITIONS AT LEVELS ABOVE THE ABILITY OF SOME EMPLOYERS TO PAY.

Section 1 of the Sherman Anti-Trust Act (15 USCA 1) provides, in part, that:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is . . . illegal".[28]

Under *Clayton's* Section 4 (15 USCA 15), "Any person . . . injured in his business or property", by reason of the foregoing "may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee" .

However, Section 6 of the Clayton Act (15 USCA 17) provides:

> "*The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor,* agricultural, or horticultural organizations, *instituted for the purposes of mutual help,* and not having capital stock or conducted for profit, *or to forbid or restrain individual members of*

---

[28] Section 2 thereof (15 USCA 2) declares that:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . .".

Likewise, Section 3 of the Sherman Act (15 USCA 3) also makes such contracts, combination in form of trust or otherwise, or conspiracy illegal.

such organizations, from lawfully carrying out the legitimate objects thereof; *nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.*"

The Sixth Circuit, as noted (pp. 14-18), bottomed its approval of the jury's verdict that UMW engaged in a conspiracy outside and beyond the *Sherman* exemption to labor unions upon (a) UMW's knowledge that higher wage costs would drive "weaker companies" from the industry, (b) violence attending union organizing, and (c) the "land-lease" and "protective wage" clauses.

The Sixth Circuit's conclusion, approving the jury finding of a conspiracy against UMW, stands for the proposition that a union, acting with employers as it must in the discharge of its collective bargaining function, restrains trade by exercising collective employee rights protected or regulated by *Taft-Hartley's* Sections 7 and 8 (29 USCA 157, 158) when, in consequence of the exercise of those rights, certain employers are excluded from an industry engaged in commerce. The Sixth Circuit's errors are manifest from the following:

A. This Court Has Recognized That Collective Bargaining Agreements Embodying Labor Standards Are Not Commercial Restraints Interdicted By Sherman.

Though *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, declared that to some undefined extent labor unions are subject to *Sherman* (p. 488), it also professed that restraints on the sale of employees' services are not commercial restraints and do not constitute conspiracies outlawed by *Sherman* (pp. 502-3).

Even *Allen Bradley Co.* v. *Local Union No. 3,* 325 U.S. 797, which brought within *Sherman's* scope union "activities for the purpose of 'employer-help' in controlling markets and prices" (325 U.S. 808), recognized that *Sherman's* policy was "to preserve a competitive business economy"

with "the rights of labor to organize to better its conditions through the agency of collective bargaining". (325 U.S. 806), and that when a union acts alone in its own self-interest for betterment of its members, independent of nonlabor groups intent upon violating anti-monopoly laws, its acts are sheltered from penalties imposed under *Sherman.*

1. UMW's Knowledge That Marginal Coal Producers Could Not Pay Higher Labor Costs Does Not Bring UMW's Achievement Thereof in Its Collective Bargaining Agreement Within Sherman's Interdictions.

The Sixth Circuit's declaration that UMW knowledge "that the weaker companies could not meet the increased costs of wages and welfare fund payments required by the successive wage agreements, and that the increased costs in the successive wage agreements were geared to the abilities of the major coal companies to mechanize and not have their profits affected by the increased costs", as a basis for upholding the jury's conspiracy verdict against UMW, is challenged by pronouncements in *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U.S. 184, and *Apex.*

The primary purpose of organizing people into trade unions is to eliminate wage competition. Professing "Union was essential to give laborers opportunity to deal on equality with their employer", this Court in *American Steel Foundries* sanctioned its extension beyond one employer, saying, to render a union "at all effective, employees must make their combination extend beyond one shop" and continuing, "It is helpful to have as many as may be in the same trade . . . united, because, in the com-

petition between employers, they are bound to be affected by the standard of wages of their trade" (257 U.S. 209).

Consistent with UMW's historical policy of equal pay for equal services, and mirroring its goal that equal service or specially skilled services in a coal mine regardless of where a miner performs his service entitles him to equal pay (R. 414a), the 1950 Agreement and its amendments provided the terms under which miners producing 82 per cent of all bituminous coal mined in this country and Canada would work. Its industry-wide, multi-employer basis finds approval in *NLRB* v. *Truck Drivers Local Union*, 353 U.S. 87, 95, in which there is judicial recognition of Congress' refusal to interfere with multi-employer bargaining because of its being "a vital factor in the effectuation of the national policy of promoting labor peace to strengthen collective bargaining." UMW was not concerned whether the successive wage increases were "designed to meet the increased ability" of large companies to pay them (R. 401a). UMW sought to obtain "a compensatory rate for" services in an ultrahazardous industry, affected with much unemployment; UMW was representing the interest of UMW members and was not concerned with what operators would do as affecting those questions over which the UMW had no jurisdiction" (R. 401a, 404a).

Apex rejected restraints on the sale of employees' services as violative of *Sherman* "however much they curtail the competition among employees" (310 U.S. 503). Though recognizing that "successful union activity, as for example, consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences

in labor standards", nonetheless this Court continued in *Apex* (310 U.S. 503-4):

> *"Since in order to render a labor combination effective it must eliminate the competition from non-union made goods . . . an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act."*

But, what *Apex* avows to be permissive under *Sherman*, the Sixth Circuit condemns, averring UMW knowledge that marginal producers would be forced out of the industry because of inability to meet increased labor costs supplied requisite proof of the alleged conspiracy. Singularly, while *Apex's* holding is expressly made accommodative to the immunity given labor unions under *Clayton's* Section 6 (15 USCA 17) [310 U.S. 503], the Sixth Circuit ignores both *Apex* and the immunity[30] in considering the instant point. This Court continued to recognize in *Allen Bradley* that restraints pertaining to "labor standards" are entirely free from *Sherman's* proscriptions: "We may assume that" collective agreements "standing alone would not have violated the Sherman Act" (325 U.S. 809).

Since labor costs are a significant element of total costs in virtually all industries, it is necessarily foreseeable that elimination of competition in wages will reduce the area of costs within which competition exists and will have a tendency to eliminate from an industry those competitors who, for one reason or another, are dependent for survival on preservation of a more favorable employment cost struc-

---

[30] The only reference the Sixth Circuit made in its opinion to the immunity provisions is in its statement that since *Allen Bradley* and other cases, the exemption exists only where a union acts alone in furtherance of its own purposes, but not where it combines with a nonlabor group to restrain competition in or monopolize marketing of goods in interstate commerce (R. 1750).

ture than their competitors. *Apex* took cognizance of these economic facts and held that such indirect restraint was not within *Sherman's* purview.

In obtaining for its members the 1950 Agreement and its successive amendments UMW was implementing federal labor policy enunciated in the Taft-Hartley Act. Though *Sherman* condemns a conspiracy in order to maintain freedom of commerce, *Taft-Hartley* likewise seeks "to eliminate the causes of certain substantial obstructions to the free flow of commerce" (29 USCA 151), and Section 6 of the Clayton Act expressly negates that labor organizations are illegal combinations or conspiracies in restraint of trade under *Sherman* and rejects judicial action which forbids union legitimate objects (A. 3a, 7-9a).

UMW did no more than pursue with historical vigor its legitimate aims as a labor union. In pressing its demands, UMW receded from bargaining positions, at times as required by judicial decree; and always, in light of industrial realities, when it appeared advantageous to UMW's membership to do so. With the right to terminate the national agreement on sixty days' notice (R. 1741a), it has retained its freedom and its willingness to strike the operators in support of bargaining demands.

Throughout the 1950's UMW pursued its traditional policy of achieving the highest level of wages and benefits for its members which could be paid by the industry without unreasonable economic attrition. Yet, UMW could implement its high wage policy only by collective bargaining and, ultimately, by agreement with operators.

2. The "Land-lease" and "Protective Wage" Clauses Are Lawful Subjects of Collective Bargaining.

Similarly, the Sixth Circuit's use of the labor contracts "land-lease" and "protective wage" clauses as circumstantial evidence warranting jury inference of a *Sherman* conspiracy is legally unjustified. Evidence pertaining to

these clauses has been detailed (*ante*, pp. 16-18). Both, the unassailed evidence shows, sought to protect wage standards and working conditions and opportunities of UMW members (R. 1108-9a, 448a). Both were insisted upon by UMW and resisted by operator signatories (R. 1111a, 1201a, 1205-6a).

The "land-lease" clause does not prohibit signatory operators from leasing their lands to non-signatories. Its sole restriction is that coal lands of signatories not be leased "as a subterfuge for the purpose of avoiding the application of this agreement". It sought to prevent operators from repudiating (R. 1202a) and "chiseling away at the agreement" by subleasing to irresponsible persons unable to meet wage obligations due coal miners (R. 1108a). Even had the "subterfuge" sentence been omitted, federal decisional law would impose an "implied covenant of good faith and fair dealing" and preclude leasing of mining operations to evade the performance of obligations under a collective agreement. *United Steelworkers, Local 4264* v. *New Park Mining Co.*, 10 Cir., 273 F. 2d 352, 356 (1959); cf. *Manners* v. *Morosco*, 252 U.S. 317. The fact that subcontracting is a bargainable issue [*Town & Country Mfg. Co.* v. *NLRB*, 5 Cir., 316 F. 2d 846 (1963); *Fibreboard Paper Prod. Corp.*, 138 NLRB 550, 551 (1962), enforced D.C. Cir., 322 F. 2d 411 (1963), cert. granted 375 U.S. 963] emphasizes the Sixth Circuit's error in employing the subject clause as justifying the jury to infer that UMW conspired with coal operators in violation of *Sherman*.

So, too, as to the "protective wage" clause, which sought, as the clause itself reads, "to provide the maximum possible continuity and stability of employment under the" agreement's provisions and by which signatory operators agreed their mines "shall be so operated as not to debase or lower" the wages and working conditions established in the UMW contract and by which operators agreed not to buy, process, sell, produce or handle coal produced at

standards lower than the UMW contract provided. Although the alleged conspiracy, which the Sixth Circuit held could be inferred from the "protective wage" clause, arose with the 1950 Agreement's execution, pre-existing contract provisions evidence UMW's historical concern with the coal industry's problems to which the clause is directed. Specific contract provisions antedating 1950—the beginning of the alleged conspiracy—expressly dealt with "subcontracting" as such and a "protective wage" clause as such.[31] As noted above, labor standard clauses by which a bargaining agent seeks to maximize employment for employees are mandatory bargaining subjects [*Town & Country Mfg. Co.*, (316 F. 2d 846) and *Fibreboard* (322 F. 2d 411)].

Since both the "land-lease" and "protective wage" clauses fall within the scope of collective bargaining, this Court's avowal in *Local 24, Teamsters* v. *Oliver*, 358 U.S. 283 (1959), that inclusion in collective bargaining agreements of matters within the scope of mandatory collective bargaining may not be stamped with illegality under antitrust laws becomes cogent. Though *Oliver's* concern was whether a *state's* antitrust law could prevent parties to a labor agreement from carrying out their contractual obligations (358 U.S. 295), *Oliver's* rationale is equally apposite herein where a *Sherman* conspiracy finding is said to be warranted solely because a collective bargaining agreement contains matter which both federal courts and NLRB have professed to be mandatory subjects of collective bargaining.

In *Oliver*, this Court stated, "Within the area in which collective bargaining was required, Congress was not con-

---

[31] The Southern Wage Agreement, effective April 1, 1941 contained a "Protective Wage Clause". The 1941 Agreement which is Exhibit 77 in the trial court record was not printed and does not appear in the certified appendix record herein.

cerned with the substantive terms upon which the parties agreed", that Taft-Hartley's purposes "are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves" and "To allow the application of the . . . antitrust law here would wholly defeat the full realization of the congressional purpose" and "frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving . . ." (358 U.S. 295-96). Moreover, to stamp such bargaining as conspiratorial under *Sherman* poignantly demonstrates that the right of collective bargaining is only illusory and "the road to prison" which *U. S.* v. *Hutcheson*, 312 U.S. 219, 234-35, rejects. The Sixth Circuit's warrant for the jury inference by use of the two contract clauses offends this Court's statement that a federal law is not "violated by the union acting precisely in accordance" with Congress' purpose "to obtain stability . . . in employment for workers" (*The Order of Rr. Telegraphers* v. *Chicago, etc. R. Co.*, 362 U.S. 330, 339-40).

3. Federal Legislation, Both Before and Following Apex and Allen Bradley, Shows Congress' Intent That Union Activities Pertaining to Organizing and Collective Bargaining Are Not to be Regulated by Sherman.

In *Apex's* holding that "elimination of price competition based on differences in labor standards" was not prohibited conduct under *Sherman*, this Court found support in, and took pains to state, that pre-*Apex* labor legislation reflecting national labor policy, such as Norris-LaGuardia, Wagner, Walsh-Healey and the Fair Labor Standards Acts, recognized "that combinations of workers eliminating competition among themselves and restricting competition among their employers based on wage cutting are not contrary to the public policy". *Apex* (310 U.S. 504, fn. 24). Indeed, the Fair Labor Standards Act

condemns "labor conditions detrimental to the maintenance of the minimum standard of living . . ." (29 USCA 202).

Notably, it was not until 1947—after *Apex* and *Allen Bradley*—that Congress undertook to regulate union conduct in relation to organizing activities and collective bargaining procedures. In its enactment, in 1947, of the Labor Management Relations Act, 1947 (called "Taft-Hartley"), one of its avowed purposes was to regulate union conduct which prevented "the free flow of goods . . . through strikes and other forms of industrial unrest or through concerted activities . . ." 29 USCA 151.[32] Significantly, its declaration of policy included recognition of the need for collective bargaining action because, in its absence, there exists inequality of bargaining power causing commerce to be burdened by "depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within . . . industries" (29 USCA 151). *Taft-Hartley* prescribed labor-management rules "to promote the full flow of commerce" (29 USCA 141). Enforcement of this code regulating union activities was committed to the National Labor Relations Board; and for activities for which Congress determined a union should respond in damages, it made specific provisions in Sections 301 and 303 of that Act (29 USCA 185, 187). In this enactment Congress affirmed *Apex'* judicial declaration of its purpose not to regulate union behavior attendant with union organizing and collective bargaining under *Sherman*.[33]

The congressional intent is emphasized by *Taft-Hartley's* Section 8(b)(4) [29 USCA 158(b)(4)] making it unlawful for a union to engage in product boycotts and Section 8(e) [29 USCA 158(e)] making it unlawful for both employers

---

[32] The pertinent provisions of 29 USCA 141 and 151 are to be found in Appendix A hereto, pp. 7-9a.

[33] Congressional intent is further reflected in *Taft-Hartley's* legislative history discussed herein, *post*, p. 50.

and union to agree to engage in such product boycotts, as enacted in 1959.[34] See *Texas Millinery Co.* v. *United Hatters*, DC, N.D. Texas, March 24, 1964, 55 LRRM 2863, declaring that 26 USCA 158(e) clearly shows congressional intent to exclude union-induced agreements resulting in an employer's boycott of non-union products from *Sherman's* scope.

Oliver (358 U.S. 283) refused to permit federally-regulated collective agreements to be frustrated by state antitrust legislation. Where federal legislation, including that above noted, mandates parties "to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife" (*Oliver*, 358 U.S. 295) and has placed regulation thereof in the hands of a congressionally-selected administrative agency, namely, the National Labor Relations Board, *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, states that "When an activity is arguably subject to § 7 or § 8 of the Act, . . . *federal courts* must defer to the exclusive competence of the . . . Board." The same "potenial conflict of rules of law, of remedy, and of administration" (359 U.S. 242) which caused this Court to reject the right of "two law-enforcing authorities"—state and federal—to deal with matters arguably within the Board's exclusive competence apply with equal force if problems of wage and hour standardizations which Congress has committed to the Board may be placed before federal courts and juries under *Sherman*. Congress obviously was aware of *Apex'* and Allen Bradley's denial that labor-standards agreements were commercial restraints within *Sherman's* ban when it enacted the labor legislation. This awareness stresses its intent to exclude from *Sherman's* ban those matters of collective bargaining which Congress has regulated in Sections 7 and 8 of *Taft-Hartley*.

---

[34] These statutes are found in Appendix A hereto, pp. 11-13a.

4. Both Apex and Taft-Hartley's Legislative History Reject Violence Attending Organizing Activities as Conduct Falling Within Sherman's Proscriptions.

The Sixth Circuit's holding that "it was *not error* for the jury to consider" evidence that UMW forcibly closed Phillips' operation "as bearing on the overall issue of whether such acts were done as part of a conspiracy to restrain competition or create a monopoly" (R. 1751) is in direct opposition to this Court's pronouncement in *Apex Hosiery Mills, Inc.* v. *Leader*, 310 U.S. 469, and to congressional intent, in passage of the *Taft-Hartley* law regulating labor unions, that behavior of those organizations as it pertains to wages and working conditions is not a matter for antitrust regulation.[35]

Even if the Sixth Circuit were accurate in stating Phillips' operations were forcibly closed, still, the activity there was for the purpose of having Phillips' employees join UMW. The Sixth Circuit's use of violence as a "principal factual aspect" to warrant the jury inference of a conspiracy stands in sharp contrast to this Court's pronouncement in *Apex* that "*Restraints not within the Act, when achieved by peaceful means, are not brought within its sweep merely because, without other differences, they are attended by violence* (p. 513).[36] It is assailable too by *Hutcheson's* holding that "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit . . . are not to be distinguished by any

---

[35] This is equally applicable to the Sixth Circuit's statements (R. 1756) that "The campaign to impose the wage contracts upon the smaller nonunion mines was intense after 1950" and "In areas of strong resistence mobs and terrorism were used."

[36] The Sixth Circuit's views are also disharmonious with the charge given the jury by the trial court that "if acts of violence are the only things . . . in this record, then such acts would not be a violation of the anti-trust laws" (R. 122a) and that "Acts of violence in and of themselves are not material to the determination of the question of whether the anti-trust laws were violated" (R. 1557a).

judgment regarding . . . the rightness or wrongness . . . of the end of which the particular union activities are the means" (312 U.S. 232).

Moreover, *Taft-Hartley's* legislative history militates against the Sixth Circuit. When the House of Representatives first passed H.R. 3020 it contained a proposal to amend the Clayton Act so as to withdraw from labor's immunity under Section 6 union activities involving force and violence;[37] but, as the House Conference Report stated, the provision was omitted from the conference agreement.[38]

5. The Sixth Circuit's Opinion Conflicts With Clayton's Immunity Provision. It Ignores Hutcheson's Requirement That Sherman and Other Federal Labor Statutes be Considered as "Interlacing Statutes".

The antitrust immunity of a union under *Clayton's* Section 6 exists for the precise purpose of preventing juries and courts alike from inferring the existence of a conspiracy on a union's part to restrain trade from sanctioned conduct. Otherwise, as the Sixth Circuit has achieved in the instant case, lawful exercise of collective employee rights would be converted into a conspiracy to restrain trade by imputing a purpose to obtain those effects on inefficient employers which are but the by-product of UMW's pursuit of its members' interests. In short, the problem is one of dual effect. When a union secures higher wages for its members, it benefits its members but may injure some employers. If its conduct can be adjudged in light of the effect on the injured employers, a union's immunity from *Sherman* is wholly illusory. So long as a union acts as agent of employees exercising collective rights guaranteed by *Taft-Hartley's* Section 7, it is not subject to liability under *Sherman* whatever the foreseeable economic consequences of its act.

---

[37] Legislative History of the Labor Management Relations Act, 1947 (U.S. Government Printing Office, 1948), Vol. 1, pp. 158, 204-7, 219-21.

[38] Ibid, p. 569.

Indeed, *Allen Bradley* (325 U.S. 806) proclaims that conduct permitted by federal statutes "is not to be declared a violation of federal law".[39] *U. S.* v. *Hutcheson,* 312 U.S. 219, 232, which concerned *Norris-LaGuardia* and *Clayton's* Section 20 and mandated that allowable conduct is freed of a *Sherman* taint (p. 236), teaches that whether trade union conduct constitutes a *Sherman* violation depends upon reading *Sherman* and other federal labor statutes as "interlacing statutes". This is precisely what the Sixth Circuit failed to do. Indeed, the current vitality of *Norris-LaGuardia* and *Clayton* as ensuring that antitrust laws cannot be used to stifle legitimate labor union activities was recently acknowledged in *Los Angeles Meat, etc. Drivers Union* v. *U. S.,* 371 U.S. 94, 103.[40]

Hutcheson's command is equally apposite to conduct which finds sanction under *Taft-Hartley's* Section 7, and thus renders unavailable the use of an inference of conspiracy from permissible activity.

As noted (*ante,* pp. 46-49), since each of the factors before the jury falls within the scope of activities permitted or regulated by *Taft-Hartley's* Sections 7 and 8, clearly, no inference of conspiratorial conduct may be derived therefrom:

---

[39] More recently, Mr. Justice Black declared, "It would stretch credulity too far to say that the Railway Labor Act, designed to protect . . . workers, was somehow violated by the union acting precisely in accordance with that Act's purpose to obtain stability and permanence in employment for workers." *The Order of Rr. Telegraphers* v. *Chicago, etc. R. Co.,* 362 U.S. 330, 339-40.

[40] Only recently Mr. Justice Goldberg, in a concurrence, in which Mr. Justice Brennan joined, of *Los Angeles Meat Etc. Union, Local 626* v. *U. S.,* 371 U.S. 94, 105, observed that resolution of antitrust violations concerned "consideration of federal labor policy, the scope of the antitrust exemption afforded labor organizations by Sections 6 and 20 of the Clayton Act and the Norris-LaGuardia Act, as interpreted by United States v. Hutcheson, 312 U.S. 219 . . .". Both the Court's opinion by Mr. Justice Stewart and the concurrence challenge the Sixth Circuit's use (R. 1750) of *Los Angeles Meat Union.*

Conclusion on Argument 1.

The full effect then of the Sixth Circuit's holding, if a labor union is to avoid the charge of a *Sherman* conspiracy, is that wages and working conditions in a collective bargaining agreement must be restricted to those which the least efficient and the least successful coal operator in the industry could afford—a result totally inconsonant with UMW and all other legitimate unions' objectives and with national labor policy as provided for in the Clayton, Norris-LaGuardia, Taft-Hartley, as now amended, the Walsh-Healey and Fair Labor Standards Acts and federal decisional law implementing those statutes.

Phillips' own operation demonstrates how fallacious is the Sixth Circuit's views, for both *before and after* UMW organized Phillips' operation and it became a contract signatory, Phillips' wage rate was substantially less than the standard set for the industry by the UMW Agreement (R. 212-13a). Phillips was not a victim of UMW's wage policy but, to the contrary, used this cost advantage to engage in price cutting activities to deprive unionized operations of business. Phillips, with the Sixth Circuit's imprimatur, would reestablish the right to compete upon the basis of substandard wages and working conditions in producing goods for interstate commerce. Yet, federal legislation was enacted to eliminate that very competition.

Under the Sixth Circuit's views, if permitted to stand, parties negotiating a collective agreement will not sit at the bargaining table alone. One or more invisible parties will also attend. He or they will be "smaller", "weaker" or "competing" employers; and before signing, the bargainers must reckon with the fact that these invisible strangers may not be able, or indeed willing, to meet increases in labor benefits and labor costs which the bargaining may produce. Any such unwillingness or inability may become a basis for an alleged *Sherman* violation.

The speciousness of the Sixth Circuit's holding becomes manifest when it is considered that had wages and other labor costs not been increased, mechanization would have continued, since Phillips does not explain how it could be stopped, thus making it mandatory that UMW accept a wage scale below which major coal companies could afford to pay, thereby enriching the large operator at his employees' expense, or alternately, giving small operators a differential and thereby introduce into the coal industry the precise wage competition which it is UMW's purpose, as a union, accordant with federal labor policy, to eliminate.

Attainment of industrial peace in the coal industry has been a cherished federal government objective. Yet, in its accomplishment the Sixth Circuit finds an illegal conspiracy and that which Congress mandated in protection of the public interest has become a litigation trap for UMW.

But the thrust of the Sixth Circuit's opinion does not impinge upon UMW alone. Unless it is reversed, collective bargaining on a national scale stands imminently threatened. Every industry-wide collective bargaining agreement, every labor union and every employer signatory to a multi-employer agreement is rendered a suspect for charges of violating *Sherman* by one or more disgruntled marginal employers seeking to operate at wage levels lower than those achieved in industry-wide bargaining.

To let the decision stand is to invite chaos in the existing pattern of multi-employer national bargaining agreements attained only after a long, bitter and expensive experience and currently prevalent in all major industries in this country. If the Sixth Circuit's doctrine is permitted to stand, the public interest will be thwarted because no labor union could hereafter safely expose itself to criminal, injunctive and monetary penalties imposed upon it by the Sixth Circuit's pattern in discharging the very duties and functions constituting the purpose of its existence and as directed by government itself.

This Court's recognition in *Truck Drivers Local Union* (353 U.S. 87, 95)' of Congress' intent that unions and employers in industry-wide bargaining procedures may act in concert to equalize wages and that "Approximately four million employees are now governed by collective bargaining agreements signed by unions with thousands of employer associations" accentuates the Sixth Circuit's errors. Since judicial authority negates that Union activities pertaining to the accomplishment and implementation of labor standards are restraints outlawed by *Sherman*, the district court should not have permitted the jury, as a matter of law, to consider these matters in determining the conspiracy issue. Because the Sixth Circuit has used them as predicates to support the conspiracy finding, reversal of the Sixth Circuit's judgment is both appropriate and required.

II. WHERE A LABOR UNION AND EMPLOYER SIGNATORIES TO A COLLECTIVE BARGAINING AGREEMENT OBTAIN FROM THE UNITED STATES SECRETARY OF LABOR, UNDER THE WALSH-HEALEY ACT, A MINIMUM WAGE RATE FOR THE BITUMINOUS COAL INDUSTRY ON COAL PURCHASED BY FEDERAL AGENCIES, AND SEEK TO HAVE TVA COMPLY THEREWITH, SUCH UNION ACTIVITY IS NOT CONSPIRATORIAL CONDUCT UNDER THE SHERMAN ANTI-TRUST ACT.

A. The Sixth Circuit's Holding That Efforts to Obtain Minimum Wage Determinations Under the Walsh-Healey Act and to Have TVA Comply Therewith Constituted Evidence From Which the Jury Could Infer a Sherman Conspiracy Conflicts With a Prior Decision of This Court and With a Decision of the District of Columbia Court of Appeals.

A material part of Phillips' theory, discussed at length by the Sixth Circuit (R. 1758-61), relates to Phillips' partial exclusion from the TVA market by reason of the Walsh-Healey Act which requires government contractors on contracts of $10,000 or more to pay "prevailing minimum wages" and empowers the Secretary of Labor to make that wage determination. Efforts of UMW and operators signatory to the National Agreement pertaining to

the TVA market and the minimum wage determinations are discussed, *ante*, pp. 19-21. Phillips' wages were well below *Walsh-Healey's* requirements, and it was thus foreclosed from the TVA markets on contracts of $10,000 or more.

The Sixth Circuit held that "it was a reasonable deduction which the jury could make that the wage determination for the coal industry under the Walsh-Healey Act . . . materially and adversely affected the operations of Phillips in the important TVA market, thus contributing to the elimination of the company as a competitor to the large coal producing companies operating in that area, including the West Kentucky Coal Company, in which the UMW had such a dominant interest" (R. 1760-1). The Sixth Circuit's use of this holding in sustaining the jury verdict conflicts with this Court's prior construction and interpretation of *Sherman* in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and the District of Columbia Court of Appeals' decision in *Assn. of Western Railways* v. *Riss & Co., Inc.*, D.C. Cir., 299 F. 2d 133 (1962).

Walsh-Healey's purpose "is to use the leverage of the Government's immense purchasing power to raise labor standards." *Endicott Johnson Corporation* v. *Perkins*, 317 U.S. 501, 507. *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 128, was positive in asserting Congress' purpose to withdraw government business from those "tending to depress wages . . . and offending fair social standards of employment." Yet the Sixth Circuit's opinion holds that campaigns and actions directed by a union and employers toward obtaining government action may be treated as illegal and serve as a basis for the imposition of judgments for *Sherman* violations. This is precisely what this Court rejected in *Noerr*, saying (365 U.S. 135) that no *Sherman* violation can be predicated upon mere attempts to influence "the passage or enforcement of laws", and that "The

right of the people to inform their representatives in government of their desires with respect to the *passage or enforcement of laws cannot properly be made to depend upon their intent in doing so*" (p. 139).

As in *Noerr*, the issue here is whether the efforts of UMW and certain coal operators to bring about governmental action is proscribed by *Sherman*. The district court reasoned that it was so regulated *where its purpose was to effect a trade restraint* (R. 456-57a). The Sixth Circuit held (R. 1764) that such action was lawful *only where "unaccompanied by a purpose or intent to further a conspiracy to violate a statute."* But this Court's *Noerr* rejects this view by declaring "that, at least insofar as the railroads' campaign was directed toward obtaining governmental action, *its legality was not at all affected by any anticompetitive purpose* it may have had" (365 U.S. 139-40), and that *"where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out"* (p. 136).

Though in *Noerr* the "sole purpose" of the railroads *"in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors"* (365 U.S. 138), the Sixth Circuit would have the issue here turn on whether it was UMW's purpose "to drive small coal operators out of business".

Nor is the Sixth Circuit's decision herein reconcilable with the District of Columbia Court of Appeals' *Riss* case, which, implementing *Noerr*, noted that "joint solicitation of government action with respect to the passage or enforcement of laws does not violate the Sherman Act, *even it its purpose is to destroy competition*" (299 F. 2d 135).

The Sixth Circuit's opinion challenges Congress' objective in enacting the Walsh-Healey Act by permitting persons having contracts with the Government to deal with

"forces tending to depress wages and purchasing power and offending fair social standards of employment". *Perkins* v. *Lukens Steel Co.*, 310 U.S. 128.

B. The Sixth Circuit's Sanction of the Admission of Evidence and the Jury Charge Relating to UMW's Efforts to Obtain Walsh-Healey Determinations and to Have TVA Comply Therewith Conflicts With the Noerr and Riss Cases.

In both the trial court and the Sixth Circuit UMW urged not only that UMW's efforts to obtain a Walsh-Healey minimum wage determination and to have TVA comply therewith constituted lawful activity and did not evidence a conspiracy unlawful under *Sherman* but that there was reversible error in its admission. Similarly it pressed upon both courts that the district court's instruction, charging the jury that such activity was not violative of *Sherman unless* the jury found it was a part of a conspiracy to drive small operators out of business (R. 1558a, 1587a), conflicted with *Noerr;* and consonant with that position UMW offered, but the trial court rejected, UMW's request No. 53, which omitted the "unless" portion of the court's instruction (R. 1582a).[41] The Sixth Circuit rejected UMW's contentions and sanctioned both the admission of the evidence and the trial court's jury charge (R. 1763-64). The discussion under Argument II-A showing that *Noerr* rejects the subject evidence as having no probative worth in establishing a conspiracy is equally apposite to these rulings of approval by the Sixth Circuit.

The Court will recall the jury finding of conspiracy was a general one wherein the jury verdict did not explain which of the factors admitted in evidence it believed supported the verdict. Since the trial court erred under *Noerr* in the admission of evidence and in charging the

[41] In the Sixth Circuit, in addition to *Noerr*, UMW relied also upon *Riss* (299 F. 2d 133).

jury, and because the jury verdict may have rested upon this erroneous theory, "it is unnecessary . . . to explore the legality of the other theories". *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19, wherein (pp. 29-30) approval is given to the rule of *Maryland use of Markley* v. *Baldwin*, 112 U.S. 490, 493, as pertains to a general verdict: "[I]ts generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld . . ." (370 U.S. 30).

C. The Sixth Circuit's Sanction of the Admission of Evidence Placing the Secretary of Labor in the Role of a Co-Conspirator Offends the Rule That the Sherman Act Is Not Applicable to Authorized Actions of Public Officers.

Under Argument II-B it has been shown that *Noerr* and *Riss* reject evidence of UMW's efforts in obtaining *Walsh-Healey* minimum wage determinations and TVA's enforcement of them. This evidence included the convention statement of Secretary of Labor Mitchell concerning these determinations and their enforcement in connection with TVA's coal purchases (*ante*, pp. 20-21).

The Sixth Circuit sanctioned (R. 1759-61) the admission of Mitchell's convention speech, and its use by the jury as a "reasonable deduction" that the wage determination under *Walsh-Healey* contributed to Phillips' elimination as a competitor in TVA's spot market purchases. In so doing, the Sixth Circuit violated the rule enunciated by this and other federal courts that actions of public officials pursuant to and under authority of law do not fall within the trade restraints interdicted by *Sherman*. *Parker* v. *Brown*, 317 U.S. 341, 350; *Stroud* v. *Benson*, DC, E. D. North Carolina, 1957, 155 F. Supp. 482, vacated on other grounds, 4 Cir., 254 F. 2d 448, cert. den. 358 U.S. 817; *Miley* v. *John Hancock Mut. L. Ins. Co.*, D.C., Mass., 1957, 148 F. Supp. 299, aff'd., 1 Cir., 242 F. 2d 758, cert. den. 355 U.S. 828.

Conclusion on Argument II.

Argument II's discussions demonstrate that not only does the evidence pertaining to UMW's efforts in obtaining *Walsh-Healey* minimum wage determinations and in having TVA comply therewith show *permissive, not conspiratorial conduct,* under *Sherman,* but also that errors committed in the admission of evidence and in the jury charge, as well as the refusal to charge the jury as UMW requested, necessitate the award of a new trial.

III. THE SIXTH CIRCUIT HAS ERRONEOUSLY SANCTIONED A JURY CONSPIRACY FINDING WHICH, AS A MATTER OF LAW, HAS NO SUBSTANTIAL EVIDENTIARY PREDICATE

1. UMW's Evidence Denying the Conspiracy Is Unassailed.

Phillips asserted that at the time of the 1950's execution there was an "*express understanding*" between UMW and major coal companies that stabilizing the coal industry's economics "was to be taken care of by eliminating the smaller and weaker companies in great numbers, leaving the industry to the major coal companies alone" (R. 51a). Both UMW's John L. Lewis and John Owens denied the charged conspiracy or any agreement other than the 1950 collective bargaining contract. *No evidence disputes these denials;* yet the Sixth Circuit declared it a jury function to appraise witnesses' credibility, ignoring the principle in *Pennsylvania Rr. Co.* v. *Chamberlain,* 288 U.S. 333, 343, that fact finders are not at liberty, *under guise of passing upon a witness' credibility,* to disregard his testimony when from no reasonable point of view is it open to doubt. Similarly, *Moore* v. *C & O Rr. Co.,* 340 U.S. 573, holds that mere disbelief of witnesses' testimony "would not supply a want of proof" (p. 576). Accord: *Hazel Atlas Glass Co.* v. *NLRB,* 4 Cir., 127 F. 2d 109, 115.

2. The Sixth Circuit Totally Ignored the 1950 Federal Court Proceedings.

Phillips' assertion "the conspiracy charged was formed with the making of the 1950 National . . . Agreement" and the Sixth Circuit's approval of the jury's conspiracy finding must be appraised in light of undisputed evidence detailing the litigation story which attended the 1949-50 negotiations preceding that Agreement which, as the record establishes (R. 1474-93a), discussed *ante*, pp. 5-7, mirrors the at-arms-length dealings between UMW and operators.

It is against solid sense that UMW and operators *ordered by a federal district court* to bargain in good faith would have conspired as Phillips charges when they were under the scrutiny, surveillance and vigilance of a federal court, the President of the United States, a Presidential Board of Inquiry, and NLRB. The litigation was a *cause celebre*. Cast in the role of settling their dispute, UMW and operators were the center objects of an intense vigilance by governmental agencies determined not only that the dispute be settled, but settled accordant with law. Though UMW and operators were the primary actors in the dispute's solution, federal agencies played a dominant role. Dismissal of the variant litigation already noted (*ante*, p. 7) *upon UMW's compliance* fully supports its contention there was no conspiracy. To say the bargaining agreement thus achieved is tainted, is to point tacitly an accusing finger at those federal agencies. Only by stamping the litigation as pretensive and fraudulent could it tenably be said that UMW combined and conspired with non-labor groups to secure a result condemned by *Sherman*.

Whereas, the trial court believed the 1950 court proceedings and the negotiations pursuant thereto, weakened, if not destroyed, Phillips' conspiracy charges (*ante*, p. 13), pertinently the Sixth Circuit's opinion completely avoids them—and understandably so, since they militate against and completely challenge the conspiracy finding.

3. The Sixth Circuit Was Not Warranted in Approving the Jury's Inference of the Conspiracy Based Upon Union Activities Sanctioned by Law or Within the Jurisdiction of the National Labor Relations Board.

The jury verdict was responsive to a *general verdict form*, making it impossibe to know which of the variant factors offered by Phillips the jury believed proved the conspiracy. Nor did the verdict inform UMW with whom it purportedly conspired.

The Court will recall that the Sixth Circuit and the district court based their responsive approvals of the jury verdict upon totally different elements.

The trial court, expressly troubled by UMW's directed verdict motions which it appraised as "serious" and "debatable" (R. 1532-33a), found "substantial evidence" in "*some* proof . . . that Union representatives and large coal operator representatives discussed stabilization of prices at one time or another during the critical periods referred to in the cross-claim" (R. 87a). But UMW evidence denied making any agreement with coal operators to influence pricing of coal (R. 1139a, 1189a, 1224-25a); its evidence denied that "stabilization" related to excessive production (R. 390a), yet affirmatively avowed that talk of a stabilization plan "has no basis of fact" (R. 315a); and even Phillips' own witness George Love (coal operators' representative) testified that stabilization did not revolve around working time (R. 539a).

Significantly, the district court specified no evidence to support its finding. The Sixth Circuit made no reference to the district court's finding, obviously discarding it as a predicate for the conspiracy finding because of UMW's assertion in that appellate court that the district court's finding lacked evidentiary support.

Instead, the Sixth Circuit, as has been shown (*ante*, p. 14), reverted to activities, as circumstantial evidence warranting jury inference of a conspiracy, which, except

for UMW's investments in West Kentucky, are regulated by *Taft-Hartley* or *Walsh-Healey*—and not by *Sherman*.

The fallacy of the Sixth Circuit's use of UMW's knowledge of the effect of increased labor costs on so-called "weaker" companies, of contract provisions concerning labor standards, and of violence has been fully demonstrated (*ante*, pp. 38-54). Likewise, it has been shown (*ante*, pp. 54-59) that the Sixth Circuit's use of UMW's activities in connection with obtaining, under *Walsh-Healey*, minimum wage determinations and having TVA comply therewith is challenged by *Noerr* (365 U.S. 127) and *Riss* (299 F. 2d 133). Even if these cases were inapposite, lawful union objective (protection of UMW membership) distinguished from management's protection of business interests negates a *Sherman* conspiracy.

The Standard of Proof Sanctioned Herein By the Sixth Circuit Conflicts Both With Norris-LaGuardia's Standard of Clear Proof and With Clayton's Immunity Provisions

Norris-LaGuardia's command in its Section 6 is that union liability be shown by *clear proof* (A. 6a). A basic purpose of that section was to insulate labor unions against liability except upon that standard of proof. Congress' intent and will was that union liability should rest upon factual realities rather than suspicion, speculation and conjecture. Yet, the Sixth Circuit's opinion warranting jury inferences concedes the lack of a *clear-proof predicate* for the jury's conspiracy finding.

Moreover, the Sixth Circuit's sanction of the jury's inferring the conspiracy, and particularly in warranting the jury's use of inference from conduct sanctioned or regulated by *Taft-Hartley* or *Walsh Healey*, does not implement Congress' will that union activities be immunized from *Sherman's* proscriptions.

Indeed, where Congress has so immunized union activities as to preclude their falling within the scope of banned

conduct under *Sherman* and has commanded that union liability shall not be imposed except upon clear proof of responsibility, it follows that so long as charged conduct proves no more than the achievement of lawful union objectives, whether within sanctioned conduct under Taft-Hartley or Walsh-Healey, or activities juridically declared not to fall within *Sherman's* ambit, or, in the event of violence, then not within *Sherman's* prohibitions, it is wholly impermissible for a jury to infer therefrom a *Sherman* violation. To the contrary, any inference derivative therefrom must be one of legality.

4. The Sixth Circuit's Use of UMW's Investments in West Kentucky and That Company's TVA Bids as Circumstantial Evidence of the Conspiracy is Unsupported by, and is Contrary to, Undisputed Evidence.

The Sixth Circuit's employment of UMW's investments in stock ownership of West Kentucky and loans to other stockholders secured by shares of that company's common stock as a basis "for the jury to conclude from these facts that it was" UMW's purpose "to have a very material voice, if not the dominant one, in determining the policies and operations" of West Kentucky and Nashville Coal, its subsidiary (R. 1757-58), totally lacks any evidentiary support and is wholly contrary to the undisputed evidence.

While the Sixth Circuit sanctioned the use of UMW's investments in West Kentucky as a warranted predicate for the jury's conspiracy finding, it is notable that the conspiracy charged allegedly occurred in 1950 *at a time prior to any acquisition of stock by UMW in West Kentucky and when West Kentucky was not a signatory to the UMW contract and therefore could not have been a participant in the alleged conspiracy.*

Moreover, nothing disputes UMW testimony that its investments in West Kentucky sought the "wider . . . and the greater employment of" UMW members (R. 1124a). Though UMW achieved its collective agreement with West

Kentucky only after UMW purchased West Kentucky stock, the undisputed evidence is that no pressure was had upon the company to force the agreement's execution. As the record shows (R. 1444a), it was executed by West Kentucky only upon evidence that its employees had, in writing, selected UMW as bargaining agent. Thus, UMW pressed for an agreement as national labor policy permits and protects. West Kentucky's execution of the labor agreement accorded too with such policy. In so doing, both UMW and West Kentucky showed respect for the law, from which no inference of a conspiracy could be warranted.

Six witnesses testifying *without contradiction* that UMW made no suggestions and proposed no policies with reference either to the company's management, marketing or pricing policies (R. 492a, 585a, 1127a, 1128a, 1211a, 1404a, 1406a, 1445a) challenge the Sixth Circuit's unwarranted and unsupported assertion that UMW's purpose for its investments in West Kentucky was to have "a very material voice, if not the dominant one", which is wholly without evidentiary support. Indeed, since the Sixth Circuit has coupled the "dominant interest" in West Kentucky which it attributed to UMW with its unwarranted assertion of West Kentucky's dumping of coal on the TVA spot market to warrant the inference of the conspiracy charged, emphasis must be placed upon testimony of West Kentucky's Vice President Hoffman, who formulated West Kentucky's bids on the TVA market, that he never talked with UMW and had no agreement or understanding with UMW concerning such bids R. 1404a, 1406a). The Sixth Circuit's contrary statement is "speculation run riot" condemned in *Moore* v. *C. & O. Ry. Co.*, 340 U.S. 573, 578, which makes clear that the Sixth Circuit's disbelief of the testimony of the six witnesses "would not supply a want of proof" (340 U.S. 576).

Moreover, in the absence of testimony disputing the reasons for UMW's investments and that UMW took no part

in the management or pricing policies of the two coal companies, the Sixth Circuit's avowal that the jury could conclude UMW's purpose was to have a "material" or "dominant" voice in the companies' policies and operations is challenged, *first*, by the rule that a jury is not at liberty to disregard testimony when from no reasonable point of view it is open to doubt (Cf. *Pennsylvania R. Co.* v. *Chamberlain*, 288 U.S. 333, 343); and *secondly*, the jury was never so instructed in the trial court but, to the contrary, it was told that "The fact that the Union was able to make investments of considerable size with its assets, does not constitute a violation of the anti-trust laws" (R. 1556a).

Since, in the absence of conspiratorial conduct, UMW could not be made accountable for West Kentucky's bids on the TVA market, it is legally irrelevant whether or not that company improperly "dumped" coal thereon, nevertheless the Sixth Circuit's conclusion that the jury appropriately inferred a *Sherman* conspiracy from "the dumping of West Kentucky coal on the TVA market" is challenged both by the record evidence and by applicable law.

Recital of undisputed facts, already detailed (*ante*, pp. 22-27), abundantly shows the price decline and "large offerings of tonnage on the TVA spot market at generally declining prices" by West Kentucky and Nashville Coal, in addition to Pittsburgh-Midway Coal Co. and Peabody Coal Co., which the Sixth Circuit found warranted the inference of a conspiracy (R. 1760), resulted from forces unrelated to any alleged conspiracy. Just as there is no evidence of any agreement of predatory pricing between UMW and West Kentucky, similarly no testimony connects UMW and the other companies in agreements which *Sherman* proscribes.

West Kentucky, the evidence shows (*ante*, p. 26) followed but did not lead the market. Its bids on the TVA

spot market were a matter of business judgment, lawfully motivated by a need for sales (*ante*, pp. 26-27).

A report of the House Committee on the Judiciary quoted with approval in *Balian Ice Cream Co.* v. *Arden Farms*, D.C., S.D. Calif., 1952, 104 F. Supp. 796, 801,[44] gives further answer to this contention:

> "In any competitive economy we cannot avoid injury to some of the competitors. *The law does not, and under the free enterprise system it cannot, guarantee businessmen against loss.* That businessmen lose money or *even go bankrupt does not necessarily mean that competition has been injured* . . . We cannot *guarantee competitors against all injury.* This can only be accomplished by *prohibiting competition.*"

5. The Jury's Conspiracy Finding is Without Any Substantial Evidence to Support it.

In *Delaware Valley Marine Supply Co.* v. *American Tobacco Co.*, 3 Cir., 297 F. 2d 199, 202-3 (1961), as here, *plaintiff offered no direct proof of conspiracy*, and *defendants denied any conspiracy agreement*, the Third Circuit declared, "But it is the fact that *conspiracy remains an essential ingredient* of a" *Sherman* case. Though verdicts premised upon circumstantial evidence in antitrust cases have been sustained, "To sustain a finding of fact the circumstances proven must lead . . . with *reasonable certainty* and must be of such probative force as to create the basis for a *legal inference* and not mere suspicion." *Wesson* v. *U. S.*, 8 Cir., 172 F. 2d 931, 933; accord, *Pevely Dairy Co.* v. *U. S.*, 8 Cir., 178 F. 2d 363, 370. So, too, in *U. S.* v. *Morgan*, D.C., S.D.N.Y., 1953, 118 F. Supp. 621, 634, Circuit Judge Medina cogently remarked, "*Either there is*

---

[44] Affirmed 9 Cir., 231 F. 2d 356 (1955), cert. den. 350 U.S. 991. See also *Ben Hur Coal Company* v. *Wells*, 10 Cir., 242 F. 2d 481, 486 (1957). The italicized text in *Balian* is that of the district court.

some agreement, combination or conspiracy or there is not" and the answer must be found in evidence adduced and not "in some crystal ball or vaguely sensed by some process of intuition, based upon a chance phrase used here or there."

In upholding the jury verdict, the Sixth Circuit not only employed activities which were either permitted or regulated by labor statutes but it treated the elements it regarded as circumstantial as if they were totally isolated from collective bargaining processes and procedures, as if *Hutcheson* had not mandated that "whether trade union conduct constitutes a violation of" *Sherman* depends upon interpreting statutes expressing national labor policy as "interlacing statutes", as if *Norris LaGuardia's* Section 6 did not command union guilt and responsibility be shown by clear proof, and as if there were no need of accommodating *Sherman's* policy to preserve a competitive business economy with "the rights of labor to organize to better its conditions through the agency of collective bargaining" (*Allen-Bradley*, 325 U.S. 806).

As to the remaining element used by the Sixth Circuit to warrant the jury's inference of the conspiracy, namely, UMW investments in West Kentucky, it has been shown (*ante*, pp. 63-66) that such investments primarily related to UMW achievements of lawful labor goals and that undisputed evidence established UMW neither controlled, nor sought to control, West Kentucky's management, or its marketing or pricing policy; but that, to the contrary, it had nothing to do with any of them. Notably, while the Sixth Circuit does not directly charge UMW therewith, it obliquely implies it did so by declaring it was UMW's purpose "to have a very material voice, if not the dominant one, in determining policies and operations of West Kentucky and its subsidiary, Nashville Coal. Even had this been UMW's purpose—and undisputed evidence is to the contrary—the fact remains that its investments

stood isolated and separate and apart from West Kentucky's management and its policies.[45]

Conclusion on Argument III.

The foregoing demonstrates that a jury verdict of conspiracy under *Sherman* may not be inferred from a showing that arms-length industry-wide collective bargaining has resulted in increased wage scales and welfare fund contributions and in contract prohibitions against buying from or leasing to employers whose labor standards are below those required of contract signatories; efforts to persuade the United States Secretary of Labor to establish and enforce, in accordance with the law, minimum wage standards for government purchases; and acquisition by the union, acting independently, of security of one of the alleged co-conspirators.

The Sixth Circuit, like the jury and the Trial Court, ignored the rule given by the district court to the jury that "if two inferences can be reasonably drawn from the same facts, one pointing to culpability and the other to innocent conduct then it is your duty to infer that which indicates innocent conduct" (R. 1560a).

Where, as herein, (1) UMW's evidence denying the conspiracy is unassailed, (2) the Sixth Circuit totally ignored federal court proceedings attending the negotiations and

---

[45] Since the Sixth Circuit has justified the jury's conspiracy finding upon UMW's investments in West Kentucky, it is appropriate to direct this Court's attention to the fact that the trial court, in its jury charge, instructed the jury that it does not constitute a *Sherman* violation for a union to make substantial investments in a company engaged in producing bituminous coal or to finance others in their acquisition of control in a company for the purpose of having it recognize and bargain with the company (R. 1557a). Hence, had the jury premised its conspiracy finding upon such investments—which is the element the Sixth Circuit employs to justify the jury finding—the jury would not have followed the district court's instructions.

execution of the 1950 contract at the very same time it was alleged there was an express understanding constituting the conspiracy, (3) admittedly there is no direct evidence of the conspiracy, and (4) the inferences upon which the Sixth Circuit warranted the jury's verdict of conspiracy are legally impermissible, there is no substantial evidence to support either the jury's conspiracy finding or the Sixth Circuit's justification therefor. As said in *G. & P. Amusement Co.* v. *Regent Theater Co.*, DC, N.D. Ohio, 1952, 107 F. Supp. 453, 461, "the claimed existence" of a conspiracy herein is to be "*found in constant assertion*" *by Phillips* "*rather than* in the proof."

Heretofore, this Court has made it plain that "Speculation cannot supply the place of proof" (*Moore* v. *C. & O. Ry. Co.*, 340 U.S. 573, 578) and that "mere speculation be not allowed to do duty for probative facts" (*Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29, 32). Implementation of this principle to the case at bar makes it clear the jury should not have been given the task of finding a verdict; that the trial court erred in denying motions for directed verdict and that the Sixth Circuit's criteria of circumstantial evidence does not constitute substantial evidence requisite to sustaining a jury verdict. Corrections of these errors by this Court's reversal of the judgments entered by both the Sixth Circuit and the trial court and its direction of judgment in favor of UMW is appropriate.

IV. THE JURY AWARD WAS WITHOUT SUBSTANTIAL EVIDENCE TO SUPPORT IT. THE STANDARD SANCTIONED BY THE SIXTH CIRCUIT FOR ITS ASSESSMENT IS UNWARRANTED BY THE UNDISPUTED EVIDENCE AND IS ERRONEOUS AS A MATTER OF LAW.

As already noted (*ante*, pp. 27-31), and as the Sixth Circuit observed (R. 1761-62), UMW challenged the evidence's sufficiency to sustain any award of damages and asserted the national average price of all kinds of coal does not afford a valid basis of comparison with Phillips' TVA coal.

To overcome the variant factors which UMW contended supported its position and which the Sixth Circuit admitted could reduce the difference between national average and Phillips' average receipt prices, the Sixth Circuit opined that other factors kept the "comparison" from being "so unfair" so as to warrant the jury's considering "national average" (R. 1762).

To UMW's argument that national average price of all coal is substantially above national average price of strip mine coal, the Sixth Circuit declared this was overcome by the difference in BTU content, the national average being 12,900 whereas the county in which Phillips operated had an average of 13,200 BTU and that there was a guaranteed minimum of 13,215 BTU per pound in Phillips' coal (R. 1762).

To UMW's assertion that the utility market is the lowest coal market in price, the Sixth Circuit pointed out that "the market for steam coal was not restricted to the utilities, but included industrial concerns and railroads" (R. 1762). This fact does not affect UMW's argument that utility market coal—even if used also by industrial concerns and railroads—costs two to three dollars FOB mine lower than premium coals included in the national average; that steam coal (whether used by utilities, industrial concerns or railroads) costs at least one dollar less than commercial stoker coal included in the national average; that such steam coal costs at least two or three dollars per ton less than metallurgical coal included in the national average; and that such steam coal is lower in price than the price commanded by coke and industrial coals, also included in national average.

Similarly, the Sixth Circuit fails to dissipate UMW's challenge of "national average price" on the ground that Phillips sold its premium coal *separately* from utility coal *but excluded the price it received therefor* in comparing its average with the national average. The Sixth Circuit's answer that "the higher priced coal sold at retail had

fallen from 20 per cent of the total in 1940 to 8 per cent in 1958" (R. 1762) is obviously abortive, for the fact still remains that, whatever the percentage, national average includes the premium coal whereas Phillips' average price admittedly excluded it! While the Sixth Circuit (R. 1762) noted that there was evidence—disputed—that the difference between national average price for all coal and the price received by Phillips' for steam coal was not "materially affected" by the exclusion of Phillips' sales of premium coal, the admitted fact of its exclusion abundantly demonstrates that the predicate of national average price was not an appropriate standard for the assessment of damages.

Notably, the Sixth Circuit does not undertake to answer UMW's criticism of "national average price" as a standard for the assessment of damages on the ground that that average necessarily contemplates sales on differing markets; that Tennessee does not afford a market for quality coals comparable to the national market; and that during 1956-58 (the years in question) from 70.2 to 78 per cent of Tennessee coal was sold to TVA's utility coal market (R. 813a).

Nor does the Sixth Circuit concern itself with the undisputed facts that Phillips sold its coal on TVA's *lower priced spot market* where prices were one and a half to two cents per million BTU's (about 50 cents per ton) (R. 1396a) less than prices on TVA's higher term market.[46]

Where plaintiffs in antitrust cases have failed to prove injury resulting from alleged antitrust violations, judgment for the party sued has been approved *Wolfe* v. *National Lead Co.*, 9 Cir., 225 F. 2d 427 (1955). Where, as here, the facts underlying a jury award are fallacious, the Sixth Circuit in *Volasco Products Company* v. *Fry*

[46] The difference in price was urged by Phillips not only as a measure of damages, but as evidence of the fact of conspiracy as well (R. 53-54a, 114-116a). The lawful economic reasons for the price difference, manifest in the foregoing discussion, invalidates the judgment of the Sixth Circuit both from the standpoint of liability and the quantum of damages.

Roofing Company, 6 *Cir.*, 308 F. 2d 383 (1962), cert. den. 372 U.S. 907, rejected and reversed a judgment based thereon.

Since the standard of damages was an improper one, the jury award had no evidentiary support. Damage awards based upon speculation are not warranted. Cf. *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1961); also *Sunkist Growers, Inc.* v. *Winckler and Smith Citrus Products Co.*, 9 Cir., 284 F. 2d 1, 32 (1960), reversed on other grounds, 370 U.S. 19.

This Court should, for reasons herein discussed, set aside the jury's award of damages and reverse the Sixth Circuit's judgment of affirmance of the trial court based thereon.

CONCLUSION

UMW submits this Court should reverse and set aside the judgment of the Sixth Circuit herein complained of (R. 1768), as well as the district court's judgment of August 2, 1961 (R. 82-4a), set aside the jury verdict, and remand the case with directions that judgment be entered for UMW or, in the alternative, that UMW be granted a new trial.

Respectfully submitted,

HARRISON COMBS
900 Fifteenth Street, N. W.
Washington, D. C.

E. H. RAYSON
R. R. KRAMER
904 Burwell Building
Knoxville, Tennessee

M. E. BOIARSKY
511 Kanawha Valley Building
Charleston, West Virginia

Attorneys for Petitioner.

September, 1964.

APPENDIX A

15 USCA:

§ 1. TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL; EXCEPTION OF RESALE PRICE AGREEMENTS; PENALTY

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937,

c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

§ 2. Monopolizing Trade a Misdemeanor; Penalty

Every person who shall monopolize, or attempt to monopwise, or conspiracy, in restraint of trade or commerce in persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

§ 3. Trust in Territories or District of Columbia Illegal; Combination a Misdemeanor

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in a restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or State or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 3, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

§ 15. Suits By Persons Injured; Amount of Recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States

in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

§ 17. ANTITRUST LAWS NOT APPLICABLE TO LABOR ORGANIZATIONS

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. Oct. 15, 1914, c. 323, § 6, 38 Stat. 731.

---

29 USCA Sec. 52 (Sec. 20 of the Clayton Act):

§ 52: STATUTORY RESTRICTION OF INJUNCTIVE RELIEF

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. Oct. 15, 1914, c. 323, § 20, 38 Stat. 738.

---

29 USCA Sec. 102 (Sec. 2 of the Norris-LaGuardia Act):

§ 102: PUBLIC POLICY IN LABOR MATTERS DECLARED

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain

acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted. Mar. 23, 1932, c. 90, § 2, 47 Stat. 70.

---

29 USCA Sec. 104 (Sec. 4 of the Norris-LaGuardia Act):

§ 104: Enumeration of Specific Acts Not Subject to Restraining Orders or Injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specfiied;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, § 4, 47 Stat. 70.

---

29 USCA Sec. 106 (Sec. 6 of the Norris-LaGuardia Act):

§ 106: RESPONSIBILITY OF OFFICERS AND MEMBERS OF ASSOCIATIONS OR THEIR ORGANIZATIONS FOR UNLAWFUL ACTS OF INDIVIDUAL OFFICERS, MEMBERS, AND AGENTS

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof. Mar. 23, 1932, c. 90, § 6, 47 Stat. 71.

Labor Management Relations Act, 1947 (29 USCA):

§ 141: SHORT TITLE; CONGRESSIONAL DECLARATION OF PURPOSE AND POLICY

(a) This chapter may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce. June 23, 1947, 3:17 p.m., E.D.T., c. 120, § 1, 61 Stat. 136.

§ 151: FINDINGS AND DECLARATION OF POLICY

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or opera-

tion of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such

commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 136.

§ 157. Right of Employees as to Organization, Collective Bargaining, Etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 140.

§ 158. Unfair Labor Practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 159 (f), (g), (h) of this title, and (ii) unless following an election held as provided in section 159 (e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of

the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

* * * * *

July 5, 1935, c. 372, § 8, 49 Stat. 452; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 140; Oct. 22, 1951, c. 534, § 1(b), 65 Stat. 601.

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manu-

facture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

* * * * *

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception. As amended September 14, 1959; Pub. L. 86-257, Sec. 704(b).

* * * * *

§ 185. Suits by and Against Labor Organizations—Venue, Amount, and Citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in

any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * * * *

(b) . . . Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. . . . June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title III, § 301, 61 Stat. 156.

* * * * *

§ 187. Boycotts and Other Unlawful Combinations; Right to Sue; Jurisdiction; Limitations; Damages

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b) (4) of this title. As amended Sept. 14, 1959, Pub. L. 86-257, Title VII, § 704(c), 73 Stat. 545.

(b) Whoever shall be injured in his business or property by reason or[1] any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit. June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title III, § 303, 61 Stat. 158.

29 USCA (Fair Labor Standards Act of 1938):

§ 201. Short Title

This chapter may be cited as the "Fair Labor Standards Act of 1938". June 25, 1938, c. 676, § 1, 52 Stat. 1060.

* * * * *

[1] So in original. Probably should read "of."

§ 202. Congressional Finding and Declaration of Policy

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power. June 25, 1938, c. 676, § 2, 52 Stat. 1060; Oct. 26, 1949, c. 736, § 2, 63 Stat. 910.

* * * * *

41 USCA (Walsh-Healey Act):

§ 35. Contracts for Materials, Etc., Exceeding $10,000; Representations and Stipulations

In any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding

$10,000, there shall be included the following representations and stipulations:

* * * * *

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

* * * * *

(e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection. June 30, 1936, c. 881, § 1, 49 Stat. 2036; May 13, 1942, c. 306, 56 Stat. 277.

* * * * *

§ 38. Same; Administration; Officers and Employees; Appointment; Investagations; Rules and Regulations

The Secretary of Labor is authorized and directed to administer the provisions of sections 35-45 of this title and to utilize such Federal officers and employees and with the consent of the State, such State and local officers and employees as he may find necessary to assist in the administration of said sections and to prescribe rules and regu-

lations with respect thereto. The Secretary shall appoint, without regard to the provisions of the civil-service laws but subject to the Classification Act of 1949, an administrative officer, and such attorneys and experts, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to time find necessary for the administration of sections 35-45 of this title. The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as provided in sections 35-45 of this title, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of sections 35-45 of this title. June 30, 1936, c. 881, § 4, 49 Stat. 2038; Oct. 28, 1949, c. 782, Title XI, § 1106 (a), 63 Stat. 972.

* * * * *

§ 39. Same; Hearings by Secretary of Labor; Witness Fees; Failure to Obey Order; Punishment

Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of sections 35-45 of this title, and on complaint of a breach or violation of any representation or stipulation as provided in said sections, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the United States District Court for the

District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of sections 35-45 of this title. June 30, 1936, c. 881, § 5, 49 Stat. 2038; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

* * * * *

§ 45. Same; Effective Date; Exception as to Representations with Respect to Minimum Wages

Sections 35-45 of this title shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from June 30, 1936: *Provided, however,* That the provisions requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor. June 30, 1936, c. 881, § 12, 49 Stat. 2039, renumbered June 30, 1952, 9:36 a.m., E. D. T. c. 530, Title III, § 301, 66 Stat. 308.

* * * * *

APPENDIX B

EXCERPTS FROM

BNA, COLLECTIVE BARGAINING—NEGOTIATIONS AND CONTRACTS

Industry Patterns & Wage Data

18:2

* * * * * * * * * * *

1950

In 1950, the fourth round of pension and social insurance benefits, with relatively few general wage increases, continued through the first few months of the year. General Motors and UAW renewed their wage formula of 2 years' standing for another 5 years. But there were few imitators until in August a surprise "voluntary" wage boost of 10 cents at Chrysler dramatized the new situation attending the Korean involvement and set off the "Fifth Round." This fifth, "voluntary" round moved much faster than previous rounds and emphasized straight wage boosts—often in the neighborhood of 10 percent —rather than fringes. This was largely the result of two factors: (1) Many of the later settlements involved parties who had already signed pension and insurance agreements earlier in the year or in 1949. (2) A large number of settlements were outside the contract terms—frequently, they were made with the knowledge that wage controls were just around the corner. Accordingly, welfare benefits were not under consideration.

18:3

The GM-wage formula—almost completely ignored in 1948—was now adopted by many companies. Most widely used in the auto and electrical industries, the essential elements of this formula—escalator clauses and annual increases—appeared also

in chemicals, textiles and nonelectrical machinery. In some cases, contracts linked wage reopenings only generally—rather than automatically—to the cost of living. But an increasing number of settlements were of the second type.

1951

The rash of pre-control, "voluntary" settlements continued into the first three weeks of the year, then was cut short by the wage freeze late in January. When the Wage Stabilization Board, in February, came up with its formula allowing increases of 10 percent over January 1950 rates, many negotiators were quick to settle on these terms. Of course, such settlements could take place only to the extent that this allowance had not already been used up in the fifth-round settlements of late 1950. The issuance of WSB's cost-of-living policy later afforded a little more leeway for wage boosts. But negotiators in many major industries did not stop at wage increases within the Board's limits for automatic approval. They went further and settled on their own terms. In most cases, WSB found a way to approve these agreements—sometimes on the basis of a "base period abnormality" as in textiles, meat packing and shipbuilding, sometimes in order to correct wage inequities as in nonferrous metals. In a couple of instances, notably textiles and maritime, the Board trimmed down the negotiated increase to some extent.

Provisions for automatic wage adjustments based on the cost of living were cleared for operation by WSB. In addition, the Board permitted automatic annual "productivity" raises which had been agreed to before the freeze—or were based on a tandem relationship—to be put into effect. So, on one or both of these bases, workers in the auto, electrical equipment, farm machinery, railroad and other industries were allowed increases above those normally within the Board's limits.

Actually, there was no clear-cut pattern of wage increases during 1951 for industry as a whole. To the extent that there was a pattern, it might be described as an extension of the 10-percent fifth round to include 10 percent plus cost-of-living increases, but there were many exceptions.

Industry-wide patterns, however, took on an increasing importance throughout the year, in part because of WSB's policy of approving wage settlements on a tandem relationship basis. In the electrical equipment industry, for instance, both the 1951

settlements were approved because of tandem relationships. The first increase was okayed for companies which could show a tandem relationship to General Electric, the second for those which could show a relationship to General Motors' electrical divisions. This tended to fortify the post-war practice of most companies in an industry to wait for the leader to settle and get the settlement approved by the Board; then, by showing that they had followed the same wage practices in the past, they could put the same wage adjustment into effect.

---

* * * * * * * * * *

18:14d

Wage Chronology: Automobiles

The table below lists all wage changes and major fringe items negotiated by General Motors and UAW since the end of World War II.

Date	Wage Increase	Fringe Items
*	* * * *	* * * *
3/51	5 cents under escalator	
5/51	4 cents annual improvement factor	
6/51	3 cents under escalator	
9/51	1 cent under escalator	
12/51	1 cent under escalator	
3/52	3 cents under escalator	
5/52	4 cents annual improvement factor	
6/52	—1 cent decrease under escalator	
9/52	3 cents under escalator	
11/52	—1 cent decrease under escalator	
4/53	—1 cent decrease under escalator	
9/53	5 cents annual improvement factor; 10 cents for skilled workers; 19 cents of 24-cent cost-of-living increase frozen into base rates for all workers	Maximum monthly pension benefits raised to $137.50 after 30 years.
9/53	1 cent under escalator	
12/53	2 cents under escalator	
3/54	—1 cent decrease under escalator	
5/54	5 cents annual improvement factor	
6/54	—1 cent decrease under escalator	

18:14e

Wage Chronology: Automobiles—Contd.

Date	Wage Increase	Fringe Items
9/54	1 cent under escalator	
12/54	—1 cent decrease under escalator	
6/55	2½ percent (6 cent minimum) annual improvement factor; 8 cents for skilled employees; revised escalator clause providing 1 cent adjustment for each 0.5 point change in Index	Supplemental Unemployment Benefit Plan; pension benefits raised to $2.25 per month per year of service; vesting rights; revised insurance; two additional ½ holidays; 2½ weeks vacation for 10 to 15 years' service.
9/55	1 cent under escalator	
3/56	—1 cent decrease under escalator	
5/56	2½ percent (6¢ min.) annual improvement factor	
6/56	1 cent under escalator	
9/56	4 cents under escalator	
12/56	2 cents under escalator	
3/57	1 cent under escalator	
5/57	2½ percent (6¢ min.) annual improvement factor	
6/57	2 cents under escalator	
9/57	3 cents under escalator	
3/58	3 cents under escalator	
10/58	2½ percent (6¢ min., 7¢ avg.) annual improvement factor retroactive to 7/1/58; 8¢ for skilled employees; addit. 2¢ retroactive to 7/1/58 and addit. 1¢ effective 9/1/58 under escalator clause.	Revised SUB, pensions, disability benefits, life insurance, sick benefits, and contributory surgical insurance; ½¢ per hour average to enequity fund.
6/59	2½ percent (6¢ min., 7¢ avg.) annual improvement factor	
9/59	2 cents under escalator	
12/59	1 cent under escalator	
6/60	2 cents under escalator	
9/60	2½ percent (6¢ min., 7¢ avg.) annual improvement factor	
12/60	2 cents under escalator	

18:16

1951

In one of the most peaceful settlements ever reached in the coal industry, the Mine Workers signed a "voluntary" agreement late in January 1951, providing a fifth-round increase in wages of $1.60 per day. In issuing General Regulation No. 2, WSB assured the miners that their increase would become effective on the agreed date—February 1.

* * * * * * * * * * *

18:16a-16b

* * * * * * * * * * *

Wage Chronology: Coal Mining

The table below lists all wage changes and major fringe items negotiated by the Bituminous Coal Operators and United Mine Workers since the end of World War II.

Date	Wage Increases	Fringe Items
5/46	$1.85 per day (about 18½ cents per hour)	Welfare & retirement fund financed by employer payments of 5 cents per ton of coal; revised overtime & vacation pay
7/47	$1.20 per day (total increase estimated at 44⅝¢ per hour, taking into account reduction in work-day)	Workday reduced one hour; additional 5 cents employer payment for welfare fund (total of 10 cents per ton)
7/48	$1.00 per day	Additional 10 cents royalty (total of 20 cents per ton)
3/50	70 cents per day	Additional 10 cents royalty (total of 30 cents per ton.)
2/51	$1.60 per day (20 cents per hour)	
9/52	$1.90 per day	Additional 10 cents royalty (total of 40 cents per ton)
9/55	$1.20 per day	Additional 2 days vacation (12 days total) and addit. $40 vacation pay ($140 total)
4/56	80¢ per day deferred increase	
10/56	$1.20 per day	Double time for work on Sunday & holidays; additional $40 in vacation pay ($180 total); $40 in Christmas holiday pay
4/57	80¢ per day deferred increase	
1/59	$1.20 per day	Additional $20 in vacation pay ($200 total)
4/59	80¢ per day deferred increase	

18:32

* * * * * * * * * * *

1950

* * * * * * * * * * *

The fifth-round of increases started in October with all the major firms granting "voluntary" increases of 10 cents an hour by the end of the year. Exceptions to the 10-cent limit were CIO's Electrical Workers at Phelps-Dodge, who got 15 cents, and AFL's Aluminum Workers and CIO's Steelworkers with a 10-percent increase at Alcoa—average increase was about 14

cents. (Aluminum Workers at Reynolds Metals received the same amount—10 percent.) Included in the Alcoa agreement was an additional 2 cents for Southern plants plus six paid holidays.

* * * * * * * * * *

18:34f-g

* * * * * * * * * *

Wage Chronology: Nonferrous Smelting & Refining

The table below lists all wage changes and major fringe items negotiated by Kennecott Copper Company and Mine, Mill & Smelter Workers since the end of World War II.

Date	Wage Increase	Fringe Items
*	* * * *	* * * *
7/51	15 cents (8 cents across the board plus 7 cents in rate reclassifications)	Pension plan to cost 4½ cents an hour
1/52	33 cents per *day*	
12/52	7½¢ per hr.	3 wks. vac. after 15 yrs.
8/1/53	8.5¢ per hr. for Utah plant; 9.2¢ to 9.89¢ per hr. for Ariz., N.M. & Nev. plants	Addit. 4.2¢ per hr. for (Utah) intrastate inequity adjustments
9/54	5 cents	Addit. 2.44¢ per hr. co. payment to contributory hospital and-surgical plan; increased shift differentials
8/55	10 cents general increase, plus ½-cent increase on job increments	Revised pension plan providing $1.75 per mo. per yr. of service, exclusive of social security
7/56	10 cents general increase	Revised pension plan providing $2.25 per mo. per yr. of service effective 7/57; hospital & surgical benefit for pensioners; increased disability pension; revised insurance
7/57	7-cent deferred increase	Revised pensions negotiated 7/56
7/58	7-cent deferred increase	
12/59	7¢ per hr. general increase, plus 1.5¢ avg. on increments between job clarsifications	Addit. amt. toward reduction of Southwest area wage differentials in Ariz. & New Mexico; 7th pd. hol.; 2½ time for hols. worked; doubletime after 12 hrs.; jury duty pay; addit. health & welfare benefits including increased hospital room allowance & increased health coverage for dependents; severance pay of $100 for each yr. service for workers laid off because of changes in methods, machinery or processes
7/60	7¢ per hr. general increase, plus 1.5¢ avg. on increments between job classifications	

18:37

1950

Early in the year, Sinclair and CIO's Oil Workers agreed to revise their existing contributory, voluntary pension plan. Based on the new amendments to the Federal Social Security Law, the revised plan provided a minimum of $125 per month, including social security, for employees at age 65 after 20 years' service.

Fifth-round pattern for the industry was established when Texas, Pan American and Standard Oil granted increases averaging six percent—most agreements provided a 10-cent minimum increase. In November, Sinclair settled for a similar increase although the company's contract provided for no wage increases until mid-1951. On the West Coast, Shell Oil also agreed with CIO's Oil Workers for a 6% increase—with a minimum of $17 per month.

* * * * * * * * * *

18:38b-c

Wage Chronology: Oil

The table below lists all wage changes and major fringe items negotiated by Sinclair Companies and Oil, Chemical & Atomic Workers since the end of World War II.

Date	Wage Increase	Fringe Items
4/51	3.7 percent (7½-cent average); escalator clause	
7/51		5-cent and 7-cent shift differentials; 7th paid holiday; sick pay revised according to length of service up to a maximum of full pay for 7 weeks, half pay for 26 weeks after 20 years.
10/51	1 cent under escalator	
1/52	3 cents under escalator	
4/52	—1 cent decrease under escalator	
4/53	—3-cent decrease in cost-of-living bonus; escalator abolished	
5/52	15 cents, in part retroactive to 1/52	
7/52		Sick pay revised to give 8 weeks with full pay, 26 weeks with half pay, after 10 years; shift differentials applied to non-shift employees; revised holiday pay
9/52		Contributory hospitalization insurance revised

Wage Chronology: Oil—Contd.

Date	Wage Increase	Fringe Items
7/53		Savings Plan: Company to contribute ½ of the amount of employee's savings which are limited to 5% of monthly base pay.
8/53	4% (averages about 9 cents)	
7/55	10 cents per hour retroactive to 3/55	Revised pensions and insurance
2/56	6% (15 cent per hour min.)	Increased shift differentials; 3 weeks vacation after 10 years service; 8th paid holiday; revised benefits under employee savings plan.
6/57	6% (5% retroactive to 4/57, 1% retroactive to 5/57; 16-cent avg.)	Revised insurance; 2½ time for holiday work; 4 wks. vac. after 20 yrs.
1/59	5% (13.5¢ per hr. avg.)	
12/60	14¢ per hr.	

* * * * * * * * * *

18-42f-42g

Wage Chronology: Rubber

The table below lists all wage changes and major fringe items negotiated by B. F. Goodrich and Rubber Workers since the end of World War II.

Date	Wage Increase	Fringe Items
*	* * * *	* * * *
8/51	13 cents	
8/52	10 cents	Double time for holidays worked plus straight holiday pay
8/53	4.6 cents (1.7 to 7.6 cents in different plants)	Noncontributory hospitalization, life hospital-medical and surgical insurance, sickness & accident benefits, reduction in vacation service requirement
8/54	6¢ general increase (addit. 1½ to 3¢ for geographical differentials)	
6/55		Pension plan made noncontributory, provides $1.80 mo/yr up to 30 years, exclusive of social security; pensions above minimum computed on basis of 1/12th of 1 percent of total less ½ social security; $10 minimum disability after 15 years; vesting rights; revised ins.
9/55	12¢; addit. 8¢ for craft and maintenance classifications; plus 1.0¢ to be applied locally 6.2 cents	7th paid holiday; 2 weeks and 3 days vacation (5% of gross earnings) for employees with 11 to 15 yrs.; supplemental jury pay
7/56		Supplemental unemployment benefit plan
4/57		6 cent minimum night shift differential; 3 weeks' vacation after 11 years, 4 weeks after 23 years; 2 weeks' supplemental military reserve pay; paid grievance time

Wage Chronology: Rubber—Contd.

Date	Wage Increases	Fringe Items
7/57	14½¢ cents for general increases & intraplant inequity adjustments; additional ½ cent allotted to cost of 4/57 shift differential adjustment	
7/58	8¢ per hour general increase	
6/59		Revised pension and insurance agreement running for 3 years providing $2.40 per mo. for each year of service prior to 1/1/59, $2.50 thereafter, $2.25 for past retirees, with early retirement at age 55 after 25 years, vesting at age 40 after 10 years; revised insurance; revised SUB plan providing 65% of take-home pay for up to 39 weeks in states where UC extends that long, with $30 (was $25) per week maximum.
8/59	10¢ per hr. general increase	
7/60	9½¢ per hr. general increase, plus 4¢ & 5¢ for skilled & other workers	

* * * * * * * * * *

18:48-48a

1950

At the end of November, U.S. Steel settled—for the fifth time since VJ Day—with CIO's Steelworkers; general increase was 12½ cents plus a further increase of ½ cent in the increment between job classes. Average increase was about 16 cents per hour—but the over-all percentage figure, including the compounding effect of the increase in the cost of fringe items, amounted to about 11 percent. In addition, Southern mill employees received 4½ cents, cutting the North-South differential to 10 cents an hour. An extra 8½ cents was set aside for a job classification program for iron-ore miners in Minnesota who received a 12½-cent general increase. Negotiations were limited to economic issues only and no action was taken on revising the pension plan to provide higher minimum payments as in auto and other industries. By the end of the year all major steel companies, including Bethlehem, Republic, Jones & Laughlin and Inland, had settled on almost identical terms.

* * * * * * * * * *

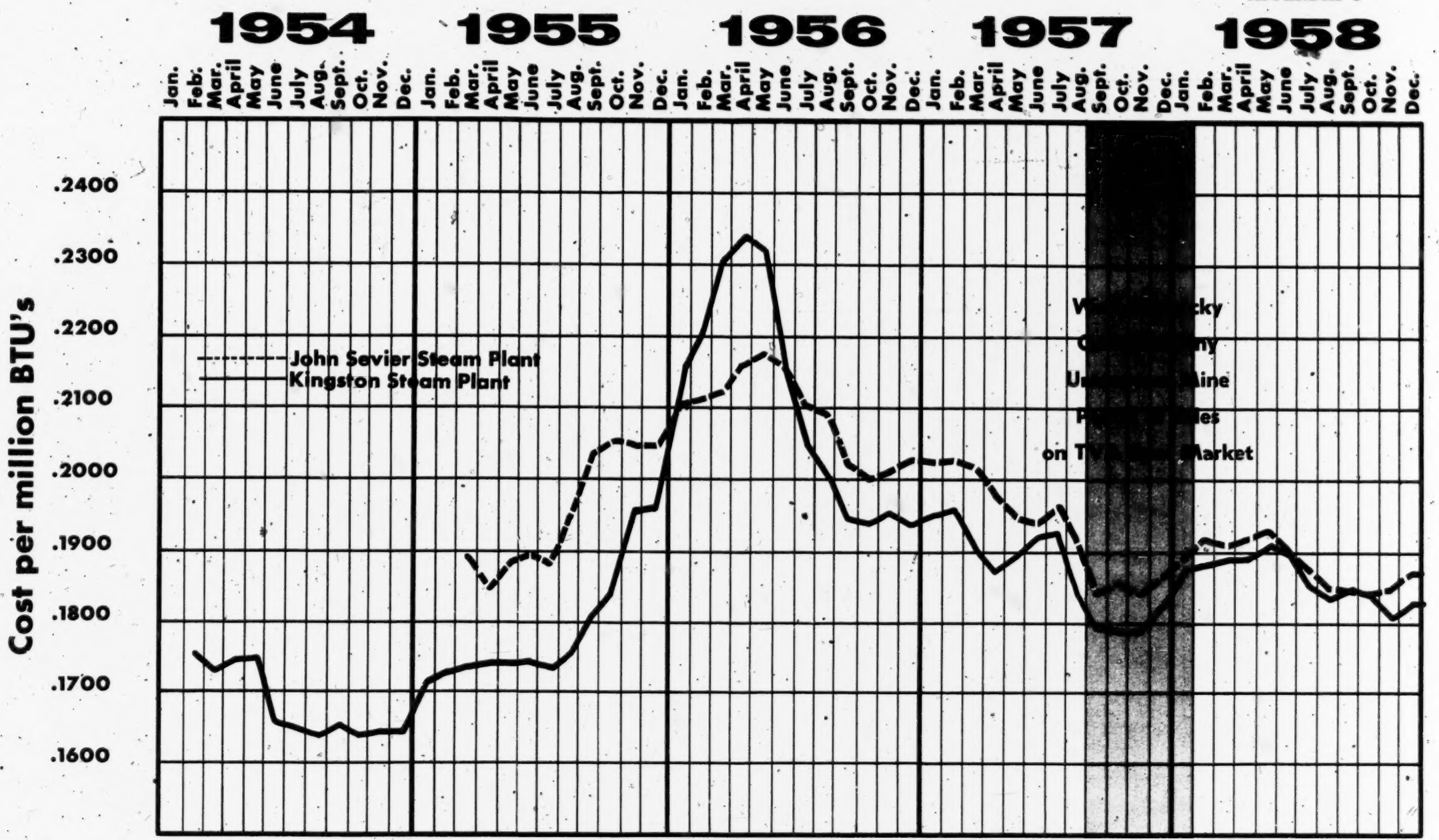
Wage Chronology: U. S. Steel

The table below lists all general wage changes and major fringe items negotiated by U.S. Steel and the Steelworkers since the end of World War II.

Date	Wage Increase	Additional Fringe Items
* * * *	* * * *	* * * *
7/52	16 cents average increase (12½ cents across the board, plus job rate adjustments up to 15½ cents; total job spread now 5½ cents)	North-South differential of 10 cents cut in half. Shift differentials increased from 4¢ and 6¢ to 6¢ and 9¢. Six paid holidays; double time if worked. Service for 3-week vacation cut from 25 to 15 years
6/53	8½ cents	5-cent North-South differential eliminated in 2 steps, 2½ cents on 1/54, 2½ cents on 7/54; other area differentials eliminated or reduced; pension & insurance revisions to be studied
7/54	5 cents	Employee & Co. contribution to insurance plan each increased 2¢ per hr. (9¢ total); joint group to study revision of insurance benefits; pension plan revised to provide $140 min. pension (including social security) after 30 yrs. eff. 11/4/54 (formerly $100 min. after 25 yrs.) $110 min. after 15 yrs. (formerly $60), flat Social Security deductions set at present level of $85 per mo.; $75 per mo. disability pension (formerly $50); Co. to discontinue charging administration costs against insurance plan
7/55	11½ cent minimum increase, plus ½ cent on job rate adjustments (total spread now 6 cents); 27-cent maximum	
7/56	7½ cents plus 0.3 cent on increments between job classifications (union est. 10½ cents [illegible]ase in earnings); escalator clau[illegible]ided.	Supplemental unemployment benefit plan; revised pensions & insurance; premium pay for Sunday; 7th pd. holiday; supplemental jury duty pay; revised overtime rate for holiday work; revised vacation pay
1/57	3 cents under escalator	
7/57	4 cents under escalator	
7/57	7 cents plus 0.2 cent on job increments (9.1 cents avg.) deferred increase	
1/58	5 cents under escalator	
7/58	7 cents plus 0.2 cent on job increments (9.1 cents avg.) deferred increase	
7/58	4 cents under escalator	
1/59	1 cent under escalator	

* * * * * * * * * *

APPENDIX C



TVA SPOT COAL PRICES, 1954 - 1958 ★

Kingston Steam Plant - John Sevier Steam Plant

★ Source: Exhibits 102 (1655a) and 107 (1639a).

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 15 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 48

UNITED MINE WORKERS OF AMERICA, *Petitioner*,

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Administratrix of the Estate BURSE PHILLIPS, Deceased, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE BITUMINOUS COAL OPERATORS' ASSOCIATION, AMICUS CURIAE

GUY FARMER
1120 Connecticut Avenue, N. W.
Washington 36, D. C.
General Counsel for Bituminous Coal Operators' Association

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Statement of Facts	1
a. The Interest of the Amicus Curiae	2
b. BCOA and Bargaining	3
Implications of the Proceedings Below to the Future of Collective Bargaining in the Coal Industry	4
Bargaining Chaos in the Coal Industry Prior to the Formation of BCOA	16
Conclusion	22

TABLE OF CASES

Alston Coal Co., 13 N.L.R.B. 683 (1939)	21
NLRB v. Truck Drivers' Local Union, 353 U.S. 87 (1957)	21
Stevens Coal Co., 19 N.L.R.B. 98 (1940)	21
United States v. Hutcheson, 312 U.S. 219 (1941)	15

MISCELLANEOUS

84 Monthly Labor Review 1081 (1961)	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 48

UNITED MINE WORKERS OF AMERICA, *Petitioner,*

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Administratrix of the Estate BURSE PHILLIPS, Deceased, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE BITUMINOUS COAL OPERATORS' ASSOCIATION, AMICUS CURIAE

STATEMENT OF FACTS

This brief, Amicus Curiae, is addressed to the writ of certiorari granted by this Court (R. 1769) to review the judgment of the United States Court of Appeals for the Sixth Circuit, reported at 325 F. 2d 804 (December 18, 1963), which affirmed the judgment of the United States District Court for the Eastern District of Tennessee, Northern District (R. 85a) in overruling motions of Petitioner for a new trial or for judgment n.o.v. The jury returned an adverse verdict to Petitioner in this private antitrust suit,

finding that the Petitioner had engaged in a combination or conspiracy so as unreasonably to restrain trade, or monopolize or attempt to monopolize commerce among several states in violation of Sections 1 and 2 of the Sherman Act. Although the respondents named only the United Mine Workers of America and the Trustees of the Welfare Fund in their cross-complaint as parties, they named several coal operators as co-conspirators whom they claimed had conspired with the Union to drive them out of business.

In connection with this writ of certiorari petitioner, UMWA, raises several grounds, procedural and substantive, to gain a reversal of the judgment below.

The Interest of the Amicus Curiae

BCOA's sole interest in this case is in the preservation of the legality and integrity of the National Bituminous Coal Wage Agreement and the bargaining structures in which BCOA plays a part, for the effective and peaceful settlement of labor disputes in the bituminous coal industry. The National Bituminous Coal Wage Agreement, negotiated by BCOA on behalf of its members, and the established mechanisms for negotiating and amending that agreement were introduced as evidence in the trial of this case.

BCOA does not have any interest in other aspects of this case, such as, for example, evidence relating to alleged incidents of local violence and labor strife, financial relationships between the UMWA and certain coal companies, competition for the TVA market, and the like. Since BCOA is in no way involved in these issues we do not as an *amicus curiae* take a position in respect to them or as to their effect, if any, on the judgment of the court below.

BCOA and Bargaining

BCOA was formed in 1950 as an unincorporated association. Its objects, insofar as they are pertinent to this proceeding, are stated in its "Agreement and Articles of Association" to be:

> "to promote stable, just and harmonious industrial relations between its members and their employees; to negotiate, from time to time, basic agreements for its members covering wages, hours, and conditions of employment and to enter into such agreements on behalf of such members with the representatives of the International Union of United Mine Workers of America . . .; to aid in the enforcement of such agreements at top levels between the members of the Association and their employees; to secure the faithful observance by its members of all such agreements . . .".

Although the total membership varies from time to time because exit from and entrance to BCOA is a fluid matter, there are presently approximately 63 bituminous coal operators represented in BCOA either directly as a sustaining member or indirectly through an associate member.[1]

The method of negotiating a contract or changes in a contract with the petitioner UMWA is not rigidly prescribed in the Agreement and Articles of Association of BCOA. The reason for this is to promote a

[1] It should be noted that by no means all of BCOA's members are so-called "large operators". BCOA had fourteen members, who in 1958, produced less than 30,000 tons, five members who produced between 30,000 and 50,000 tons, and eight members who produced between 50,000 and 100,000 tons. Thus there were twenty-seven members who could clearly be classed as small operators. As a point of reference, Phillips Brothers' tonnage in 1955 was approximately 34,000 tons.

flexibility of approach to each new effort at negotiations. Since each negotiation has different characteristics, many of the procedures utilized, such as the appointment of study committees and the like, are *ad hoc* and vary each time negotiations are entered into.

Article II of the "Agreement and Articles of Association" states that the Association shall "enter into such agreements *on behalf of such members*" with the UMWA. The agreements referred to are collective bargaining agreements with the UMWA and the members referred to are members of BCOA. Any member of BCOA which is not in agreement with the contract may refuse to authorize execution on its behalf. BCOA mails the contract or amendment to its members with an explanatory covering letter. Even after such bargaining is completed, individual members may refuse to authorize the contract's execution on their behalf. Nor does BCOA represent all or anything approaching a majority of bituminous coal mine operators. There are other collective bargaining associations in the coal industry, including regional and state associations as well as many operators who are unaffiliated.

I.

IMPLICATIONS OF THE PROCEEDINGS BELOW TO THE FUTURE OF COLLECTIVE BARGAINING IN THE COAL INDUSTRY

Respondents claim that the Bituminous Coal Wage Agreement as amended and the negotiations surrounding the execution of that agreement and amendments were used in the alleged conspiracy. Thus counsel for respondents in his closing argument to the jury in the District Court stated:

> "Now the instrument (of conspiracy) we say they decided to use was the 1950 Coal Wage Agreement . . ."
>
> * * *
>
> So somewhere along the line, either before, during, or after, they got together on what they could do about it, and they said, 'We will use the 1950 agreement because that will put these little boys out of business, it is too expensive, they can't operate under this, we have got the wage scale.'" Tr. 3309-10.

In summarizing the respondents' contentions in his instructions to the jury, the trial judge clearly outlined the respondents' indictment of the method of bargaining in the coal industry subsequent to 1950 and the integrity of the Bituminous Coal Wage Agreement. The trial judge referred specifically to appellees' evidence of a "marked change (which) occurred in the relations between the Union and the major coal companies in 1950," (R. 1538a) and further referred to respondents' contention

> "That the conspiracy involved the use of the National Bituminous Coal Wage Agreement and its successive amendments as an instrument in accomplishing the purposes of the conspiracy." (R. 1539a)

Again:

> "That a central part of the agreement among the illegal conspirators was that the terms of the National Bituminous Coal Wage Agreement would be imposed upon the smaller and financially weaker coal companies with the knowledge and intent that these companies in large numbers would go out of business because they could not afford to pay the increasingly higher prices and welfare

> royalties which were designed to meet the abilities of the large combines to pay as the mechanization programs of the large companies progressed." (R. 1542a)

There was, in fact, no evidence presented of the existence of any "agreement" or understanding of this kind. However, among the matters relating to the National Agreement and bargaining mechanisms which were stressed by respondents in the whole complex of circumstances which respondents were permitted to put before the jury were the following:

1. General labor peace in the industry since 1950 as compared to incessant conflict, strikes, and labor unrest prior thereto.

2. Increase in wage levels and welfare payments as the result of collective bargaining since 1950.

3. Failure of the Union to effectively oppose mechanization which increased employee productivity in the mines.

These matters are all of direct concern to BCOA and its members because they are generally the product of collective bargaining and relate to the so-called National Agreement which BCOA negotiates with the Union. They are also clearly on their face the normal consequences of the system of collective bargaining which is endorsed and encouraged by the National Labor Relations Act.

The opinion of the Court of Appeals, by its recitation of the history of wage agreements between UMWA and coal operators from 1945 through 1958, and its description of some of the terms and conditions of such agreements (325 F. 2d at 812-813), has lent color

to the respondents' contentions below that the National Agreement has been used as an essential instrument of an otherwise unproven conspiracy between UMWA and certain coal operators in violation of the Sherman Act.

BCOA filed an *Amicus* brief with the Court of Appeals calling attention, as we do here, to the adverse impact on established bargaining structures in the coal industry, and other industries as well, of a jury verdict of violation of the anti-trust laws which relied so heavily upon the bargaining relationships in the industry and their consequences, chiefly the periodic wage increases negotiated with the Union and the relative labor peace which has existed since 1950.

The Court of Appeals in its 24-page opinion ignored what BCOA believes is a basic issue in this case, and made no reference to the question, regarded as vital by BCOA, that is to say, whether an illegal conspiracy may be inferred (without actual evidence of its existence) from the fact that BCOA and other associations representing coal operators in the industry entered into collective bargaining agreements over the years which provided for increased wages and benefits to miners, which, presumably, exceeded the financial ability of some operators to pay—thus resulting in some marginal operators being forced to go out of business.

The Court of Appeals, without expressly saying so, appears to have felt that a gradually increasing wage cost, resulting from established bargaining relationships, was properly considered by the jury as evidence of an unlawful conspiracy. Thus, the Court recites at length in its opinion the history of negotiations in the industry, and ruled that this evidence was properly received and submitted to the jury. Ironically, during

the period from 1945 through 1958 when these increased wage and welfare costs occurred, there were five Government seizures and much of the advance in wages and welfare payment were the direct result of Government action during the periods of Government seizures.

The Court of Appeals, as did the District Court, appears to have accepted the theory that negotiated wage and welfare increases in excess of the assumed ability of some marginal operators to pay may be presented to the jury as evidence of an unlawful conspiracy. The District Court and the Court of Appeals adopted the same view with respect to increases in the minimum wages prevailing under the Walsh-Healey Act. This evidence, together with wholly unrelated evidence as to Union violence, the alleged activity of one coal operator in dumping coal on the TVA market, and the acquisition by the Union of stock in one coal company and its subsidiary, composed the essential ingredients of the evidence from which the jury was allowed to find a conspiracy on the part of the Union and "certain large producers" to drive small producers like Phillips out of the market.

The far-reaching implications of such an approach to the anti-trust laws as applied to the labor field are readily apparent. What is cast into doubt by the Court of Appeals decision is whether the normal consequences of established bargaining relationships in a particular industry can be subjected to collateral attack under the anti-trust laws.

The comparative labor peace in the coal industry which has come about in the last decade has been applauded by labor relations experts and Government officials and is indeed the ultimate objective of our

National Labor Policy as expressed in the National Labor Relations Act. The preamble to that statute states in part:

> "Is is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining . . ." 29 U.S.C. Section 151.

Thus collective bargaining is made mandatory by law and enforced by the NLRB and the Courts. Indeed, the record in this very case shows that the critical bargaining leading to the 1950 agreement here under attack was conducted pursuant to a mandatory court injunction against both the union and the operator parties. The ultimate objective of our National Labor Policy is to bring about the peaceful settlement of labor disputes and the elimination of strikes, a policy that has found some success in the coal industry since 1950.

Increased wages and benefits and better working conditions are the primary and traditional goals of labor unions, and their right to pursue these goals through collective bargaining is fully recognized and implemented by law. The UMWA is by no means unique in its devotion to these objectives or in its success in attaining them during the past ten years, just as they pursued and attained with equal success substantial wage and other concessions in the decade preceding 1950. The wage increases and fringe benefits granted in the bituminous coal industry as the result of collective bargaining since 1950 have been no

greater than wages and fringes granted in other basic industries over the same period.[2]

Here again, however, the increases in wage rates and welfare royalty payments achieved by the Union since 1950 are admitted in evidence and presented to the jury as another circumstance from which they are permitted to infer the existence of a gigantic conspiracy on a national scale.

Likewise, with respect to mechanization and increased productivity of the individual coal miner, the trial judge, with the approval of the Court of Appeals, permitted evidence of mechanization and increased productivity in the industry to go to the jury, and has permitted adverse inferences to be drawn from the Union's acquiescence in mechanization.

There is no question that the coal operators have attempted, with some success, to mechanize their mines and to increase the productivity of the individual miner. In doing this, they were motivated by normal, prudent business considerations of controlling costs

---

[2] Based on published statistics of the Department of Labor, Bureau of Labor Statistics, the average weekly earnings of bituminous coal miners in 1950 and 1960, compared with three other basic industries were as follows:

Industry	1950 Average Weekly Earnings	1960 Average Weekly Earnings
Bituminous Coal	$67.46	$112.77
Petroleum Refining	$75.11	$118.78
Blast Furnace, steel works & rolling mills	$67.95	$116.13
Automobiles	$74.85	$115.21

and enhancing their ability, at best precarious, to compete with other fuels.[3]

These mechanization programs started long before 1950 and they are continuing and will continue in the future under the compulsion of economic necessity. How and in what manner the Union could have impeded these efforts, had it sought to do so, remains unexplained. The inference that the Union's acceptance of mechanization may be considered as evidence of a conspiracy is totally unwarranted. The fact again is that modernization and mechanization are necessities of our times and our industrial system. The same process is going on in all of our major industries and is a key factor in our ability to compete in a world market. The remarkable progress which the coal industry has made in holding down costs of production against the inflationary thrust of rising labor and material costs has received general acclaim.[4] Like all other unions, the UMWA has pressed the operators to obtain a share in this increased productivity in the form of increased wages and benefits for its members. All this is entirely

[3] Official Government statistics show the declining percentage of bituminous coal production in relation to the total U. S. energy production as against the rising percentage of production of crude petroleum and natural gas.

Year	Bituminous Coal and Lignite	Anthracite	Crude Petroleum	Natural Gas, Wet	Waterpower
1900	70.5%	18.4%	4.7%	3.2%	3.2%
1930	55.4%	8%	23.5%	9.7%	3.4%
1950	39.2%	3.2%	33.2%	19.8%	4.6%
1960	26%	1.2%	35.7%	33%	4.1%

Source: Mineral Industry Surveys, United States Department of Interior, Bureau of Mines, September 1, 1961, Weekly Coal Report, No. 2294, Table 17, p. 24.

[4] See 84 Monthly Labor Review 1081 (1961).

consistent with traditional Union objectives as they are pursued in industry generally.

The intrinsic legality of the National Agreement should not require argument. When referring to negotiations and the collective bargaining agreement in his charge to the jury on the law to be applied, the trial judge instructed that multi-employer bargaining (R. 1563a), a single contract in the industry (R. 1556a), the increasing wage and welfare provisions (R. 1565a), and other provisions were all lawful contractual provisions as long as their existence was not pursuant to a combination or conspiracy to put small operators out of business.

Although some potential protection to the current patterns of bargaining in the industry and to the integrity of the agreement is found in the opening portions of the judge's instructions on these matters, it is a matter of grave concern to BCOA that the so-called National Agreement, its method of negotiation and its provisions, should have been intermingled in the evidence presented below and in the judge's charge with various other facts and circumstances, which are wholly unrelated and some of which, such as evidence of local labor violence, are inflammatory in character. The evidence presented as to local violence, the financial relationship between UMWA and certain coal companies, not members of BCOA, the competition for the TVA market, the policies and goals of the UMWA as a labor organization, and other circumstances introduced in evidence, are entirely outside the province of BCOA and are in no remote way connected up with the National Bituminous Coal Agreement, its provisions, or the bargaining procedures which are utilized to negotiate and amend it. Yet, these unrelated circum-

stances have been used to lend color to the bald and unsupported assertion by respondents that the National Agreement, itself, was used as an instrument of the alleged conspiracy.

The only thread apparent from the record to tie together these widely variant and unrelated circumstances is the constant reiteration by the respondents that all of the circumstances—separated as they are by time, distance, nature, and motivation—were undertaken pursuant to a conspiracy national in scope and unlawful in purpose. Yet, there was no independent evidence submitted to show the existence in fact of such a conspiracy. Rather, the conspiracy was presumably inferred from these very circumstances which are concededly lawful.

We recognize the wide latitude permitted in anti-trust cases for the submission of evidence from which reasonable inferences can be drawn. However, if the existence of an unlawful conspiracy under the Sherman Act can be inferred from the normal and traditional relationships between management and labor negotiation and maintenance of labor agreements in a particular industry, then the stability of labor relations in this and other industries has been seriously threatened.

The District Court, with the approval of the Court of Appeals, erred in failing to instruct the jury that the circumstances relating to the National Agreement, and the bargaining processes which produced it, were lawful circumstances which could not be used as evidence from which unfavorable inferences could properly be drawn in an anti-trust suit. By the District Court's inclusion of these matters in his charge to the jury, the jury was handed here a whole multitude of unrelated and disssimilar facts and circumstances,

ranging from incidents of local violence in Tennessee to the National Bituminous Coal Wage Agreement itself, and told, in effect, that from all or any combination of these facts and circumstances the jury could infer that a conspiracy exists. The decision and opinion of the Court of Appeals affirming the District Court's judgment fails to rectify this error.

All that the jury verdict tells us is that the jury believed that the UMWA had engaged in a conspiracy. We do not know who the jury believed to be the other party or parties to such a conspiracy, nor do we know its nature or scope Yet, it is clear from the wide range of admitted evidence, and from the instructions given by the trial judge that in that determination the jury was given a multiple choice of possible parties and possible conspiracies and possible circumstances on which to base a verdict.

The very ambiguity of the jury verdict, when meas-used against the wide choice of conspirators and conspiracies left open to it by the District Court, has shocking and far-reaching implications. If allowed to stand, it creates a cloud of suspicion over the entire bituminous coal industry and over the collective bargaining procedures and agreements which govern its labor relations on a national scale. It puts into question any form of association or multi-employer bargaining which is a characteristic of many of our major industries as well as coal. The repercussions could have an unstabilizing effect on labor peace not only in the coal industry but in many other industries as well.

It is submitted that the District Court failed to perceive and to instruct the jury on certain important features of this case which distinguish it from the

ordinary anti-trust suit. To be sure, it noted the immunity given labor organizations from anti-trust actions unless they conspire with employer groups. But the District Court did not, as we think it was required to do, instruct the jury that evidence of a conspiracy with employer groups could not be found in a collective bargaining agreement, lawful on its face; or in the lawfully established procedures for negotiating and amending that Agreement. It is further suggested that the District Court should have instructed the jury that no inference of an unlawful conspiracy could be drawn from the results which have flown from the arm's-length collective bargaining which has taken place under compulsion of law, such as increases in wage rates and employee benefits for members of the union over the years. These are the normal and expected consequences of our system of free collective bargaining, under the aegis of the NLRB and the courts, as the history of industry generally throughout the last 25 years will attest.

The failure of the District Court to differentiate and insulate the normal processes and consequences of collective bargaining from attack under the anti-trust laws will, if allowed to stand, create a basic inconsistency between the anti-trust laws and the labor laws which foster and enforce the very processes and procedures here under attack. This is strongly analogous to the apparent inconsistency between the Sherman Act and the Norris-LaGuardia Act which the Supreme Court clarified in the *Hutcheson* case[5] by giving precedence to the policy expressed in the labor statute. The decision and opinion of the Court of Appeals, by its mere repetition of the evidence introduced by respond-

[5] United States v. Hutcheson, 312 U.S. 219 (1941).

cuts, failed to perceive and, indeed, perpetuated the errors of the District Court.

By characterizing respondents' evidence as "background . . . given to the jury" (325 F. 2d at 811) and concluding that such background constituted substantial evidence to uphold the jury's verdict, the Court of Appeals has endorsed the same blank check given to the jury in this case by the District Court.

BCOA cannot ignore this direct attack on the integrity of the agreement it has helped to negotiate and the procedures it has used to bargain. The labor agreement in this industry which has been negotiated and maintained over the last two decades has brought a measure of labor peace and has helped to insure the uninterrupted production of a commodity—coal—which is essential to our economy. The jury verdict and the decision of the Court of Appeals leaves the bituminous coal wage agreement itself, the parties who negotiated it and who are signatories to it in an exposed and hazardous legal position.

II.

BARGAINING CHAOS IN THE COAL INDUSTRY PRIOR TO THE FORMATION OF BCOA

A brief review of bargaining in the coal industry prior to 1950, as disclosed in this record, should cause sober reflection to those who would indict the post-1950 agreement and bargaining on such sweeping charges.

It is matter of history that from 1930 to 1950 bargaining in the coal industry was highlighted by bitter and protracted "klieg light" negotiations between large numbers of the union's committee and even larger numbers of employers. Costly strikes impairing the national interest were a recurring symptom and govern-

ment seizure of the mines became an ordinary, not extraordinary remedy. NLRB charges and countercharges were frequently exchanged and lawsuits resulting from bargaining differences were on court dockets continuously. The only way to describe such bargaining in the 30's and 40's is to say that it was chaotic and costly to the industry and the public at large. This period of history was characterized by national strikes, injunctions, Government seizures, and almost total disruption.

During these years the bargaining for a contract generally became focused on a similar date for most of the operators. Three distinct employer groups emerged in these national negotiations—the Northern operators, the Southern operators and the so-called "captive mine" operators (operators who mine coal for use in the processing of another product, mainly steel). These broad lines of division between the employer groups made for disorganized bargaining on the employer side, and provided opportunity for the union to exploit the organizational weaknesses of the employers. With each new effort at negotiations the operators would attempt to form a committee with various subcommittees to receive and present bargaining proposals. There was, however, no continuing organization to attempt to maintain peaceful and stable labor relations. The amorphous and *ad hoc* nature of the employers' bargaining organization made serious, good faith and business-like bargaining difficult, if not impossible, on both sides of the bargaining table.

Given the organizational disarray of the employers and the increasing strength of the union through the National Recovery Act with its Coal Code in 1933, the Guffey Act in 1935, and the Bituminous Coal Act of

1937, and the second Guffey-Act of 1939, the results were not surprising. In 1934, 400,000 miners struck for one week after which the operators agreed to a wage rate of $5.50 a day in the North and $5.10 in the South. In 1939, the union demanded a wage increase, a 30 hour week, paid vacations, seniority rights, improved hospitalization, federal inspection of mines and a protective clause. Negotiations broke down. The miners struck for five weeks and returned only after Presidential intervention. In 1941, the Southern miners struck Southern operators after the operators withdrew from negotiations in which the union was seeking to eliminate the regional wage differential. Shortly thereafter miners of the captive mines struck. One hundred thousand other miners struck in sympathy with the strike of the captive mine employees. During the 1943 negotiations there were a number of strikes over a six month period and the government seized the mines twice. Similarly in 1945 a number of strikes following a breakdown of negotiations resulted in government seizure of 235 mines.

When the government seized the mines once again in 1946 because of a breakdown in negotiations over a welfare fund, a settlement was reached only by means of negotiating a collective bargaining agreement with the then Secretary of Interior who agreed to the welfare fund.

The succeeding contracts in 1951, 1952, 1955, 1956, 1958 and 1964 have been in form of amendments to the 1950 agreement. BCOA has participated in the making of these amendments by negotiating with the Union on behalf of its own members, in the manner described above. BCOA's contribution has been to provide a continuing focal point for its operator members to

attempt to achieve peaceful and amicable settlements with the Union and to avoid crippling strikes. BCOA performs this function on behalf of its members only, but BCOA membership is open to any coal operator who wishes to participate in the negotiations through BCOA.

The results of the post-1950 method of negotiations are an open record. Collective bargaining has been, to a marked degree, stabilized in the industry. There have been no government seizures or crippling nationwide strikes since 1950. Collective bargaining problems have not ended as a matter of course in NLRB or court proceedings, or in Government seizure or other intervention.

The record will show, however, that the negotiations since 1950 have not been without real issues between the parties. Each new union demand has been carefully analyzed for its legality and its economic impact on the members of BCOA. Many demands have been opposed and few have been accepted without compromises. The issues are still the same; only the procedures by which the issues are resolved have been changed. They have gone from jungle-type economic warfare to the reasoned and rational processes of the conference table.

The thrust of respondents' argument with respect to the post-1950 negotiation of the National Bituminous Coal Wage Agreement appears to be that there is something sinister and unlawful in the fact that a group of coal operators have chosen to eschew individual company bargaining and conduct their contract negotiations with the Union through BCOA, an employer association established for that express pur-

pose. Respondents also seek to draw unfavorable inferences from the further fact that the post-1950 bargaining for amendments to the agreement has been characterized by peaceful settlements and by the absence of strikes, public bickering and legal controversies of the type which were prevalent in the pre-1950 era.

Respondents do not enlighten us as to how the coal operators should conduct these contract negotiations in such a way as to lift this cloud of suspicion from the contract negotiations. Presumably, however, this could require the abandonment by coal operators of association-type bargaining and force a reversion to the disorganized and dismally unsuccessful pattern of the past, where the weaknesses inherent in the lack of maturity and organization on the operator side were exposed and exploited by a strong and unified labor union.

Nor do respondents enlighten us as to how the coal operators, acting through their associations or otherwise, can roll back or unduly retard wage and welfare advances in this industry without regard to the aspirations of the miners for improvement and the general upward movement of wages and welfare in the economy at large.

An essential element of Respondents' case appears to be an attack on any form of Association or pattern bargaining. The right of individual employer units in the same industry to form an association to represent their common interests in collective bargaining has been sustained by the NLRB and the courts.

NLRB v. *Truck Drivers' Local Union*, 353 U.S. 87 (1957), *Alston Coal Co.*, 4 L.R.R.M. 337, 13 NLRB 683 (1939), *Stevens Coal Co.*, 19 NLRB, 98 (1940). The legality of association bargaining is therefore beyond question. The regulation of collective bargaining between employers and unions and the enforcement of the rule of good faith, arm's-length negotiating fall within the exclusive province of the NLRB. The NLRB has not prescribed that any particular formalities be followed in reopening and negotiating changes in collective bargaining agreements, nor has the Board even drawn any inferences of collusion or bad faith bargaining from the fact that the parties are able to resolve their disputes at the conference table rather than by resort to strikes or lockout to gain their ends. On the contrary, the national labor policy encourages and fosters the establishment of orderly bargaining procedures for the peaceful settlement of contract disputes.

It is inconceivable that bargaining procedures, which have the complete endorsement of our labor laws, should in any respect be questioned under the anti-trust statutes. The assumed fact, even if it were shown to exist, that there are marginal coal operators in the industry who cannot afford to pay the wages and benefits to their employees provided by the National Agreement provide no proper basis for an anti-trust violation. This is an unfortunate economic condition and a fact of life which exists in all industries, and in some perhaps to a greater extent than others. Unions, in presenting and pursuing their bargaining goals in a particular industry, are not required to, and normally do not, take into account the ability to pay of the financially weaker business units, but

traditionally center their aim on the larger and more stable enterprises in the industry. By the same token, the more stable employers have had little success in resisting union wage and other economic demands on the ground that less stable employer units cannot afford to meet union standards.

Yet, a major item of the alleged conspiracy is the contention that it is a violation of the anti-trust laws for one group of employers to agree to wages and conditions which another group in the same industry may not be able to meet. This concept would again cast reflection upon the patterns of bargaining and their consequences in all of our major industries.

CONCLUSION

BCOA submits that the policies of the anti-trust laws would not be furthered by returning the status of bargaining in this industry to the condition it was in prior to 1950. Unless this Court rectifies the error of the Court below there will be, of necessity, a weakening of support for the bargaining relationship and mechanisms which have been developed after years of crisis and which show promise for a sustained period of labor peace under law.

This error of the Courts below lies in abdicating their responsibility to clearly delineate the admissible evidence which may be submitted to a jury from which an inference of illegal conspiracy can be drawn. While the trial court appears generally to have enunciated the correct principles of law applicable to the case, the Court failed to observe these principles when it permitted the jury to draw an inference of illegality from the normal and traditional functioning of the collective bargaining procedures which have the support and

sanction of Federal law. This created a situation in which, for all that can be known, the jury could have based its finding of an unlawful conspiracy solely on the spurious contentions made by Respondents and accepted by the courts below that the National Agreement, the manner of its negotiation, and its economic consequences *vis-à-vis* the small operator constituted a conspiracy in restraint of trade. The granting of such wide latitude to a jury, inflamed by extraneous evidence of labor violence, will inevitably project the anti-trust prohibitions into areas of labor-management relations which are extensively governed by and in basic conflict with the National Labor Relations Act.

It is therefore, urged that the opinion and judgment of this Court vindicate the integrity of the National Agreement and the methods used to negotiate it by holding that they are not relevant or probative evidence from which a conspiracy may be inferred.

Respectfully submitted,

GUY FARMER
General Counsel for the Amicus Curiae The Bituminous Coal Operators' Association

PATTERSON, BELKNAP & FARMER
1120 Connecticut Ave., N. W.
Washington 36, D. C.

Office-Supreme Court, U.S.
FILED
DEC 4 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 48.

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admx. of the Estate of Burse Phillips, Deceased,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF

Of Respondents in Reply to the Brief of AFL-CIO as Amicus Curiae, Particularly With Respect to the Legislative History of the Taft-Hartley Act and Consideration by Congress of the Allen Bradley Rule.

JOHN A. ROWNTREE,
1412 Hamilton Bank Building,
Knoxville, Tennessee,
Attorney for Respondents.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477



TABLE OF CONTENTS OF BRIEF.

Page

Brief of Respondents in Reply to the Brief of AFL-CIO as Amicus Curiae, Particularly With Respect to the Legislative History of the Taft-Hartley Act and Consideration by Congress of the Allen Bradley Rule 1, 2

I. The Disposition of the Language in Bills Designed to Make Specific Changes in the Clayton and Norris-LaGuardia Exemptions of Labor Unions Under the Antitrust Law Shows No Intent on the Part of Congress to Change the Antitrust Law as It Existed in 1947 .... 2, 8

II. The Boycott Provisions of the Taft-Hartley Act Show No Dispositions on the Part of Congress to Change the Antitrust Law 8, 11

Conclusion 12

Case Cited.

Allen Bradley Co. v. IBEW Local 3, 325 U. S. 797 . . 2, 9, 11

Miscellaneous Cited.

Hearings Before the Committee on Labor and Public Welfare, United States Senate, 80th Congress, First Session on S. 55 and S. J. Res. 22 10

Legislative History of the Labor Management Relations Act, 1947 ..... 3, 4, 5, 6, 7, 8

U. S. Code Congressional Service, 1946, 79th Congress, Second Session 4

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 48.

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admx. of the Estate of Burse Phillips, Deceased,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF

Of Respondents in Reply to the Brief of AFL-CIO as Amicus Curiae, Particularly With Respect to the Legislative History of the Taft-Hartley Act and Consideration by Congress of the Allen Bradley Rule.

Since filing the main reply brief Counsel for Respondents has had an opportunity to review the legislative history of the Taft-Hartley Act. The Amicus Curiae brief of AFL-CIO, at pages 23-24, made reference to parts of

this legislative history. The remarks made here supplement pages 24-27 of Respondents' main reply brief.

We believe that a thorough analysis of the legislative history of Taft-Hartley strongly indicates absence of intent on the part of Congress to weaken or change the anti-trust law and particularly shows no intent to change the then existing decisions of the Supreme Court interpreting the anti-trust statutes with respect to the position of a labor union under those statutes, including the rule in Allen Bradley Co. v. IBEW Local 3, 325 U. S. 797, which had been decided by the Supreme Court in 1945.

The two parts of the bills leading up to the Taft-Hartley Act which touched upon anti-trust law were the language relating specifically to the Clayton and Norris-LaGuardia exemptions of labor unions from the anti-trust law, and the language pertaining to boycotts.

I. The Disposition of the Language in Bills Designed to Make Specific Changes in the Clayton and Norris-LaGuardia Exemptions of Labor Unions Under the Anti-Trust Law Shows No Intent on the Part of Congress to Change the Anti-Trust Law as It Existed in 1947.

H. R. 3020, as it passed the House, contained Section 301 (b), reading as follows:

> "(b) Section 6 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended, is amended by inserting before the period at the end thereof a colon and the following: 'Provided, however, That it shall not be within the legitimate objects of labor organizations or the officers, representatives, or members thereof, to make any contract, or to engage in any combina-

tion or conspiracy, in restraint of commerce, if one of the purposes or a necessary effect of such contract, combination, or conspiracy is to join or combine with any person to fix prices, allocate customers, restrict production, distribution, or competition, or impose restrictions or conditions, upon the purchase, sale, or use of any product, material, machine, or equipment, or to engage in any concerted activity declared to be unlawful under section 12 of the National Labor Relations Act, as amended.'" (Legislative History of the Labor Management Relations Act 1947, U. S. Government Printing Office, 1948, Vol. 1, pp. 220-221.)

The above language extends beyond the Allen Bradley situation where a labor union conspires with business groups to aid such groups in restraining and monopolizing trade. The House Report No. 245 on H. R. 3020 stated:

"Section 301 contains the amendments to the Clayton Act that were included in the Case Bill of last year, and which at that time passed the House by an overwhelming majority." (Legislative History of the Labor Management Relations Act, 1947, supra, p. 336.)

The Case Bill had been broadly interpreted to extend beyond the Allen Bradley type of conspiracy. When the President vetoed the Case Bill his message stated:

"Section 11. This provision subjects various union activities to the anti-trust laws with all their criminal sanctions, injunctive remedies, and provisions for treble damages. Although the section is entitled 'Secondary boycotts,' the scope of the section in fact extends far beyond such matters. While its enactment would provide remedies that might result in the elimination of certain evils, such as improper application of the secondary boycott, it would also make those remedies available against recognized legitimate activities of organized labor.

"That there are some abuses in this field, no one can gainsay. I deplore the strike or boycott arising out of a jurisdictional dispute as one of the most serious of such abuses. A way must be found to prevent the jurisdictional strike. It cannot be justified under any circumstances. I am convinced, however, that the anti-trust laws, the objectives of which are the elimination of unfair business practices and the protection of free competition, are not designed to solve the abuses pointed out in this section.

"In this regard, however, I do not need to emphasize the necessity of applying the anti-trust laws to combinations between employers and labor designed to restrain competition." (Emphasis added.) (U. S. Code Congressional Service, 1946, 79th Congress, Second Session, page 1691.)

That the rejection of the foregoing language by Congress was attributable to the fact that it extended beyond the Allen Bradley type of conspiracy, is indicated in the House Minority Report No. 245, on H. R. 3020, where the minority reported:

"Section 301 of title II again subjects trade unions to criminal prosecution and treble damage suits under the antitrust laws regardless of whether they are legitimately seeking to preserve union wage rates and standards. **Insofar as this section makes it a violation of the antitrust laws for labor to combine with nonlabor groups to fix prices, restrict production, or to control markets it is completely unnecessary. The Supreme Court has repeatedly held that the antitrust laws apply to restraints imposed on commerce by the combination of a union with nonlabor groups.** But subsection (d) of section 301 sweeps within the scope of criminal prosecution 'any concerted activity declared to be unlawful in section

12 of the National Labor Relations Act as amended.' Thus, for example, all boycotts as defined in section 2, including refusal to work on or install nonunion-made goods, or a refusal to work on jobs with which the nonunion employer is connected are subjected to criminal sanctions.

* * * * * * * *

"Section 301 would turn the clock back to the period before 1914 and would encourage new industrial strife. Once again the Danbury Hatters case and the Duplex and Bedford Stone case might become the prevailing law." (Emphasis added) (Legislative History of Labor Managements Relations Act, 1947, supra, pp. 398-399.)

The amicus curiae brief of AFL-CIO at page 24 referred to the above quoted language in the House Bill but did not make note of the existence of similar language in proposed amendments to the Senate Bill. Senate Report No. 185 on S. 1126, Supplemental Views, sought to have added to the Senate Bill a section 303(d) as follows:

"(d) The provisions of sections 6 and 20 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and the provisions (except section 7, exclusive of clauses (c) and (e) and sections 11 and 12) of the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,' approved March 23, 1932, shall not be applicable in respect of violations of subsection (a) or in respect of any contract, combination, or conspiracy, in restraint of commerce, to which a labor organization is a party, if one of the purposes of such contract, combination, or conspiracy is to fix prices, allocate customers, restrict produc-

tion, distribution, or competition, or impose restrictions or conditions upon the purchase, sale, or use of any material, machines, or equipment." (Legislative History of the Labor Management Relations Act, 1947, supra, pages 461-462.)

Senator Ball introduced the foregoing language on the Senate floor at page 4887 of the Congressional Record for May 8, 1947. (Legislative History of the Labor Management Relations Act, 1947, supra, pages 1323-1324.)

The Congressional Record for May 9, 1947, page 5040, shows the following colloquy between Senator Ball and Senator Pepper, Senator Ball's statement being the first part of the following quotation:

"That language is designed to correct the interpretation of the Norris-LaGuardia and Clayton Acts made by the Supreme Court in the Hutcheson case, and a number of other cases brought by former Assistant Attorney General Thurman Arnold, when he attempted to break up monopolistic practices on the part of labor unions, sometimes acting on their own, sometimes in conspiracy with employers. They were engaging in all kinds of price-fixing. They were attempting to determine, on their own responsibility, what products should be used in industry, what kind of machines, and what products the public should be entitled to buy.

"Mr. Pepper: Mr. President, will the Senator yield?

"Mr. Ball: I yield.

"Mr. Pepper: The able Senator says the purpose o this portion of the amendment is to correct a decision of the United States Supreme Court. What he means is that it is intended to overrule or set aside the holding of the United States Supreme Court that the Clayton Act and the Sherman Antitrust Act do not apply to labor organizations and to permit the application of the Clayton Act and the Sherman Antitrust Act to the acts set out in the words of the amendment.

"Mr. Ball: The Senator can phrase it in any way he desires; whether it is 'to correct' or 'overrule', it means the same thing. There is no reason why those acts should not be applicable."

(Legislative History of the Labor Management Relations Act, 1947, supra, page 1354.)

The fear that the foregoing proposed amendment was too broad was expressed by Senator Morse at page 5044 of the Congressional Record for May 9, 1947, as follows:

"The language of this section would revive the case of Duplex v. Deering (254 U. S. 443), and the Bedford Cut Stone case (274 U. S. 37)."

(Legislative History of the Labor Management Relations Act, 1947, supra, p. 1363.)

And Senator Pepper expressed the same fear at page 5048 of the Congressional Record as follows:

"The second point is that the amendment is designed, as the Senator from Minnesota pointed out, to overrule or correct, as he stated, the decision of the United States Supreme Court that the antitrust laws of the United States are not intended to be applied to labor unions. The Senator from Minnesota is trying to reverse or set aside that decision of the Supreme Court and to make the antitrust laws applicable to labor unions. I do not believe the Senate wishes to make those two radical departures from either the present law or the present decisions of the Supreme Court of the United States."

(Legislative History of the Labor Management Relations Act, 1947, supra, p. 1367.)

After the foregoing discussion the proposed amendment was defeated. (Legislative History of the Labor Management Relations Act, 1947, supra, page 1370.)

Senator Taft introduced at this point an amendment which finally became law, but which eliminated the amendment of the Clayton and Norris-LaGuardia Acts proposed by Senator Ball as set forth above, at page 5060 of the Congressional Record. Senator Taft said with respect to his proposed amendment:

> "This is similar to the Ball amendment, dealing with the jurisdictional strikes and secondary boycotts. It eliminates the injunctive process, the suspension of the Norris-LaGuardia Act, which I found was creating so much difficulty . . ."
>
> (Legislative History of the Labor Management Relations Act, 1947, supra, page 1370.)

The foregoing history of the proposed language in the House and Senate Bills relating to amendment of the Clayton Act or other antitrust statutes, shows no disposition on the part of Congress to change the antitrust laws. Rather it shows conclusively that Congress accepted the law as it existed at that time under the decisions of the Supreme Court, including the Allen Bradley case.

II. The Boycott Provisions of the Taft-Hartley Act Show No Disposition on the Part of Congress to Change the Antitrust Law.

The language of the Act with respect to boycotts certainly does not encompass a conspiracy between a union and business groups to aid the business groups in accomplishing a restraint of trade or monopoly. If Congress intended to change the Allen Bradley rule, after that rule had been called to its attention, it would have expressly done so. It appears that Congress, in the boycott provisions of the Act, was concerned with the problem outside of the Allen Bradley type of conspiracy, the same as was the President in his Case Bill veto, which is quoted from above.

The problem has to do with a situation where the union is not aiding or abetting a business group in restraining trade or monopolizing. This problem involves a union acting alone, for its own self-interest, engaging in jurisdictional or secondary boycotts; and also a situation where, as developed in the Allen Bradley matter, the illicit conspiracy has been found and enjoined in a Sherman Act case but the union continues its boycott and asserts that the continuance is by the union alone and not in conspiracy with business groups.

The AFL-CIO brief, pages 23-24, quotes from the Senate Committee Report on the boycott provision, and contends this language shows intent to encompass within the labor law boycott provision the entire regulation of union restraint of trade practices regardless of whatever type of conspiracy the union enters upon. The Committee Report (No. 105) reads in full at this point as follows:

> "This paragraph also makes it an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New York City by Local No. 3 of IBEW, whereby electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organization other than Local No. 3. (See testimony of R. S. Edwards, Vol. 1, p. 176, et seq.; Allen Bradley Co. v. Local Union No. 3, IBEW, 325 U. S. 797.)"

The report of hearings encompassing the testimony of Mr. R. S. Edwards, referred to at the end of the foregoing quotation from the Senate Committee Report, includes a colloquy between Mr. Edwards and the committee members showing clearly that the intent of the boycott provision was not to weaken or change the antitrust law, but was to provide a remedy for the situation where the union was acting alone and not in combination with business groups. Thus at page 184 of the Hearings before the

Committee on Labor and Public Welfare, United States Senate, 80th Congress, First Session on S. 55 and S. J. Res. 22, being for the date January 29, 1947, the following occurred:

"The Chairman: I do not want to go into the law end of it, but as I remember the union and the manufacturers, or the distributors, contractors, were indicted under the Sherman Act for monopoly as long as the contractors were in on it. It was found to be illegal, was it not?

"Mr. Edwards: That is all covered. That is the Allen Bradley case that reached the Supreme Court. That is covered in the filed brief, and I have a very short comment on that.

"The Chairman: Then later when the contractors withdrew entirely, the Supreme Court held that the monopoly exercised by the union was not in violation of the Sherman Act or any of the existing statutes. Is that correct?

"Mr. Edwards: That is right, sir.

"The Chairman: So if anything is to be done about it, there is clearly no present remedy under present law.

"Mr. Edwards: There is no remedy.

"I would like to quote also another paragraph from Mr. Weir's affidavit.

'Within the last month—

this is Mr. Weir speaking—

"'the union notified my association through me, that, beginning the 15th of January, it would not allow employees of wholesalers with whom it had contracts to sell or deliver any electrical materials to contractors whose employees were not members of IBEW Local No. 3, notwithstanding the fact that this union has a full, closed membership in their contracting group and has expressly stated that they would not accept any new members.'"

It seems clear that the observations in the foregoing quotation relate to the following language of this Court in its opinion in Allen Bradley at pages 810-811:

> "Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups. This, it is argued, brings about a wholly undesirable result —one which leaves labor unions free to engage in conduct which restrains trade. But the desirability of such an exemption of labor unions is a question for the determination of Congress.
>
> * * * * * * * *
>
> "Congress evidently concluded, however, that the chief objective of antitrust legislation, preservation of business competition, could be accomplished by applying the legislation primarily only to those business groups which are directly interested in destroying competition. The difficulty of drawing legislation primarily aimed at trusts and monopolies so that it could also be applied to labor organizations without impairing the collective bargaining and related rights of those organizations has been emphasized both by congressional and judicial attempts to draw lines between permissible and prohibited union activities. There is, however, one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the Act."

CONCLUSION.

It is submitted that the foregoing legislative history shows no intent on the part of Congress to weaken or change the antitrust law as it existed in 1947, after the Allen Bradley decision; rather it appears strongly that Congress was primarily concerned with strengthening the Labor Law in a situation, outside of the Allen Bradley type of conspiracy, where the union was acting alone for its own benefit, in the limited situation specified in the secondary boycott provisions of the Taft-Hartley Act.

Respectfully submitted,

JOHN A. ROWNTREE,
Attorney for Respondents.

LIBRARY
SUPREME COURT, U. S.

FILED
JAN 19 1950

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 48

UNITED MINE WORKERS OF AMERICA,
Petitioner,
vs.
JAMES H. PENNINGTON, SEYMORE E. PHILLIPS, and LILLIAN GOAD PHILLIPS, Admrs. of the Estate of Boone Phillips, Deceased,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF

Of Respondents in Reply to Comments Concerning This Case Made by the United States as Amicus Curiae in Its Brief Filed in Case No. 368, Local Union No. 189, Etc., vs. Jewel Tea Company, Inc.

JOHN A. BOWMTREE,
1412 Hamilton Bank Building,
Knoxville, Tennessee,
Attorney for Respondents.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. Chestnut 1-4477.

TABLE OF CASES.

Page

Allen Bradley Company v. Local Union No. 3, 325 U. S. 797 ..... 2, 5, 6, 7, 8

Apex Hosiery Company v. Leader, 310 U. S. 469 6

Continental Ore Co. v. Union Carbide Co., 370 U. S. 690 13

Georgia v. Pennsylvania Railroad Company, 324 U. S. 439 9

Hylton Harmon, Trustee of the Coffeyville Loan and Investment Co., Inc. v. The Valley National Bank of Arizona et al. (C. A. 9th, Dec. 17, 1964), ... F. (2) ..., CCH Trade Cases 71,327 12

Jewel Tea Company Case, No. 240 ..... 3, 9

Pfotzer v. Aqua Systems (C. A. 2d, 1947), 162 Fed. 2d 779 12

United Brotherhood of Carpenters and Joiners of America v. United States, 330 U. S. 395 8

United Brotherhood of Carpenters v. United States, 330 U. S. 395 6

United States v. Hutcheson, 312 U. S. 219 6

United States v. Socony-Vacuum Oil Company, 310 U. S. 150 8

United States v. Women's Sportswear Association, 336 U. S. 460, 463-464 9

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 48.

UNITED MINE WORKERS OF AMERICA,
Petitioner,

vs.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admrx. of the Estate of Burse Phillips, Deceased,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF

Of Respondents in Reply to Comments Concerning This Case Made by the United States as Amicus Curiae in a Brief Filed in Case No. 240, Local Union No. 189, Etc., vs. Jewel Tea Company, Inc.

We read Press reports in December, 1964, that the United States as Amicus Curiae had filed a brief in Case No. 240, Local Union No. 189, Etc., v. Jewel Tea Company, Inc., and that this brief recommended reversal of this case, No. 48, as well as No. 240.

Not having been served with copy of the Government brief, we called the Department of Justice and in response to that call have been furnished a copy of that brief. We are making reply to comments concerning the case at bar, No. 48, in the Government brief, as soon as possible after receiving copy thereof.

We observe that the Government brief at page 26, without explanation, classifies the case at bar as one involving solely the question of the validity of a wage clause in a collective bargaining agreement. On that page it is also indicated, without explanation, that Allen Bradley Company v. Local Union No. 3, 325 U. S. 797, is in a category that is not applicable to the case at bar. Then the brief states at page 33:

> "Thus, in the pending Pennington case we would conclude that the judgment should be reversed if the evidence shows no more than that the United Mine Workers and the employer parties to the wage and royalty agreements knew, or even desired, that the consequence of the increased compensation would be to put some employers out of business, provided that the union was acting bona fide in the belief that increased compensation would benefit its members."

The brief goes on to specify two qualifications to the above observation:

> "First, a union which owns and operates a business has no more right to use anticompetitive leverage to injure its business competitors than does any other business entity."

> "Second, both the union and employers are guilty of a violation of Section 1 of the Sherman Act where the proof shows an independent conspiracy of businessmen, even though it grew out of labor dispute, or was implemented through a collective bargaining agree-

ment, or the collective bargaining negotiations were the occasion for its origination. Allen Bradley, supra, and United States v. Women's Sportswear Mfgrs. Assn., 336 U. S. 460, are such cases."

It seems on the surface that the Government has considered a part of the theory of conspiracy involved in this case, dismembered that part of the theory, made a recommendation with respect to reversal, and then added some saving clauses on the chance that there might be something more to the case.

Before the granting of the writ in the **Jewel Tea Company** case, No. 240, the Government filed a brief stating at page 5:

> "We have not filed a brief amicus curiae in United Mine Workers case because it involves a number of peculiar facts and also because the antitrust issues appear to turn chiefly upon the detailed analysis of a voluminous record."

It is not directly stated whether or not Government Counsel had made the detailed analysis of the record and considered fully the "peculiar facts", or even read the briefs, in this case when it filed its last brief in No. 240. We cannot believe that the Government, in a brief not served upon Counsel in this case, intended to pass judgment upon either the theory upon which the case was tried, or the jury verdict based upon the record.

The brief of the United States does not directly consider any but a small part of the theory of conspiracy advanced by us in this case. Apparently, the Government was primarily concerned with the validity, per se, of certain types of clauses in multi-employer collective bargaining agreements, rather than conspiracies behind such agreements. And the brief was filed in a case (No. 240) where the Trial Court found that the evidence established that the collective bargaining agreement with reference to hours

of work "was fashioned exclusively by the unions to serve their own interests."

It will be recalled that the case at bar was founded on a conspiracy participated in by the union with business groups to stabilize production and prices and to monopolize markets for major coal companies who were favored by fixed conditions of geology and terrain, and the case involved the efforts of the conspirators to take over the important new TVA coal market. The case involved the investment by the union in, and loans to, major coal companies, with expectations of profit, and these companies supported by union financing have engaged in predatory pricing on plaintiffs' market, damaging the plaintiff, at a time when the union and the major coal companies were trying to drive the local small companies out of that market. The gist of the conspiracy is found in that part of the statement of "theory of conspiracy" set forth in our main brief which states:

> "The union in carrying on the foregoing activities pursuant to its understanding and agreement with the major coal companies was not acting alone to further its own interests as an organization of wage earners but was aiding, abetting and cooperating with businessmen in an effort to restrain trade of small coal companies and to monopolize the industry for the major coal companies; the conspiracy involved boycotts and a purpose to stabilize the prices of coal in the industry; the practices used pursuant to the conspiracy, particularly the imposition of the constantly increasing terms of the National Bituminous Coal Wage Agreement upon the small coal companies, such as that of Phillips Brothers, and the price-cutting practices of the conspirators on the markets supplied by Phillips Brothers were unreasonable."

The jury found the conspiracy existed and this verdict has been sustained by the two lower courts.

Thus, our whole case falls outside of the area of prime concern to the Government—the validity, per se, of the terms of a collective bargaining agreement. Rather, our case falls entirely within the qualifications stated by the Government to its principal observations, which qualifications were rather lightly treated in the Government brief.

Two aspects of the Government brief are difficult for us to understand. One of these is the tendency to relegate the **Allen Bradley** rule to a place of insignificance in a Sherman Act case against the union. The other aspect concerns the ideas expressed about the kind of proof that is appropriate in this kind of case.

The brief seems to be completely absorbed with the concept that such cases as this should be judged solely from the nature of provisions in a collective bargaining agreement. We are not sure we understand the analysis made by the Government of particular kinds of clauses in collective bargaining agreements, wherein the Government considers whether such clauses give direct or indirect benefit to members, or impose direct or indirect restraints upon commerce.

Generally, a collective bargaining agreement is not simply a wage clause or an hour's clause, but it contains these clauses together with a lot of others, including union shop clauses and, in some cases, boycott provisions and protective wage clauses, etc., and the overall effect of the agreement cannot be judged without looking to the whole agreement. Furthermore, it cannot be judged without looking to the circumstances in the industry covered by the agreement.

We had assumed that no union would violate the antitrust law, regardless of what its agreements provided, if it were operating for the benefit of its members exclusively and was not acting pursuant to a combination, understanding or conspiracy with business groups to aid

such groups in restraining trade or monopolizing in the markets for goods.

On the other hand, it has been our position that if such a combination, understanding or conspiracy is charged, any kind of provision in an agreement that can be shown to further that conspiracy may be proper evidence of the existence of that conspiracy, when taken in connection with other proof on the background, circumstances and relationships in the industry. We cannot read the decisions in **Apex Hosiery Company v. Leader**, 310 U. S. 469; **United States v. Hutcheson**, 312 U. S. 219; **Allen Bradley Co. v. Local Union No. 3**, supra; and **United Brotherhood of Carpenters v. United States**, 330 U. S. 395, to mean anything else. We do not believe these decisions leave all of the uncertainties in the law which the Government indicates exists.

Perhaps the intricate problems the Government visualizes result from the Government's reluctance to confine union liability under the antitrust law to the **Allen Bradley** rule and from a purpose to save some area of the law for an anticipated situation, not presently defined or identified, where a union should be liable under the antitrust law for a particular kind of bargaining agreement without proof of any other understanding with business groups. Or, perhaps, the Government Counsel outside of the Anti-Trust Division share the antipathy to Sherman Act conspiracy cases against unions expressed by the unions who have filed briefs in this case. However, we do not believe that any better rule could be devised than that found in the **Allen Bradley** case.

The Sherman Act conspiracy case has to be a sort of blunt instrument to be wielded to preserve economic freedom, and the ultimate decision must be by a trial court or jury on whether the charged combination or conspiracy existed, based upon all of the proof and inferences from

that proof, and this decision should stand on appeal, if the verdict comes after appropriate instructions and if it is reasonable on the record.

When a union uses its economic power and bargaining status in such a way that it can readily show it was acting for the interests of at least a majority of its members and can also show that it was not favoring a group of employers over a large competing segment of the industry on whom the union was imposing impossible conditions, it has not had to fear the Sherman Act in the twenty years since **Allen Bradley**. But, if the union finds it difficult to show these things, we submit that it should stand in fear of the Sherman Act and the rule in **Allen Bradley**. That rule preserves the purposes envisioned in the Clayton and Norris-LaGuardia exemptions, yet it has proved effective to accomplish the purposes of the Sherman Act.

We find some confusion in the Government brief with respect to the evidentiary rules in this kind of case. We refer to the language employed with respect to consideration by a Court or jury of the provisions in a collective bargaining agreement in a Sherman Act case against the union. We are not sure as to the position of the Government on this because at page 34 of the brief it is parenthetically acknowledged that a union violates the Sherman Act by engaging in a conspiracy with business men "even though it grew out of a labor dispute, or was implemented through a collective bargaining agreement, or the collective bargaining negotiations were the occasion for its origination." In such situations it would be anomalous, indeed, to say that any proof about the collective bargaining agreement or negotiations would be "immaterial" or otherwise incompetent.

The language used at page 36 of the Government brief is the kind of comment to which we take exception. Even here it is not clear whether the contention is that proof about collective bargaining agreements or negotiations is

simply insufficient by itself or whether it is incompetent and to be excluded. In some parts of this long paragraph it is said that such proof "is not enough," but in other parts it is said that such proof is "immaterial," and it is indicated that such proof should be excluded in a conspiracy case since the jury should not be allowed to speculate about why a union bargains a certain way or to consider such evidence in reaching a verdict.

The brief also takes the position at pages 32-33 that it is immaterial that a union intends that its demands drive out of the industry employers who cannot meet those demands in order that the living standards of its members employed by the surviving companies may be raised. This latter concept is surely contrary to the successful contentions of the Government in such a case as **United Brotherhood of Carpenters and Joiners of America v. United States**, 330 U. S. 395 (which case was not mentioned in the Government brief; and see the Government's contention in that case at 144 Fed. 2d 549), to say nothing of the holding in **Allen Bradley Company v. Local Union No. 3**, 325 U. S. 797.

Page 33 of the Government brief indicates that it is not material whether a union desires stabilization of the industry, but it is not clear whether the Government is contending that the union should be allowed to promote stabilization of prices and production in an industry by combining with business groups in that industry. Such a purpose is clearly one of the fundamental targets of the antitrust law. **United States v. Socony-Vacuum Oil Company**, 310 U. S. 150.

In our case we take the basic premise that a union violates the Sherman Act by conspiring with business groups to aid such groups to restrain trade and to monopolize in the markets for goods. It is foreign to antitrust law that there be technical restrictions and boundaries in the proof bearing upon the relationships and purposes between the

alleged conspirators. No rule could have effective or fair results except that which permits the development of the whole picture of the conduct, relationships and understandings. The intent and effect of any agreement between a union and business groups in a Sherman Act case must be judged "in the light of its origin and the circumstances of the industry." **United States v. Women's Sportswear Association**, 336 U. S. 460, 463-464. Indeed, in the **Jewel Tea Company case, No. 240**, the trial court considered it necessary to go into the origin and background of the agreement on hours as well as its effect on the union members and on the trade before reaching its conclusion from "the purport, history and effect of the controverted provision;" that it "was fashioned exclusively by the unions to serve their own interests." And the Government carefully pointed out these considerations by the Trial Court in the statement of the facts in its brief.

Perhaps the difficulties we have with the Government's brief is the starting point. Rather than starting from a contention of invalidity, per se, of a bargaining agreement clause under the antitrust law (the Government's initial point of focus) we start from a contention that there was a behind the scenes illicit combination and understanding between the union and major coal combines as to the commercial or economic future of the industry, the nature of the understanding being evidenced and promoted, in part, by the successive coal wage agreements. The concept of an illicit combination or understanding back behind otherwise legal contracts or arrangements between alleged conspirators is, of course, not novel in Sherman Act cases. And, this is true with respect to combinations to accomplish illegal restraints by means of contracts or activities that are fully regulated by duly constituted federal regulatory agencies.

The example that seems apt is that found in **Georgia v. Pennsylvania Railroad Company**, 324 U. S. 439. In that

case the defendant railroads contended that Georgia's suit under the Sherman Act impinged upon the fully regulated area of rail rates wherein the doctrine of primary jurisdiction had originated and held full sway. But this Court said:

> "(Georgia) merely asks that the alleged rate fixing combination and conspiracy among the defendant carriers be enjoined. As we shall see that is a matter over which the Commission has no jurisdiction."

Of course, we emphatically disagree with the impression, apparently held by the Government, that this case only involves the question of the validity of a wage clause in a union contract. We refer to our statement of facts in the Appendix to our main brief and we do not think it appropriate to go through all of the statement of the case again. We wish to emphasize certain parts in view of the comments made by the Government.

In the preliminary stages of this case the developing facts spoke loudly of union purposes and understandings that are not normally found in a collective bargaining agreement. The facts open with the union concentrating on the commercial or economic side of the industry, throwing its tremendous power into an effort directed at production and price control, preceded by blasts at the operators for not initiating these efforts, and warnings that it was going to take this course itself as "the only stabilizing force in the industry." When the struggles of the union with major companies ended in 1950, there are multiple facts indicating the union's concentration on the commercial side of the industry has not subsided, but rather is redoubled in combination with major coal companies cooperative with union policies which were slanted to a fantastic extent toward elimination of jobs for members and elimination of production from whole areas in the industry. These areas could not possibly fit methods of operation into the scheme set by the union and the major

combines—not because they were "marginal" competitors without normal ability or initiative and not because they were "sweated labor" employers, but because geology and terrain created physical barriers which constituted obvious and well known exterminators of their production which was competitive to that of major companies. At the end the union sits with the major companies as owner and investor, expecting its economic ventures in the coal industry in the long run to be "immensely profitable" (493a). The union was conscious of the intrinsic value of the enormous coal lands held by these companies (1126a)—a billion tons of reserve coals strategically located in the thick western Kentucky seams which were suited for the type production with intensive mechanization which was the only way that the union and the major companies would allow coal to be mined in the straight jacket that they had devised.

The union-owned companies were allowed to share in supplying large contracts obtained by other major companies. In the meantime, in the midst of a campaign of the union and certain major companies to drive the small Tennessee operators out of the TVA market, the union-owned companies, financed with union pledges, were used as "fighting ships" to dump coal on that market at depressing prices. The only important market the plaintiffs had was wrecked and this is how plaintiffs were damaged.

As the Government brief indicates, some part of this conspiracy relates to forcing upon the coal industry wage increases in rapid succession "tailored to fit" the progressively increasing mechanization techniques of the major coal combines, with knowledge of the effect on the thin-seam areas. Parallel to this phase of the case is that wherein the union and major companies sought to force the same wage scale under the Walsh-Healey Act upon the

thin-seamed local mines in the TVA market where the policing of the contract was difficult. But these phases are only part of the whole picture.

When phases of the proof in a case charging a broad conspiracy furnish evidence of the purposes and intents of the alleged conspirators, it appears reasonable and proper to allow admission of such proof. Thus in **Hylton Harmon, Trustee of the Coffeyville Loan and Investment Co., Inc. v. The Valley National Bank of Arizona et al.** (C. A. 9th, Dec. 17, 1964), ... F. (2) ..., CCH Trade Cases 71,327, it was said:

> "Nonetheless, **Noerr** does not necessarily bar relief under the present complaint. The complaint can be read as alleging that appellee's joint effort to influence the Attorney General was but one element in a larger, long-continued scheme to restrain and monopolize 'commercial banking in particular and the financial industry in general within the State of Arizona.'"

And this distribution from the **Noerr** rule seems particularly applicable where a government market for goods is involved. In **Pfotzer v. Aqua Systems** (C. A. 2d, 1947), 162 Fed. 2d 779, the plaintiff contracted to install a gasoline aqua distribution system at the Naval Air Station at Pensacola, Florida. The defendant, having a patent upon a particular kind of hydraulic distribution system, sought to force the plaintiff to purchase the defendant's system to install on this job, and it also sought to influence the Naval authorities to keep out any other hydraulic gasoline distribution system besides the one upon which the defendant had a patent. The Trial Court excluded communications between the defendant and Naval authorities which tended to show the effort of the defendant to influence the Naval authorities in this respect. Judge Learned Hand said, at page 785:

"The correspondence between Kaestner and Wrightson (the Naval purchasing authority), coupled with the Sullivan report, were rationally relevant to the question whether Kaestner and the Aqua Company were trying to influence the naval authorities to keep out any other hydraulic gasoline distribution system. It was not necessary to prove that there was any corrupt bargain between them; it was enough, if the correspondence threw light upon the efforts of the Aqua Company, and served to prove they had acquired control, and meant to keep it. That made the correspondence admissible on the issue of monopoly."

This proposition is supported by **Continental Ore Co. v. Union Carbide Co.**, 370 U. S. 690.

We apologize for tendering yet another brief, but we felt the Court might not understand our position on these matters, since the Government evidently did not.

Respectfully submitted,

John A. Rowntree

JOHN A. ROWNTREE,
1412 Hamilton Bank Building,
Knoxville, Tennessee,
Attorney for Respondents.

Office-Supreme Court, U.S.
FILED
JAN 21 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 48

UNITED MINE WORKERS OF AMERICA,
Petitioner

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, *Admx. of the Estate of* BURSE PHILLIPS, deceased,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

HARRISON COMBS,
900 Fifteenth Street, N. W.,
Washington, D. C.

E. H. RAYSON,
R. R. KRAMER,
904 Burwell Building,
Knoxville, Tennessee

M. E. BOIARSKY,
511 Kanawha Valley Building,
Charleston, West Virginia
Attorneys for Petitioner

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

IN THE

United States Court of Appeals

OCTOBER TERM, 1964

No. 48

UNITED MINE WORKERS OF AMERICA,
Petitioner

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, *Admx. of the Estate of* BURSE PHILLIPS, deceased,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITIONER'S REPLY BRIEF

Answers to Respondents' (Phillips') brief are found in Petitioner's (UMW) main brief but inaccuracies in Phillips' brief compel this reply.

Phillips' attempted summation of UMW's arguments is an aberration of UMW's position as set forth in its brief. The entire tenor of its brief opposes the concept expressed in Phillips' summation (Phillips' Brief 11), that UMW argues that *Sherman* permits a union to be "excused if one of the purposes of market restraints

pursuant to a conspiracy with business groups is to promote otherwise legitimate Union purposes". UMW argues antithetically that no conspiracy existed and no conspiracy was proved.

Nor has UMW in its brief attacked prior decisions of this Court as "not sound precedents", as Phillips (Br. 11) attributes to it. Though UMW cites *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797 seven times, none supports Phillips' contention of UMW's attack on its validity. *Allen Bradley* is simply not apposite because its factual situation, totally different from that presented herein, produced the conspiracy which the Court condemned. But, it is notable that in *Allen Bradley*, Mr. Justice Black carefully noted that the labor agreement "standing alone would not have violated" *Sherman* and, as carefully he pointed out that "it did not stand alone", explaining "It was but one element in a far larger program in which contractors and manufacturers united with one another to monopolize all the business in New York City, to bar all other business men from that area, and to charge the public prices above a competitive level" (325 U. S. 809). Such a program is wholly lacking herein. Even Phillips has not contended for its existence. Had the union acting alone added to costs or caused "individual refusals of all their employers to buy electrical equipment not made by Local No. 3", then, as *Allen Bradley* declares, "it would have been the *natural consequence of labor union activities exempted by the Clayton Act from the coverage of*" Sherman (p. 809). Thus, it becomes clear that by its assertion (Br. 14) that UMW's promotion of legitimate ends of labor in improving its members' conditions "was not an excuse *when there were also present purposes which violated the Sherman Act*",

All emphasis herein are supplied, unless otherwise indicated.

Phillips obviously equates "*purposes*" with "*illicit combination* between a union and business group" (Br. 14), which Phillips assumes in the instant case and which UMW has shown fully in its main brief did not exist under the proof.

Nor is Phillips' conspiracy assertions (Br. 16) aided by its citation of *United Bro. of Carpenters* v. *U. S.*, 330 U. S. 395. Phillips' comparison of *Carpenters* with *Allen Bradley* (Br. 16) sufficiently shows Carpenters' inapplicability herein. Indeed, the Ninth Circuit's opinion in *Carpenters (Lumber Products Assoc., Inc.* v. *U. S.*, 9 Cir., 144 F. 2d 546), stresses *Carpenters'* similarity to *Allen Bradley* in stating (p. 552), ". . . we find evidence of agreements between the two groups and conduct on the part of each directed at the elimination of competition from the northern products by the price control", which the Ninth Circuit characterized as "squeezing implements to extoft what, in effect, is a capital levy on the home builder and other consumers" (144 F. 2d 551). Indeed, this Court's citation of *Allen Bradley* as support for *Carpenters* (330 U. S. 400) indicates *Carpenter* to be an *Allen Bradley type of situation* which, as has been shown, has no relevancy herein.

Further, Phillips' comparison of the clause in *Carpenters'* labor contract with the protective wage clause in UMW's contract is not apt. In *Carpenter* (330 U. S. 395) the clause provided that "no material will be purchased from, and no work will be done on any material or article that has had any operation performed on same by Saw Mills, Mills, or Cabinet Shops, or their distributors that do not conform to the rates of wage and working conditions of this agreement (330 U. S. 399). On the other

hand, UMW's contract deals with sub-contracting[2]. Indeed, in the recent *Fibreboard Paper Products Corp.* v. *NLRB*, ____ U. S. ____, 13 L. ed 2d 233 (Dec. 14, 1964), this Court declared that replacement of employees in an existing contract unit with those of an independent contractor to do the same work under similar conditions of employment is a mandatory subject of collective bargaining under the Act's Section 8(d), making it an employer's duty to confer in good faith with the Union representative of his employees relative to the inclusion of such sub-contracting.

Similarly, contrary to Phillips' assertion (Br. 24), UMW has not, as Phillips' states (Br. 24), taken "occasional jabs" at *Apex, Hutcheson, Allen Bradley and Carpenters.* In fact, UMW's brief relies upon *Apex* and *Hutcheson* in eleven and seven instances, respectively.

That Phillips' brief assumes proof of the conspiracy is made evident in its assertion (Br. 21) that "Acts done to give effect to the conspiracy may be, within themselves, wholly innocent acts" but that "if they are part of the sum of the acts . . . relied upon to effectuate the conspiracy . . . they come within" *Sherman's* prohibition, citing *American Tobacco Co.* v. *United States*, 328 U. S. 781, 809. Phillips' thesis is readily answered by *Allen Bradley's* recognition that conduct permitted by labor statutes

---

[2]UMW's 1958 agreement provided *inter alia* (p. 1109a): "It is recognized that when signatory operators mine, prepare, or procure or acquire under sub-contract arrangements bituminous coal mined under terms and conditions less favorable than those provided for in this contract, they deprive employees of employment opportunities, employment conditions, and other benefits which these employees are entitled to have safeguarded, stabilized and protected. Accordingly, the operators agree that all bituminous coal mined, produced or prepared by them or any of them, or procured or acquired by them or any of them under a sub-contract arrangement, shall be and shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this contract."

"is not to be declared a violation of Federal law" (325 U. S. 806).

UMW's main brief shows that the elements upon which the Sixth Circuit premised its affirmance of the jury's verdict are inconsonant with this Court's decisional law and congressional enactments expressive of national labor policy. Phillips' brief does not undertake to answer UMW's contentions that such elements do not accord with such decisions and legislation. UMW reiterates what it said in its main brief, namely that "the claimed existence" of a conspiracy herein is to be found in Phillips' constant assertion thereof "rather than in the proof." *G. & P. Amusement Co.* v. *Regent Theater Co.*, D.C., N.D. Ohio, 1952, 107 F. Supp. 453, 461.

CONCLUSION

For the foregoing reasons, and those which are assigned and discussed in UMW's main brief, UMW submits this Court should grant the relief sought by UMW in its original brief (p. 72).

Respectfully submitted,

HARRISON COMBS,
900 Fifteenth Street, N. W.,
Washington, D. C.
E. H. RAYSON,
R. R. KRAMER,
904 Burwell Building,
Knoxville, Tennessee
M. E. BOIARSKY,
511 Kanawha Valley Building,
Charleston, West Virginia
Attorneys for Petitioner

January, 1965.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 25 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 48.

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admr. of the Estate of Burse Phillips, Deceased,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

REPLY BRIEF OF RESPONDENTS.

JOHN A. ROWNTREE,
1412 Hamilton Bank Building,
Knoxville, Tennessee,
Attorney for Respondents.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.



TABLE OF CONTENTS OF BRIEF.

	Page
Statement of the Case	1
Counter-Statement of Facts	2
Theory of Conspiracy	3
Argument	11
I. The Judgment Below Is Supported by Prior Decisions of This Court	12
A. The Unlawful Purpose of a Union to Aid Business Groups in Restraining Trade and Attempting to Monopolize Markets Is Not Cured by Any Co-Existing Purpose to Serve Legitimate Union Ends; the Purposes in This Case Were Like Those in Allen-Bradley and Carpenters	12
B. The Conspiracy Is Not Made Lawful by Adopting as Part of Its Apparatus the Use of Types of Practices Approved by the Labor Law for Disputes and Collective Bargaining	20
1. Unions Have Been Held to Violate the Sherman Act Where Agreements Pursuant to Collective Bargaining Have Been the Means by Which the Conspiracy Was Made Effective	21
2. Likewise, Unions Are Not Excused Under the Sherman Act Because They Engage in Traditional Types of Union Activity Such as Organizing, Picketing, Strikes and Boycotts	23

II. The Decisions in Apex, Hutcheson, Allen-Bradley and Carpenters Are Precedents Necessary to the Balancing of Dual Congressional Policies; Economic Freedom Requires That These Precedents Not Be Disturbed 24

III. Evidence Pertaining to the ctivities and the Purposes of the Alleged Conspirators in Restraining Trade and Attempting to Monopolize Government Markets for Coal, Particularly the TVA Market, Including Solicitation of Government Officers and Agents Having to Do With the Purchase of Coal, Was Properly Admitted in This Case 29

IV. The Evidence Was Sufficient to Support the Verdict Below; These Proceedings and Judgment Have Been Accompanied by the Utmost Deliberation 38

A. There Was Material Evidence From Which the Jury Could Find That the Conspiracy Existed as Alleged; the Norris-LaGuardia "Clear Proof" Rule Was Charged and Has Been Satisfied 39

B. There Was Material Evidence to Support the Amount of Damages Found by the Jury and Sustained by the Lower Courts 46

Conclusion 47

Appendix I, Counter-Statement of Facts 49

Appendix II, Facts as to the Conduct of UMW Toward the UMW Welfare Fund 124

Table of Cases Cited.

Allen Bradley Company v. Local Union No. 3, 325 U. S. 797 ..... 12, 14, 15, 16, 17, 18, 19, 21, 23, 41, 42

American Tobacco Company v. United States, 328 U. S. 781 ..... 20, 21, 32
Apex Hosiery Company v. Leader, 310 U. S. 469 ..... 13, 17, 19
Application of State of California, 195 F. Supp. 37 .. 38

California v. Federal Power Commission, 369 U. S. 482 25
Continental Ore Company v. Union Carbide Corp., 370 U. S. 690 ..... 2, 33, 37

Duplex Printing Press Co. v. Deering, 254 U. S. 433 .. 26

Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc., 365 U. S. 127 ..... 31, 32, 33, 37

Hunt v. Crumback, 325 U. S. 821 23

Lavender v. Kurn, 327 U. S. 645 47
Local 175, International Brotherhood of Electrical Workers v. United States, 219 F. (2) 431, cert. den. 349 U. S. 917 ..... 22, 23
Los Angeles Meat and Provision Drivers Union Local 626 v. United States, 371 U. S. 94 ..... 19, 23, 25, 44

Maryland and Virginia Mills Producers Assoc. v. United States, 362 U. S. 458 25

Pan American Airways v. United States, 371 U. S. 296 ..... 25, 26, 27
Perkins v. Lukens Steel Company, 310 U. S. 113 37

Silver v. New York Stock Exchange, 373 U. S. 341 .. 25
Slick Airways, Inc. v. American Airlines, Inc., 107 F. Supp. 199, Petition for prohibition dismissed 204 F. (2) 230, cert. den. 346 U. S. 806 ..... 34, 35
Streiffer v. Seafarers Sea Chest Corporation, 162 F. Supp. 602, 607 44

Union Carbide & Carbon Corp. v. Nisley, 300 F. (2) 561 36

United Brotherhood of Carpenters and Joiners of America v. United States, 144 F. (2) 546, Affirmed in part 330 U. S. 395 .....16, 17, 18, 19, 22, 23, 29, 40, 41
United States v. American Tobacco Co., 221 U. S. 106 32
United States v. Borden Co., 308 U. S. 188 .....25, 26
United States v. Employing Plasterers Assoc., 347 U. S. 186 .....19, 22, 24
United States v. General Electric Corp., 209 F. Supp. 197 38
United States v. Hutcheson, 312 U. S. 219 .....14, 19
United States v. Patten, 226 U. S. 525 .....2, 32
United States v. Radio Corporation of America, 358 U. S. 334 25

Statutes Cited.

15 U. S. C. A., Sec. 17 44
29 U. S. C. A., Sec. 106 46

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 48.

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admr. of the Estate of Burse Phillips, Deceased,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

REPLY BRIEF OF RESPONDENTS.

STATEMENT OF THE CASE.

Respondents (who were partners in Phillips Brothers Coal Company and who will be referred to herein as "Phillips") accept the statements of Petitioner (herein referred

to as "UMW") as to the procedural history of the case. It started with a complaint filed by Trustees of United Mine Workers of America Welfare and Retirement Fund against Phillips. Phillips filed the cross-claim against UMW, and this appeal concerns this cross-claim. The claim contained in the original complaint of the Trustees is the subject matter of the petition in case number 39 as to which the Court has not taken action at this time. Both cases involve the same conspiracy, the same case, trial and decisions of lower courts.

COUNTER-STATEMENT OF FACTS.

Phillips cannot accept the statement of facts contained in UMW's brief. Much is omitted. We believe there are direct refutations in the proof of several "facts" which UMW says are "undisputed"; this is true, for instance, with respect to UMW's assertions as to reasons for, and nature of, UMW's investments in coal companies and with respect to denials of conspiracy.

The disjunctive treatment of the various phases of the conspiracy in UMW's brief does not conform to the rule that a conspiracy must be viewed as a whole; the integral parts thereof are not to be weeded out and inquired into separately. **United States v. Patten**, 226 U. S. 525; **Continental Ore Company v, United States**, 370 U. S. 690.

Our version of the facts is rather long. We believe these facts and the fair and reasonable inferences drawn therefrom fully support in every detail our theory of conspiracy. In order that the Court may reach sooner the questions in the case, we present in the next section our theory of conspiracy which was included in the pre-trial order and which was included in the charge to the jury.

Our Counter-Statement of Facts is contained in Appendix I and Appendix II to this brief.

THEORY OF CONSPIRACY.

The exact theory of conspiracy alleged by Phillips, contained in the pre-trial order (49a-56a), and contained in the Trial Court's jury charge (1538a-1543a) is set forth below:

"A. **Background of the Conspiracy.**

"After World War II the economics of the bituminous coal industry became unstable by reason of the fact that there was more coal being produced than the markets required; before 1950 the major coal producers and the Union were in agreement that the major problem of the industry was over-production and that the growth of small, independent and non-Union producers was contributing to the problem; the major companies and the Union disagreed on how the problem should be handled in the period immediately subsequent to World War II; on its side the Union was contending that the answer was to cut down on the working time of all producers; the UMW urged a three-day work week; for many months before the 1950 contract was signed the UMW took the initiative on this question and directed the working time of the men in the industry, the Union Officials setting on some weeks three-day work weeks and at other times no-day work weeks; domination of the men in the industry was an essential part of the Union's effort to dictate the economics of the industry and this domination was interfered with by the passage of the new Taft-Hartley Act, the Union's efforts to maintain closed shops and maintain a Union controlled Welfare Fund were challenged and in some instances were defeated in the courts by the major coal companies; the major coal companies were opposed to the UMW's dictating the work time of the men in the industry because it cut into their profits.

"B. **Formation of the Conspiracy.**

"A marked change occurred in the relations between the UMW and the major coal companies in 1950, as disclosed in their bargaining relations before and after that year; the express understanding at the time of the signing of the 1950 National Bituminous Coal Wage Agreement was that the major coal companies, themselves, were to decide on the working time for their employees; this was a surrender on the part of the UMW of its previous policy of seeking to control the economics of the industry by controlling the working time; the understanding was that the problem of stabilizing the economics of the industry, the problem recognized by both the UMW and the major coal companies, was to be taken care of by eliminating the smaller and weaker companies in great numbers, leaving the industry to the major coal companies alone.

"C. **Use of the National Bituminous Coal Wage Agreement in the Conspiracy and Evasion of the Taft-Hartley Act.**

The conspiracy involved the use of the National Bituminous Coal Wage Agreement of 1950, and its successive amendments as an instrument in accomplishing the purposes of the conspiracy; the accomplishment of the purposes of the conspiracy was furthered by the domination of the UMW over the men in the industry and in 1950, by the express statement of the representatives of the major coal companies the Welfare Fund was turned over to the Union's control and rather than opposing the UMW's efforts to evade the Taft-Hartley Act as they had before, the major coal companies have fostered the UMW's domination of the men of the industry so that the terms of the National Bituminous Coal Wage

Agreement would be imposed upon the small mines; by successive amendments to the uniform National Bituminous Coal Wage Agreement's terms the wage scale and the Welfare Fund royalties per ton were raised to exceedingly high levels; the mechanization program of the major coal companies was to go ahead rapidly and the successive increases in the wage scale and Welfare Fund payments were designed and tailored to meet the abilities of the major coal companies to mechanize and not have their profits affected by the increasing labor costs in the successive amendments; the successive amendments to the labor contract were made after careful consideration of the abilities of the major coal companies to make the increases without affecting their profits, the Union had no concern as to whether the weaker companies could pay; the UMW displayed its knowledge that the weaker companies could not pay and that they would fall by the wayside by reason of the increased terms; the Union favored the taking over of the industry by the combines of coal producers and the Union worked toward this end; the campaign to impose the wage contracts upon the smaller, independent and non-Union mines was intense after 1950; in areas of strong resistance mobs and terrorism were used; the Trustees of the Welfare Fund stood by as pensioners under the Welfare Fund were organized into bands which had as their purpose the imposition of the uniform National Bituminous Coal Wage Agreement upon the smaller and non-Union companies; the paying of Welfare Fund benefits to men in the industry depended upon the retention of membership in good standing in the UMW, certified to by local, District and International Union Officials; the enticement of benefits under this Fund was held out to the men in the industry as being under UMW control; the finances

of the Union and the finances of the major coal companies have been used to further the drive to bring all production under the National Bituminous Coal Wage Agreement; one or more major coal companies have assisted in crushing the opposition of the principal competitor of the UMW in the bituminous coal labor fields; the result of this conspiracy and these activities has been that large numbers of small companies have been driven out of the industry and that thousands of men in the industry have been driven into unemployment; when these men are put out of the industry they cease to participate in Welfare Fund benefits and the Fund remains as a source of benefit for the employees only of those companies that survive.

"D. **Use of Boycotts.**

"To accelerate the demise of the smaller companies devices were inserted into later amendments of the National Bituminous Coal Wage Agreement to further restrain their trade; companies which could not afford to pay the wage scale in terms of the contract were barred from operating on the lands of signatories to the contract; the major companies have acquired great tracts of the coal lands of the country and there is little good coal land left for the small companies to operate upon; the small companies were prohibited from selling coal to the signatories to the contract, including the major companies which supplied coal to the large markets under large contracts.

"E. **The TVA Market.**

"The development of the Tennessee Valley Authority as the principal coal purchaser of the entire country called the attention of the conspirators to the Southern Appalachian region when TVA opened up many of its coal-using generating units in 1954,

1955 and 1956; in 1955 the conspirators manifested their intent and purpose to take over the TVA market by working together with the Secretary of Labor to obtain a determination of a minimum wage in the bituminous coal industry under the Walsh-Healey Act; the purpose was to drive out of the government market, particularly the TVA market, the small coal producers; this determination imposed a wage rate upon a producer of coal supplying coal to a government market twice as high as the wage rate determined by the Secretary of Labor in any other industry; in accordance with this design this determination of a minimum wage effectively barred Phillips Brothers from participating in the term market of the TVA because they could not pay the kind of wages set forth in that determination; because contracts for less than $10,000.00 were exempted from the minimum wage determination, Phillips Brothers was able to ship coal on TVA spot orders; the conspirators set about to eliminate or drastically reduce the spot market of TVA; when this effort failed to bring results the conspirators adopted the practice of predatory pricing to drive the spot coal market price down to a price which a small producer could not meet at a profit; in this phase of the campaign the West Kentucky Coal Company and its subsidiary, Nashville Coal Company, took the most prominent part; the Union had over $25,000,000.00 of risk capital invested in these companies; large amounts of tonnage were dumped upon the spot coal market of TVA at constantly reduced prices; the spot coal price was beaten down to such extent that Phillips Brothers suffered large losses in trying to retain their position in that market and finally had to abandon their sale of coal to that market and it became necessary for them to abandon the partnership business.

"F. **Enforcement of the National Bituminous Coal Wage Agreement.**

"Companies which survived the other onslaughts of the conspiracy have been killed off by such lawsuits as this brought by the Trustees of the Welfare Fund; prior to 1958 some three or four cases were brought by the Trustees against some of the larger producers in the area; cases against the smaller producers were commenced in 1958 and the following period; some forty-one of these cases have been brought and are presently pending against the small companies of the area in the State of Tennessee since January 1, 1958; the amount sued for by the Trustees exceeds the combined profits of the company for its entire life.

"The Union in carrying on the foregoing activities pursuant to its understanding and agreement with the major coal companies was not acting alone to further its own interests as an organization of wage earners but was aiding, abetting and cooperating with business men in an effort to restrain trade of small coal companies and to monopolize the industry for the major coal companies; the conspiracy involved boycotts and a purpose to stabilize the prices of coal in the industry; the practices used pursuant to the conspiracy particulary the imposition of the constantly increasing terms of the National Bituminous Coal Wage Agreement upon the small coal companies, such as that of Phillips Brothers, and the price-cutting practices of the conspirators on the markets supplied by Phillips Brothers were unreasonable.

"G. **Enforcement of the National Bituminous Coal Wage Agreement Against Phillips Brothers.**

"A central part of the understanding and agreement among the alleged conspirators to stabilize prices

in the industry, to restrain competition and to monopolize was that the terms of the National Bituminous Coal Wage Agreement would be imposed upon the smaller and financially weaker coal companies with the knowledge and the intent that these companies in large numbers would go out of business because they could not keep pace with the increasingly higher wage and welfare terms which were designed to meet the ability of the large combines to pay as the mechanization program of the latter progressed; the use of the National Bituminous Coal Wage Agreement against the small companies for the purpose of driving them and their employees out of the industry could not be achieved if the employees of these small companies were allowed to exercise the right afforded them by the Labor Statutes; the purposes of the conspiracy were effectuated by the major coal companies permitting the UMW to assume a dominating role over the labor force in the coal fields by evasion of the Labor Statutes which protected the rights of the employees of small companies to join a Union or refrain from joining a Union and to select their own bargaining representatives and which Statutes forbid Unions from dominating Welfare Funds; thereby and pursuant to the intent of the alleged conspirators the employees of the small companies have been deprived of any real choice as to whether they will be represented by the Union or not and whether their bargaining agreement with their employers will be on such a basis that their employers can stay in business and their jobs can be preserved; the effective use of the National Bituminous Coal Wage Agreement to destroy small coal companies and the evasion of the Labor Law is shown by this case brought by the Trustees and by the circumstances of the making of the contract sued on here by the Trustees; in this

regard the UMW completely ignored the employees of Phillips Brothers and having no authority from those employees and without having them as members and without their knowledge the UMW extracted the signing of a copy of the National Bituminous Coal Wage Agreement from Phillips Brothers; several months thereafter and before the employers knew of or had ratified the contract and with the use of mobs and in an atmosphere of coercion directed against the company and its employees, the Union Shop Clause of the contract was enforced by the UMW and the employees were required to join the UMW in order to go back to work; they were not given benefit cards under the Welfare Fund until they did join the Union; it was only under these circumstances that the UMW received any authority or right to act as bargaining representative of the employees of Phillips Brothers."

ARGUMENT.

Phillips cannot practically make a paragraph by paragraph reply to the several briefs filed against it by UMW, AFL-CIO and BCOA. We intend rather to state what we conceive to be the questions raised in those briefs and set forth our position on those questions.

It appears that the arguments of the opposing briefs may be summarized as follows:

I. That the judgments below violate the principles found in the existing precedents of this Court dealing with unions under the Sherman Act.

A. That in a Sherman Act case, a defendant union must be excused if one of the purposes of market restraints pursuant to a conspiracy with business groups is to promote otherwise legitimate Union purposes (such as better or uniform wages and better working conditions).

B. That the union will be excused for all activities which represent types of practices approved by the labor statutes (such as collective bargaining, picketing, strikes and boycotts).

II. That prior decisions of this Court are not sound precedents in holding that unions have violated the Sherman Act when they conspire with, and aid, business groups in monopolizing, and restraining trade in, markets for goods; and that this is particularly true since the passage of the Taft-Hartley and Landrum-Griffin Acts.

III. That certain phases of a conspiracy in restraint of trade (such as dealing with officers and agents having responsibilities in the buying of goods for the Government) should be excluded from the evidence in a Sherman Act case.

IV. That where there are denials of conspiracy by the alleged conspirators a Sherman Act jury verdict must be set aside where there is no direct evidence of the specific agreement alleged to have been made by the conspirators, regardless of the strength of circumstantial evidence and inferences; and that this is particularly true under the Norris-LaGuardia "clear proof" rule where a labor union is a defendant.

These propositions will be considered in the above order.

I. The Judgment Below Is Supported by Prior Decisions of This Court.

A. The Unlawful Purpose of a Union to Aid Business Groups in Restraining Trade and Attempting to Monopolize Markets Is Not Cured by Any Co-Existing Purpose to Serve Legitimate Union Ends; the Purposes in This Case Were Like Those in Allen Bradley and Carpenters.

As this Court has previously said in a Sherman Act case involving a labor union, there must be a reconciliation of two declared congressional policies. One of these policies seeks to preserve a competitive business economy. The other policy seeks to preserve the rights of labor to organize to better the conditions of employees through the agency of collective bargaining. The Court has previously been confronted with the problem of seeking a determination of how far Congress intended activities under one of these policies to neutralize the results invisioned by the other policy. **Allen Bradley Co. v. Local Union No. 3**, 325 U. S. 805, 806.

Perhaps it is the making of the foregoing reconciliation that has resulted in an emphasis in the decisions involving a labor union under the Sherman Act upon "intent" and "purpose". The intents and the purposes of a labor

union in making agreements with business groups would seem naturally to have significance in making a reconciliation of these congressional policies. The making of agreements that bring about restraints on employers is a common business of labor unions under the congressional policy favoring collective bargaining. However, the cases make it clear that unions may violate the Sherman Act by entering into agreements, combinations and conspiracies with employers where a purpose of the union is to aid business groups in restraining trade in the markets and in attempting to monopolize markets. The cases also make it clear that the unlawful character of the union's conduct in entering these combinations and conspiracies is not cured by a co-existing purpose to further the legitimate ends of organized labor.

It was pointed out by this Court in **Apex Hosiery Company v. Leader**, 310 U. S. 469, 492-493, that the Sherman Act was aimed at trusts and combinations of business and of capital organized and directed to suppress competition in the marketing of goods and services, by restricting production, raising prices or otherwise controlling the market. It was further pointed out in that case (page 495) that this Court has never applied the Sherman Act against a union unless there was some form of restraint upon commercial competition in the marketing of goods or services. Stating that unions are subject to the Act in some respects, this Court found in the **Apex** case (p. 501) that the union involved there was not being used by combinations of those engaged in an industry as the means or instrument of suppressing competition or fixing prices and that the combination did not have as its purpose restraint upon competition in the market. The Court further held in **Apex** (pp. 510-512) that the Sherman Act is violated only when the intent or necessary effect is to enable the conspirators to monopolize the supply, control the price or discriminate as between would be purchasers,

and the Sherman Act would not apply where the conspiracy is not directed at commerce.

In **United States v. Hutcheson**, 312 U. S. 219, this Court held that the Sherman, Clayton and Norris-LaGuardia Acts are to be read as interlacing statutes, giving a harmonizing text of outlawry of labor conduct. The Court said that where the union acts in its self interest and does not combine with non-labor groups the union exemption would apply.

The Court went on to hold in **Hutcheson** that the Sherman Act was not violated by the union because its conduct was directed, not at controlling markets, but solely at the obtaining of jobs for which it contended with a rival union.

An illicit combination between a union and business group came before the Court in **Allen Bradley Co. v. Local Union No. 3**, 325 U. S. 797. The fact that the union had as a purpose the promotion of the legitimate ends of labor in the improvement of conditions of its members was not an excuse when there were also present purposes which violated the Sherman Act. The first paragraph of the opinion states:

> "The question presented is whether it is a violation of the Sherman Anti-Trust Act for labor unions and their members, **prompted by a desire to get and hold jobs for themselves at good wages and under high working standards**, to combine with employers and with manufacturers of goods **to restrain competition in, and to monopolize the marketing of**, such goods." (Emphasis supplied.)

The opinion states (page 799) that the aim of the union for many years was to expand its membership and to improve the conditions and employment opportunities of its members and the union realized that to achieve this

purpose the employers of its local members must have the widest possible outlets for their products. Accordingly the union conducted an aggressive campaign to obtain closed shop agreements and expanded this campaign through conventional legal methods of strikes and boycotts. These agreements closed the market to others than the employers of the union members, resulting in more working opportunities, better wages and working conditions. But the union's agreements looked "not merely to terms and conditions of employment but also to price and market control." This control resulted entirely from the foregoing conventional union practices. But the unfairness was a matter of area limitations on those able to share in the market. A careful reading of the case makes it appear strongly that the area restrictions resulted from geographical confinement of the union involved, making the employees of the out of state employers ineligible as members and making closed shop contracts effective in closing the market.

It was said in **Allen Bradley** at page 801:

> "Our problem in this case is, therefore, a very narrow one—do labor unions violate the Sherman Act when, **in order to further their own interests as wage earners** they aid and abet business men **to do the precise things which that Act prohibits!**" (Emphasis supplied).

The answer was in the affirmative, even though the union's types of actions came within the exemptions of the Clayton and Norris-LaGuardia Acts (P. 807). The Court stated that Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services. The purpose of mutual help by union members could hardly be thought to cover activities for the purpose of employer-help in controlling markets and prices (P. 808). The Court concluded:

"It would be a surprising thing if Congress, in order to prevent a misapplication of that legislation to labor unions, had bestowed upon such unions complete and unreviewable authority to aid business groups to frustrate its primary objective . . . our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts, alone, or in combination with business groups" (Pp. 809-810).

The decision in **Allen Bradley** was the precedent controlling the Sherman Act question in **United Brotherhood of Carpenters and Joiners v. United States**, 330 U. S. 395. In **Carpenters** the market restrictions arose entirely from conventional union practices the same as in **Allen Bradley**. But unlike **Allen Bradley** the discriminatory restraints which closed the markets resulted from differences in means and methods of production rather than area limitations on eligibility for union membership. The opinion of the Court of Appeals (144 F. 2d 546, 548) shows that the conspiracy involved in **Carpenters** arose out of collective bargaining in 1936 over the union's demand for increase in wages. The employer group acceded to this demand when the bargaining agreements included these increased terms in such amount and in such form that the goods of out-of-state producers would be barred from the market. The reason why the goods of these competitors were barred from the market was because of the great disparity in the means of production between the competing groups, giving the local group an advantage over the other group under the wage scale. A part of the theory in the case at bar is substantially identical, involving the UMW wage scales of 1950 and later years tailored to intensive mechanization in thick seams of coal. The protective wage clause contained in the contracts procured by the Carpenters were substantially identical with the protective wage clause inserted in the later contracts of UMW. It was the wage scale and the disparity

in the means of production in **Carpenters** which brought about the closing of the markets to competitors and the restraining of competition in those markets.

We believe that the decisions in **Carpenters** and **Allen Bradley** must be put together with **Apex** wherein the Court said (P. 503) that the "elimination of price competition based on differences in labor standards, is the objective of any national labor organization." The combined holdings in the cases can only mean that where there is a purpose to aid business groups to control markets and restrain the competition of competitors, the union will not be excused by asserting that a purpose was to improve and make uniform the wage scale, at least in a situation where area limitations on memberships or disparity in means of production give the conspiring business group an unfair and unreasonable advantage. We believe that this meaning has great significance in the case at bar.

This case contains elements of the basic purposes and discriminatory restraints that characterized the combinations in both **Allen Bradley** and **Carpenters.** The differences in the means and methods of production in the coal industry are not disputed. In this respect this case is stronger than **Carpenters** because in the latter it is not clear in the opinions why the outside producers of lumber could not conform their production methods or their wage scale to those in the San Francisco Bay Area. The record in this case makes it clear that Phillips and other small local producers could not possibly conform their production methods and wage scale to those of the conspirators. This involves the proof about differences in the natural conditions of coal seams in the Appalachians, particularly in Tennessee, as compared to other fields.

This case has to do with thousands of people in scores of communities historically tied to the coal industry,

operating in thin seams, in rough terrain, and with no possibility of switching production, based on manpower with small machines and tools, to production, based on gigantic machines operated by a handful of highly skilled men, who, of course, are entitled to be paid according to their skill and productive capacity. But the record concedes that the uniform wage was tailored to fit the latter kind of production. The restraints here are as tight, as neat, as effective, and as unreasonable as in **Carpenters** or **Allen Bradley.** And, the human suffering and frustrations that have resulted in a whole section of this fair country have become a national scandal—all from the negotiations of a handful of men who say their purposes cannot be questioned.

Of course our point is not that UMW has refrained from resisting mechanization; the point which UMW's brief refuses to confront is the clear evidence that UMW is forcing mechanization beyond all possibilities in many areas.

We believe there can be **no** argument for the proposition that the righteous goal of a union to strive for an industrywide uniform wage scale includes the objective to impose uniform contracts industrywide which render it impossible for employers in whole areas to comply. That which is "uniform" in language of the contract may be extremely "un-uniform" in the hard actualities of geography, geology and economics, without regard to the ingenuities and abilities of competing business men. This should be most clear in a situation where two-thirds of the union's members are forced out of the industry while the union pursues its "uniformity" policy. This certainly is not the normal "objective of any national labor organization". The point is reached where, in all reason and logic, a jury may be asked to decide whether the course of conduct is for the sole purpose of "eliminat-

ing sub-standard wage competition" or for the additional purpose of aiding a business group by driving from the industry large competitive segments not favored by geography, geology or economics.

The principles of the various cases discussed above are still valid and sound. This Court has not modified **Apex, Hutcheson, Allen Bradley** or **Carpenters** in any later decision. These cases have stood for nearly two decades and have been cited as good law by this Court and by many lower courts up to the present day.

In **United States v. Employing Plasterers Assoc.**, 347 U. S. 186 and 198, it was charged that the union and the plasterers' association acted in concert to suppress competition among local plastering contractors, to prevent out-of-state contractors from doing any business in the Chicago area and to bar entry of new local contractors without approval of an examining board set up by the union. The dissenting opinion in that case indicates that this was accomplished by closed-shop agreements and enforced by slow downs, fines, intimidation and other means. It was argued on behalf of the union that the agreements were made with respect to terms and conditions of employment (98 L. Ed. 622) but it was held that the intention to suppress competition in the building business brought the combination between union and business groups under the Sherman Act.

In **Los Angeles Meat and Provision Drivers' Union, Local 626 v. United States**, 371 U. S. 94, the majority opinion held that the District Court was correct in finding that the combination was between business men and the union and was "to restrain commerce". The majority opinion held that there was no "labor dispute" involved. However, the dissenting opinion of Mr. Justice Douglass reasoned that there were wage competition and economic interrelationships between the peddlers and the union

members and that a "labor dispute" was involved in the effort of the union to improve the compensation of the peddlers. Even so, this opinion shows that the acts of the union came under the Sherman Act prohibitions when acts were committed which overstepped the bounds set by the interlacing Sherman, Clayton and Norris-LaGuardia Acts. It would seem that these unlawful acts would be those discussed in the separate opinion of Mr. Justice Goldberg, wherein it is pointed out that under the union agreements there was a favoring of certain processors in which union members had a direct financial interest. The direct financial interest of UMW in the favored combines of coal producers is a significant part of the case at bar.

The foregoing, and other cases in this area, confirm the concept that generally a union acts from a motivation and purpose to improve the condition of at least some of its members; but such a motivation or purpose does not cut off the question of whether there was a purpose to aid business groups in imposing controls on the markets and restraining competition. These cases show that the former purpose is generally present but if the latter purpose is co-existing, then the Sherman Act applies.

B. The Conspiracy Is Not Made Lawful by Adopting as Part of Its Apparatus the Use of Types of Practices Approved by the Labor Law for Disputes and Collective Bargaining.

The **American Tobacco Company** cases illustrate the fundamental rule under the Sherman Act that the lawfulness or unlawfulness of the means by which the unlawful conspiracy is carried out is not the question. Every conceivable act which could possibly come within the spirit of purpose of the prohibition of the law, without regard to the garb in which such acts were clothed, are

embraced within the first and second sections of the Sherman Act. **United States v. American Tobacco Company,** 221 U. S. 106. It is not the form of the combination or the particular means used, but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be, within themselves, wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition. **American Tobacco Co. v. United States,** 328 U. S. 781, 809.

1. **Unions Have Been Held to Violate the Sherman Act Where Agreements Pursuant to Collective Bargaining Have Been the Means by Which the Conspiracy Was Made and Effected.**

In **Allen Bradley Co. v. Local Union No. 3,** 325 U. S. 797, the Union's part in the conspiracy was effectuated by waging "aggressive campaigns to obtain closed shop agreements with all local electrical equipment manufacturers and contractors. Using conventional labor union methods, such as strikes and boycotts, it gradually obtained more and more closed shop agreements in the New York City area" (P. 799). In the course of time this type of individual employer-employee agreement expanded into industrywide understandings, looking not merely to terms and conditions of employment but also to price and market control (Pp. 799-800). And the Court said (P. 809):

> "We may assume that such an agreement standing alone would not have violated the Sherman Act. But it did not stand alone."

The Court went on to make its holding (P. 810):

> ". . . **that the same labor union activities** may or may not be in violation of the Sherman Act, dependent

upon whether the Union acts alone or in combination with business groups'' (Emphasis supplied).

In **United Brotherhood of Carpenters and Joiners v. United States,** 330 U. S. 395, the conspiracy was effectuated by collective bargaining over the wage scale and the inclusion of the protective wage clause in the collective bargaining agreement. This normally might have been lawful conduct on the part of the union and employers but what made it unlawful were the purposes and the circumstances under which the parties acted. The theory of the Government in the **Carpenters** case is expressed in the decision of the Court of Appeals, 144 Fed. 2d 546, 548. In collective bargaining over an increase in wages, the employer group gave the increase when it was accompanied by a protective wage clause which effectively barred the goods of competitors because of the existing difference in means of production which made it impractical for the competitors to pay the same wage scale. The contract was enforced to the mutual advantage of the Union and the employer groups by ''acquiescence in the arrangement'' (330 U. S. 399). The Union was not successful in its contention ''that the agreement between the parties merely embodied legitimate objectives of labor successfully obtained through the process of collective bargaining in termination of a labor dispute'' (144 F. 2d 549).

In **United States v. Employing Plasterers' Association,** 347 U. S. 186, the Union used closed-shop agreements to effectuate the purposes of the conspiracy (P. 196).

In **Local 175, Brotherhood of Electrical Workers v. United States,** 219 F. 2d 431, cert. den. 349 U. S. 917, it was the Union's refusal to enter into labor contracts with the competing contractors and the refusal to supply union labor that made the conspiracy effective (219 F. 2d 432).

2. Likewise, Unions Are Not Excused Under the Sherman Act Because They Engage in Traditional Union Types of Activities Such as Organizing, Picketing, Strikes and Boycotts.

In **Allen Bradley** it is shown that the longtime aim of Union that led up to the conspiracy was its campaign to expand its membership (325 U. S. 799). The fact that the Union was in an organizing drive did not excuse the Union under the Sherman Act.

In **United Brotherhood of Carpenters and Joiners**, the collective bargaining agreements that were the basis of the conspiracy were enforced by picketing (330 U. S. 399, and 144 F. 2d 548). In **Local 175 of the International Brotherhood of Electrical Workers**, 219 F. 2d 431, cert. den. 349 U. S. 917, the conspiratorial restraints were carried on by picketing of non-union jobs (219 F. 2d 432-433).

In **Allen Bradley** the Union used strikes and boycotts to obtain the closed shop agreements throughout the area (325 U. S. 799). In **Hunt v. Crumboch**, 325 U. S. 821, the Court said that if the boycott by the Union against the plaintiff had been pursuant to a conspiracy with competitors of the plaintiff, the activities of the Union would have violated the Sherman Act (P. 824). In **Los Angeles Meat and Provision Drivers' Union**, the contracts of the Union were enforced by strikes and boycotts against processors dealing with non-Union peddlers (371 U. S. 97).

Indeed, in **Allen Bradley** the Court recognized (325 U. S. 807) that **all** of the Union's types of actions came within the exemptions of the Clayton and Norris-LaGuardia Acts, but because there was the combination with the business groups the Sherman Act was violated.

II. The Decisions in Apex, Hutcheson, Allen Bradley and Carpenters Are Precedents Necessary to the Balancing of Dual Congressional Policies. Economic Freedom Requires That These Precedents Not Be Disturbed.

The opposing briefs would look at the problem presented in this case solely from the viewpoint of the labor statutes. As pointed out in Allen Bradley, in this kind of case there needs to be a balancing of two Congressional policies—labor relations and anti-trust.

The anti-trust statutes cannot be crammed into an insignificant and unimportant niche in comparison with the labor statutes. Both fields of legislation are wheels of comparable diameter on the vehicle designed by Congress to travel the highway of free and unburdened commerce. If one is allowed to get much larger and crowd out the other, the vehicle will end up in the ditch.

A review of **Apex, Hutcheson, Allen Bradley** and **Carpenters** impresses on the reader the absolute necessity that the trusts and combinations outlawed by the Sherman Act not be allowed to resurrect themselves and prosper by any kind of combination with any kind of group, be it a labor union or whatever. Congress has accepted this interpretation for two decades. The occasional jabs in the opposing briefs at these decisions as being erroneous in the settings in which they were rendered can find no support in precedent, logic or reason.

But the opposing briefs say that since Taft-Hartley and Landrum-Griffin were passed, there is no more room for applying these decisions to the anti-trust laws to labor unions, and that unions are now wholly regulated by the NLRB. Opposing Counsel put reliance upon decisions of this Court dealing with pre-emption of state law by Taft-Hartley. This Court did not take this view in **United States v. Employing Plasterers Assoc.**, 347 U. S. 186, or

in **Los Angeles Meat and Provision Drivers' Union v. United States**, 371 U. S. 94.

We believe the answer to the foregoing contention can be given without resorting to the fact that Landrum-Griffin came after this case.

The whole history of the effect on the anti-trust laws of other statutes, having to do with establishment of regulatory administrative bodies over particular businesses, corporations or associations, puts to rest this contention. Complete exemptions of particular classes of persons, corporations or associations, and partial repeals of the anti-trust laws by implication are not favored and are not lightly to be inferred. See **Silver v. New York Stock Exchange**, 373 U. S. 341, 357; **United States v. Borden Co.**, 308 U. S. 188, 198; **California v. Federal Power Commission**, 369 U. S. 482, 485; **Maryland and Virginia Mills Producers Assoc. v. United States**, 362 U. S. 458, 463; **United States v. Radio Corporation of America**, 358 U. S. 334; and the numerous cases cited in these decisions.

A contrast can be drawn between contentions made by opposing Counsel in this case with the decision in **Pan American Airways v. United States**, 371 U. S. 296. In that case the regulatory statute contained broad anti-trust law exemptions and dealt pervasively in both general and specific language with a number of areas of anti-trust law as it affected the air transportation business, placing regulatory jurisdiction over these areas in the Civil Aeronautics Board. The apparent displacement of anti-trust law was far greater than exists in the labor statutes or the other regulated fields dealt with in the above cited cases. The Court held the air lines were exempted under anti-trust law from these areas covered by the regulatory statute and that the CAB had exclusive jurisdiction in those areas because of the clear meaning of

the statute. But the Court stated that the anti-trust law would still apply to the air lines with respect to any other areas not covered by the "precise ingredients" of the CAB's authority in the regulatory statute (Pp. 304-305).

The reason for the rule in **United States v. Borden Co.**, and the other cases cited above is illustrated by language in the dissenting opinion of Mr. Justice Brennan, concurred in by the Chief Justice, in **Pan American Airways:**

> "However questionable the principle that repeals by implication are not favored may be in other contexts, it is entirely sound when dealing with the antitrust laws, and especially the Sherman Act. For this Act embodies perhaps the most basic economic policy of our society, basic and continuing: abhorrence of monopoly. The kind of conduct proscribed by the Sherman Act is simply not such that congressional silence may be interpreted as congressional approval" (Page 324).

The opposing briefs, under this aspect of the case, make reference primarily to the secondary boycott and "hot-cargo" provisions of Taft-Hartley and Landrum-Griffin, pointing out that here is an area of anti-trust law expressly covered by the regulatory statutes. It would appear that these provisions are aimed at boycott activity of the union acting alone in a situation like **Duplex Printing Press Co. v. Deering**, 254 U. S. 443, which kind of activity was taken out from under the anti-trust law by Norris-LaGuardia and the decision in **Hutcheson**, 312 U. S. 219, 231. The language used does not extend to the combination of unions with business groups to aid the latter in restraining competition and monopolizing markets with the use of boycotts and other means. The labor board is given no adequate means to combat the latter type of dangerous and paralyzing kind of situation, and the expertise of the board is not in the field of combinations of

business, capital and labor in market restraints, and monopolization. The same is true with respect to predatory pricing practices from which Phillips suffered its damage in this case, See **Pan American Airways**, pages 305-306.

The labor statutes themselves do not ascribe to the board any more expertise over boycotts than they do to the courts since the board's jurisdiction is not exclusive and the courts are given jurisdiction in civil damage cases. But the court cases, themselves, arising under labor law secondary boycott have involved unions acting alone, for union purposes, and not seeking to aid business groups to restrain competition and monopolize.

No argument is advanced that Taft-Hartley or Landrum-Griffin deal in any anti-trust area other than boycotts. Under the weight of United States v. Borden and the other cases cited above and the long line of related decisions of this Court, it cannot be the rule that a union engaged in the broad anti-trust conspiracy involved in this case is exempted.

A large part of the anti-trust law history deals with long, complex, hard-fought jury cases, where the factual issues were difficult, but the potential effects on large numbers of people were great. This case is no different. And when the opposing briefs argue that unions should not be submitted to trial before "provincial juries" it becomes necessary to point out that the jury has served our system of Justice well, particularly, in the anti-trust field. Juries contain union members, as the jury in this case did.

It is inherent in the jury process, and in the Sherman Act, itself, that the triers of fact listen and give heed to those who say they are injured by the organized combination, and if there is evidence of misuse of tremendous

power for wrongful purposes with tragic consequences to many people, there is no agency better able to make the decision than a Federal Court jury selected from the citizens of all counties in the District. If it is said that the District falls, in part, in the broad area where the effects of the combination have been disastrous, that is exactly what we are pointing out in this brief. A union must expect itself to be finally challenged when its so-called industrywide campaign, "for high uniform wages" benefits some groups in the country (using machines rather than manpower) by letting them take over the markets, but forces large areas of the country out of the industry; and the union must expect that challenge to come where the people have been hurt.

When the opposing briefs say that the verdict here "makes no economic sense", we reply that the jury in the district can best determine that, too. This case arose before any "Appalachian Bill" or "Anti-Poverty Bill", and the inexorable program of eliminating jobs in Appalachian's principal industry continues to give growing concern—now on the national scene. No program of relief can supplant the necessity that the people themselves must work out of their dilemma, and this is impossible when the forces of this conspiracy, from all different directions, effect all sorts of artificial ways to stop the workers; by force of mobs, who are financially supported and enticed by cruel and bogus promises; by financing adjacent, large, mechanized competitors as "fighting ships" to use predatory practices to strip away the markets; by the pretense in the Walsh-Healey wage determination that coal is entitled to twice the wage of any other industry in the face of all the poverty and that any wage below that is "sub-standard"; and all the other apparatus. The jury has found that its verdict does make "economic sense". And for good reason!

III. Evidence Pertaining to the Activities and Purposes of the Alleged Conspirators in Restraining Trade and Attempting to Monopolize Government Markets for Coal, Particularly the TVA Market, Including Solicitation of Government Officers and Agents Having to Do With the Purchase of Coal, Was Properly Admitted in This Case.

The size and the growth of the Government market for coal is reflected at page 1638a of the record. This market grew from 13,367,000 tons in 1954 to 27,511,500 tons in 1957. This tremendous growth resulted almost entirely from the rapid development of the TVA steam plant system in the period of this case. By 1957 the TVA purchase of coal represented approximately 5% of the total national consumption. The market upon which Phillips predominantly relied was the TVA market. The TVA Kingston steam plant, the largest in the world, was completed in the vicinity of Phillips' mine in late 1955 (1643a).

The activities of the alleged conspirators, including UMW, with respect to the Walsh-Healey minimum wage determinations, in 1955 and later in 1958, paralleled the activities of the conspirators in seeking to impose the same high minimum and uniform wage rate in labor contracts across the country, which created unsurmountable advantages to the business group with whom UMW was dealing, because of disparity in means of production and the other factors referred to in the statement of facts. As stated above, this phase of the conspiracy was practically identical with the type of conspiracy found to have violated the Sherman Act in **United Brotherhood of Carpenters and Joiners v. United States**, 330 U. S. 395. But the conspirators in **Carpenters** did not take the additional step of having a minimum wage determined by the Secretary of Labor in their locality in the wood industry. The record in this case reflects that there has been no deter-

mination of a minimum wage under the Walsh-Healey Act in the wood industry except for wood furniture (1621a) wherein a $1.00 per hour minimum wage was determined industrywide. It appears that the Government market for wood did not play a significant part in Carpenters.

The growth of the Government market for coal, particularly the TVA market, and Phillips' reliance upon that market, have made the Government market for coal of major significance in the case at bar. Vital questions in the case were, what effect did the industry-wide master conspiracy have upon that market and what particular steps did the alleged conspirators take with respect to that market? It would be sheer unrealism to go to the jury without answering these questions. And it would have been unfair to let the jury speculate about them.

The record reflects that UMW was having difficulty in imposing and enforcing the uniform contract wage rate in the area of the TVA market wherein small producers were supplying the developing steam plants. Phillips operated one of these mines. Implementing their efforts to impose the uniform rate industrywide by means of labor contracts, induced by muscle and force, the conspirators sought in 1955 to have the Secretary of Labor make a minimum wage determination under the Walsh-Healey Act in the coal industry. The conspirators worked together upon this project (458a). The desire of UMW that the "established operators" take the TVA coal business and the desire of those major coal combines to get the TVA coal contracts were plainly expressed (992a, 458a, 1636a). These "established operators" did subsequently obtain all the major term contracts (1658a). The purposes and intents of the proponents of the Walsh-Healey determination were expressed in the speech by the Secretary of Labor in which Mr. Lewis plainly con-

curred (465a-467a). This purpose was to exclude competitors of established operators from the Government market.

The Secretary of Labor determined a minimum wage in the coal industry in 1955 and, again, after the union contracts had repeatedly raised the wage, the Secretary of Labor made another determination in 1958, raising the minimum wage under Walsh-Healey by 50¢ per hour or $4.00 per day to conform to the increase in the union scale since the 1955 determination. This second determination was, likewise, the result of joint activity by the conspirators (470a-472a). The minimum wage thus determined was twice as high as that determined in any other industry (1620a-1624a).

These activities effectively barred Phillips from the term market of TVA but Phillips continued to sell coal on the so-called TVA "spot contracts", for tonnage valued at less than $10,000.00, exempted from the Walsh-Healey Act provisions. Because Phillips and other local miners were able to continue in operation under the spot coal contracts, UMW and the major producers turned their attention to trying to get the TVA purchasing officials to eliminate the spot coal business or substantially reduce the spot contracts. This effort was accompanied by the predatory pricing activities of major producers, including the union-owned companies, on the spot coal market, and it was from this latter phase that Phillips suffered its damage.

It is with this background that UMW would strip the case of any evidence pertaining to the activities of the conspirators with respect to the obtaining of minimum wage determinations under Walsh-Healey, relying upon **Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.**, 365 U. S. 127.

We believe that Noerr differs from the case at bar in several major respects: (1) In **Noerr** all of the activities complained of related to lobbying activities and there was no broader conspiracy which was being implemented by the lobbying activities; (2) **Noerr** did not involve the Government market for goods, and the officers or agents of the Government involved were not acting in the capacity of carrying out the purchasing policies of the Government when they were approached by the conspirators; (3) in **Noerr** the restraints complained of began, and ended, with the actions of officials representing governmental regulatory authority, whereas, in the case at bar the governmental action merely followed the establishment of an unfair prevailing wage by the conspirators, who then sought the Government agents to recognize the *fait accompli*.

We find no language in **Noerr** which would overrule the well established principle in anti-trust law that acts done to give effect to the conspiracy may be in themselves wholly innocent acts, yet if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition. **American Tobacco Company v. United States**, 328 U. S. 781. There is no indication in **Noerr** that the Court was overruling the principle that every conceivable act which could possibly come within the spirit of the prohibition of the anti-trust law, without regard to the garb in which such acts were clothed, are embraced in the Sherman Act. **United States v. American Tobacco Company**, 221 U. S. 106. In **Noerr** the Court certainly did not overrule the principle that a conspiracy is to be viewed by the Court as a whole; the integral parts thereof are not to be weeded out and inquired into separately. **United States v. Patten**, 226 U. S. 525.

In the **Noerr** case the only claim for damage was for damages resulting from the act of the Governor of Penn-

sylvania (pp. 130-131). In the **Noerr** case all of the evidence in the record, both oral and documentary, dealt with the Railroad's efforts to influence the passage and enforcement of laws (p. 142). In **Noerr** the Railroads, though desiring to restrain competition, never agreed to take, and never took, a single step which would take them out from under the constitutional right to engage in politics and they did not create a Sherman Act conspiracy. There was no anti-trust conspiracy for the Court to consider, but only a political campaign.

In **Continental Ore Company v. Union Carbide Corp.**, 370 U. S. 690, the complaint under the Sherman Act relied on several various phases of restraints practiced by the defendants. One of these phases pertained to the actions of one of the defendants as duly designated exclusive purchasing agent for the Metals Controller of Canada. The **Noerr** case was relied upon under this phase by the courts below in dismissing the complaint. The courts below had dealt separately with each phase of the restraints alleged in the complaint and dismissed all of them after this separate consideration. But this Court said (p. 699):

> "In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each . . . 'the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. United States v. Patten, 26 U. S. 525, 544, . . .; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it.' American Tobacco Company v. United States, 147 F. 2d 93, 106 (C. A. 6th Cir.); See Montague & Company v. Lowry, 193 U. S. 38, 45, 46."

This Court further said in **Continental Ore**, pages 706-707:

"Respondents are afforded no defense from the fact that Electro Met of Canada, in carrying out the bare act of purchasing vanadium from Respondents rather than Continental, was acting in a manner permitted by Canadian law. There is nothing to indicate that such law in anyway compelled discriminatory purchasing, and it is well settled that acts which are in themselves legal lost that character when they become constituent elements of an unlawful scheme. Swift & Company v. United States, 196 U. S. 375, 396; American Tobacco Company v. United States, 328 U. S. 781, 809; Steele v. Bulova Watch Company, 344 U. S. 280, 287; See Georgia v. Pennsylvania Railroad Company, 324 U. S. 439, 457, 458; Slick Airways, Inc. v. American Airlines, Inc., 107 F. Supp. 199, 207."

The reference made in this very recent decision of the Court to **Slick Airways, Inc. v. American Airline, Inc.**, 107 F. Supp. 199, 207 (petition for prohibition dismissed 204 F. 2d 230; cert. den. 346 U. S. 806), apparently has to do with the following language from that case:

"The defendants misconceive the nature of the complaint by confusing the means allegedly used with the result to be achieved. They view the complaint as alleging combinations or conspiracies to waste the resources of the plaintiff through predatory rate policies, to abuse the privilege of intervention in CAB proceedings, and to conduct a campaign of unfair competitive practices which amount to contracts and agreements within the purview of Sec. 492. It is in this that they fall into error for these alleged acts rather constituted the means and methods by which the defendants conspired to drive the plaintiff out of business in violation of the anti-trust laws. As the Supreme Court said in American To-

bacco Co. v. United States, 328 U. S. 781, 809, 66 S. Ct. 1125, 1139, 90 L. Ed. 1575: 'It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns' " (107 F. Supp. 207).

In **Slick Airways** at pages 213-214, the Court said:

"Plaintiff contends that **as part of the plan to drive it out** of the air freight industry defendants abused their privilege to intervene in CAB proceedings by their efforts to block and delay the issuance of a Certificate of Convenience and Necessity to the plaintiff to act as a common carrier, the issuance of which certificate it alleges was 'an absolute prerequisite to plaintiff's achieving its objectives in the freight business.' Defendants' alleged efforts to block certification included 'a well-planned campaign of opposition before the Board' which resulted in '65 days of hearing, 35,000 pages of testimony and briefs before the examiners, a year's study by the examiners, * * * and finally, three and a half years after the application was filed, a decision which the defendants have now appealed to the United States Court of Appeals of the District of Columbia Circuit', as well as the dissemination of false and misleading propaganda and other similar tactics in the public relations field. None of these matters alleged would seem to require any initial determination by the Board even though the Board may have exclusive control over its own procedures for the nature of the question is not that plaintiff attacks the administrative processes in the procedural field, but that defendants have used the processes of the CAB as instrumentalities with which to effect the conspiracy. While it may be questioned whether any of this alleged activity by defendants of itself constituted

illegal conduct, it is fundamental, as previously noted, that legal means may be utilized to accomplish the unlawful objective of conspiracy, American Tobacco Co. v. U. S., supra, 328 U. S. at page 809, 66 S. Ct. 1125, 90 L. Ed. 1575, and this court cannot deprive the plaintiff of its right to attempt to prove that these alleged acts were **part of the total acts** undertaken to effectuate the alleged conspiracy" (Emphasis added).

In **Union Carbide and Carbon Corp. v. Nisley**, 300 F. 2d 561, certiorari denied (on Wade's petition) 371 U. S. 801, the Court of Appeals for the 10th Circuit sustained the jury charge given by the District Court as follows:

"The Court, correctly we think, instructed the jury that if defendants used the agency powers 'for the purpose of carrying out or assisting any combination or conspiracy to restrain trade or to monopolize trade in the vanadium industry or any actual monopolization thereof, the fact that they might have been Government agents at the time does not immunize their conduct;' and that 'a violation of the anti-trust laws may be carried out by acts which, standing alone, may be legal, but **if they form a part** of an illegal combination or conspiracy to restrain or monopolize, then **you may consider them with all of the other evidence** in the case to arrive at your verdict.' The Court then proceeded to particularize to the effect that if, in the execution of a Government ore mining program USV arrived at prices paid the miners as a result of an agreement with VCA to pursue a plan to monopolize the vanadium industry, the fact that it was acting as agent for MRC (Metals Reserve Corporation, a United States Government Agency) would not immunize other unlawful conduct.' 'And this is so' said the Court, 'though

Government officials knew and tacitly approved the ore purchasing programs which violated the anti-trust laws' " (Emphasis added).

Continental and **Union Carbide** are more in point on the issue here than is **Noerr** since the latter had nothing to do with a campaign broader than a political campaign, or with activities and purposes of conspirators with respect to a government market for goods.

There needs to be considered the purposes of the Walsh-Healey Act and the role of Government officers thereunder. As stated in **Perkins v. Lukens Steel Company,** 310 U. S. 113, 128:

> "The Act does not represent an exercise by Congress of regulatory power over private business or employment. In this legislation Congress did no more than instruct its agents who were selected and granted final authority to fix the terms and conditions under which the Government will permit goods to be sold to it. The Secretary of Labor is under a duty to observe those instructions just as a purchasing agent of a private corporation must observe those of his principal."

We believe that the Walsh-Healey Act must be read alongside of the anti-trust laws and the purposes covered by those laws, rather than being considered in derogation of the anti-trust laws. The Government does have a tremendous demand for goods and the Government market in this day and time represents a gigantic part of the overall markets for goods in this country. We believe that the anti-trust laws were intended to, and do, cover with its prohibitions and protections the transactions involving the officials who control the buying of goods for this great market. The particular Government market involved in this case, the TVA market for goods, does

come under the protections and prohibitions of the anti-trust law. **United States v. General Electric Company** (DCPa, 1962), 209 F. Supp. 197. As we understand that case, it involved the garnering of TVA business at high rigged prices by means of conspiratorial practices which frustrated the terms of the Public Contracts Act, of which Walsh-Healey is a part. The basis of the action was not simply that the Public Contracts Act was violated but that contracts at rigged prices were procured from government purchasing officials pursuant to a Sherman Act conspiracy.

Surely the **General Electric Company** case and the related case of **Application of State of California,** 195 F. Supp. 37, show there is a great danger if the insulations and protections afforded by the Sherman Act are removed in whole or in any part with respect to activities directed at government officials, local, state or federal, who have responsibility in awarding or fixing the terms of contracts for the purchase of goods on the public market.

IV. The Evidence Was Sufficient to Support the Verdict Below; These Proceedings and Judgment Have Been Accompanied by the Utmost Deliberation.

This is not a case that has been hastily tried and rushed up to this Court for primary thorough consideration by brusque action of Counsel and the lower Courts. There has been a careful application of principles long established by this Court at each stage of the case.

It commenced in 1958. After extensive research, revisions of pleadings, careful preparation of a thorough pre-trial order, and extensive preparation for trial involving depositions in many states, the case went to trial before a jury in April, 1961. There was a three week trial and the jury deliberated three days before bringing

back its verdict for Phillips after receiving carefully prepared instructions of the Trial Judge as to which UMW has found scant reason to complain. A reading of the Trial Court's jury charge confirms the fairness with which the rights and contentions of UMW were protected.

The deliberate care and consideration extended by the Trial Judge in taking up and deciding the lengthy post-trial motions is shown at page 90a. Judgment was entered against UMW August 2, 1961.

Lengthy briefs were filed in the Court of Appeals (including amicus curiae briefs) and that Court heard oral arguments in October, 1962. More than a year's deliberation preceded the decision of the Court of Appeals, which was filed December 18, 1963, sustaining the judgment below.

UMW and amicus curiae supporting UMW (all of whom have sizeable and distinguished legal staffs) had four months since the granting of the Writ of Certiorari by this Court in which to prepare briefs and they used every bit of that time. We are trying to file this reply brief within our thirty days, because, frankly, we dread the effect of further delay.

A. There Was Material Evidence from Which the Jury Could Find That the Conspiracy Existed as Alleged; the Norris-LaGuardia "Clear Proof" Rule Was Charged and Has Been Satisfied.

We believe that the Court of Appeals (1753a) has stated in language well supported by the cases the basic proposition:

> "The union contends that not only was there no direct evidence that it conspired with the large coal companies, or with anyone, for the purpose of putting any operator out of business, but that there is the

unchallenged testimony of its president and its secretary-treasurer that it at no time joined with or agreed with any co-operator for such purpose. But it is recognized that conspiracies are seldom capable of proof by direct testimony and it is settled that they may be inferred from the acts of the parties thereto. Circumstantial evidence of the existence of a conspiracy may be sufficiently strong to raise a factual question for the jury even though there is no direct evidence that a conspiracy existed. It is the function of the jury to observe the witnesses while testifying, to appraise their credibility, to draw inferences from the facts established, to resolve conflicts in the evidence and to reach ultimate conclusions of fact. Eastern State Retail Lumber Dealers Association v. United States, 234 U. S. 600, 612; Local 175, etc. v. United States, supra, 219 Fed. 2d 431, 433, C. A. 6th, cert. denied, 349 U. S. 917; Loew's Inc., v. Cenema Amusements, 210 Fed. 2d 86, 93, C. A. 10th, cert. denied, 347 U. S. 976."

How the foregoing rule has been applied in cases involving unions under the Sherman Act can best be determined by looking at some of the cases discussed above which this Court has considered.

In **Carpenters** it is not apparent that there was any direct evidence of the conspiratorial agreement. It appears that the conspiracy arose when the union came to the employer group and demanded an increase in wages (144 Fed. 2d 548). This is similar to the situation that arose in the coal industry in 1950. However, in **Carpenters** there was no evidence that the conspirators were, at the critical time of the formation of the conspiracy, struggling over the basic issue of over-production and the need for stabilization of production. We have ample proof in this case that this was a basic overriding question at the critical time.

In **Carpenters**, the theory of the Government was expressed as follows (144 Fed. 2d 549):

> "They (the indictments) must be viewed in the light of all the facts charged, and, though such a provision in a contract (the protective wage clause) may not be invalid on its face, the factual context in which it will work, its alleged purpose and ultimate effect cannot be ignored in determining its actual validity. Considering all these factors the Government contends that the agreement was for the express purpose of committing the offense of violating the Sherman Act; that the gains in wages to the labor conspirators and in the profits to the co-conspiring manufacturers from their monopoly grip on the home builder and other consumers of such lumber products in the San Francisco area were not mere fortuitous and incidental results of the agreement. . . ."

These contracts from which the conspiracy was inferred in **Carpenters** were enforced "through conference or picketing or acquiescence in the arrangement" (330 U. S. 399).

The disparity in the means and methods of production between the two competing groups was a matter of utmost importance in **Carpenters** and the Court of Appeals held (144 Fed. 2d 552):

> "But in reviewing the record we find evidence of agreements between the two groups and conduct on the part of each directed at the elimination of competition from the northern products by the price control and other acts from which a jury well could find a concert of action and purpose to unlawfully restrain interstate commerce. Therefore, the Trial Court did not err in submitting the case to the jury."

We have discussed above that in **Allen Bradley** the whole conspiracy arose from the drive of the union to

expand its closed shop agreements throughout the area. These closed shop agreements benefited the local union members but they barred from the market the goods of outside producers. The dissenting Justices had trouble inferring from these activities a purpose to aid the employer group. Mr. Justice Roberts stated (325 U. S. 818):

> "Albeit the findings are that manufacturers and repairers of electrical appliances violently resisted the unionization of the businesses, they, one by one, surrendered and signed. In doing so many must have had knowledge of what others were doing or had done. And, as the coverage became complete, each one was enabled to stifle out-of-town competition and to raise prices. In any action against them and the union charging conspiracy it would be urged that a conspiracy need not consist of a written or verbal agreement but might be inferred from similarity of action. And it would be little protection to the employers concerned that, in each instance, a separate agreement was signed between union and employer."

In **Allen Bradley** Mr. Justice Murphy said in his dissenting opinion (325 U. S. 820):

> "The union here had not in any true sense 'aided' or 'abetted' a primary violation of the act by the employers. In the words of the union, it has been 'the dynamic force which has driven the employer-group to enter into agreements' whereby trade has been affected. The fact that the Union has expressed its self interest with the aid of others rather than solely by its own activities should not be decisive of statutory liability. What is legal if done alone should not become illegal if done with the assistance of others and with the same purpose in mind. Otherwise a premium of unlawfulness is placed on collective bargaining."

The majority of the Court in **Allen Bradley** held contrary to the above expressed views of the dissenters and it would seem that the fundamental difference is that the majority of the Court inferred a purpose to aid the employer group while the dissenters could not reach that inference from the foregoing facts. It appears fundamental that it is for the jury to draw reasonable inferences and make the conclusions with respect to the fact and **Allen Bradley** stands for the proposition that, where the union has gone to extremes in restraining trade and giving unfair advantage to one group of competitors with its agreements, somewhere along the line the jury may reasonably draw the inference that one of the purposes of the union was to aid the employer group that ended up with the business.

It is to be observed that in **Allen Bradley**, the same as in **Carpenters**, there is no expression in the opinions which would indicate that the union was talking to the employer group at critical times about the need for stabilizing the market or the problem of over production or the need to restrict production. So the inferences of anti-trust law violation that the jury could draw in the case at bar are far stronger than those that were permitted to be drawn in either **Allen Bradley** or **Carpenters.**

Another aspect of the case at bar which makes it a stronger case than either **Allen Bradley** or **Carpenters** is the fact that UMW, by reason of its investment, was sitting on both the business side and the union side of this combination. UMW ultimately expected to make immense profits from its investments in major coal companies (493a). The effort to conceal the direct ownership of UMW in these companies failed, and it was finally conceded that UMW was to share in the profits of those companies (1125a). Our statement of facts in Appendix I shows that the reasons UMW gave for making these investments were completely refuted. These were the com-

panies that were most active in causing Phillips to suffer damage. Accordingly, in this case the jury was confronted with facts which would raise strong inferences of a purpose to impose restraints on competition in the markets. Investments by a union or by union members in business groups with which the union deals are facts which the jury may consider in a Sherman Act case. **Los Angeles Meat and Provision Drivers Union, Local 626 v. United States**, 371 U. S. 94, 106-107; **Streiffer v. Seafarers Sea Chest Corporation**, 162 F. Supp. 602, 607. A point that has received scant attention in this case heretofore is the fact that the Clayton Act exemption of labor organizations applies only to organizations "not conducted for profit" (15 U. S. C. A., Sec. 17). We have been reluctant to complicate this case by reliance upon that provision. However, profit making motives would seem most important in determining a union's purpose in this kind of case, regardless of the technical meaning of this clause in the Clayton Act exemption.

The opposing briefs rely heavily upon denials of conspiracy by the alleged co-conspirators to nullify all reasonable inferences to be drawn from the proof. Denials of conspiracy should be particularly suspect when they are overreaching and are contrary to well proven facts in the record. In this case Mr. Lewis was asked by UMW Counsel whether he had ever been a party to any agreement with reference to the pricing of coal. Mr. Lewis responded: "I have not, neither in my individual capacity nor in an official capacity as representative of the union, nor other labor organizations when I was representing other labor organizations" (1139a-1140a). It is this denial that UMW has given special attention and prominence.

But, on the record, this denial was not correct. UMW sponsored, and was responsible for, the stabilization

agreement in the anthracite industry which was an agreement between UMW and major anthracite operators. This was according to Mr. Lewis' own statement (312a-313a). This was the very kind of stabilization agreement which Mr. Lewis was urging upon the bituminous operators in 1949-50 to rebut "the tendency of the industry to reduce their prices in the face of increasing competition" (315a). The jury was exercising its prerogatives in rejecting denials which could not be reconciled to facts.

We believe that an analysis of the decisions which have sustained findings of conspiracy to restrain trade or to monopolize, or to attempt to monopolize, would produce few cases where there is more persuasive proof than in this case that the parties charged actually negotiated and bargained over the means of stabilizing an industry, reached an understanding, effected a sharp change in the course of the industry with benefits to the negotiators and distress to the non-participants.

UMW contends that this course has been dictated by the National Bituminous Coal Wage Agreement reached in 1950, under the supervision of Federal Courts, the NLRB and a presidential fact-finding board. These agencies cannot be held responsible. They were concerned solely with the employer-employee relationships between an organized group of employers and a bargaining representative of their employees. It is not reasonable to say that these public agencies were apprised of all understandings reached by the negotiating parties in 1950, or of how those understandings would be implemented in the succeeding years. These agencies were concerned with the making and the validity of the written agreement executed in 1950. They were not authorized or empowered to determine if there were any other understandings or agreements or purposes violating the Sherman Anti-trust Act not expressed in that collective bargaining agreement.

In asserting that there was insufficient evidence in this case to support the verdict, the opposing briefs rely upon the Norris-LaGuardia "clear proof" rule. We submit that that rule has been satisfied in this case. The Trial Court gave an instruction on this rule in its charge to the jury (1555a). No objection or further request was made. In its motion for a new trial UMW assigned as error the giving of this charge (72a). We have never understood why UMW assigned this as error, since this part of the charge was for UMW's benefit. If the intent were to show that the charge was in improper language, no effort was made to straighten the Court out on this language and it seems apparent that the language was correct under Section 6 of Norris-LaGuardia (29 U. S. C. A. 106).

Practically all of the proof in the record with respect to the activities of UMW relate to the acts of the International officers of the union, proved by their own statements and testimony. We believe it is impossible to find any major part of the evidence pertaining to UMW which had not been clearly proved to have been participated in or authorized by these International officers. Actually, many of the statements of the International officers have been included in reports to the International Convention of the Union and have been expressly approved by those conventions, when the International officers' reports were submitted. The case is entirely unlike **Carpenters** in this respect. In the latter case the acts were being done by local officers and agents and the International Union had only a distant relationship to the things being done in the San Francisco Bay area.

B. There Was Material Evidence to Support the Amount of Damages Found by the Jury and Sustained by the Two Lower Courts.

A large part of the record in this case had to do with the amount of damages. From this proof the jury has

made its finding and this is within the historic province and function of the jury. Lavender v. Kurn, 327 U. S. 645, 652-653.

The facts upon the damage issue are set forth hereinafter in the statement of facts contained in Appendix I, particularly in Part II thereof, and to conserve space we simply make reference to those facts here. The Court of Appeals considered some of these facts in its opinion (1761a-1763a). It is submitted that the Trial Court and the Court of Appeals were both correct in sustaining the jury verdict.

CONCLUSION.

For the foregoing reasons Phillips submits that the judgment below should be sustained.

Respectfully submitted,

JOHN A. ROWNTREE,
1412 Hamilton National Bank Building,
Knoxville, Tennessee,
Attorney for Respondents.

APPENDIX I.

COUNTER-STATEMENT OF FACTS.

I. There Was Abundant Proof to Support the Jury's Finding That There Was a Conspiracy as Charged by Phillips.

It is the contention of Phillips that the conspiracy charged was formed in 1950. At the end of 1949 Mr. John L. Lewis gave a summary of the controls that existed at that time over the nation's coal production. He reaffirmed these statements in his testimony in this case (319a). Mr. Lewis made it his business to know such facts as these (401a, 403a).

According to Mr. Lewis, the so-called captive mines owned by steel companies produced 52,000,000 tons per year and the steel companies also bought an enormous tonnage of coal from commercial producers. Pittsburgh Consolidation Coal Company (presently Consolidation Coal Company), the largest commercial coal producer, with other companies closely allied to it, produced approximately 100,000,000 tons per year (320a).

In the South, according to Mr. Lewis, there was the Island Creek Coal Company and Pocahontas Fuel Company and certain others operating through Southern Coal Producers Association. This Association was a "front for Appalachian Coal, Inc.," which levied a brokerage rate as a sales organization on about 45,000,000 tons per year. Island Creek Coal Company controlled Appalachian Coal, Inc., and Island Creek had vast influence with any company that sold coal through Appalachian Coal, Inc., and "it would be commercially and to some degree financially disastrous for those companies, members of Southern Coal

Producers Association, to take any other attitude than the attitude taken with respect to wage contracts by the Island Creek Coal, which dominates Appalachian Coal, Inc." The controls of Island Creek Coal Company covered approximately 100,000,000 tons of production per year (320a-321a). There were controls emananting from the trust that owned Island Creek Coal Company, which trust was associated with major financial interests in the steel industry (321a).

Mr. George Love of Pittsburgh Consolidation Coal Company, and Chairman of the Operators' Negotiation Committee of 1949-50, represented these great combined interests and was, according to Mr. Lewis, "in the position of being the actual, as well as the titular, leader and spokesman of the coal operators of the country due to circumstances and competitive relationships in the industry" (323a).

"No commercial coal operator, as yet, in the country . . . producing commercial coal would hazard his business future by undertaking to disagree with the leadership furnished the industry . . . through Mr. George Love and Mr. Harry Moses, who is on the outside but is advisor and counsellor of Mr. Love" (323a).

A commercial producer, "if he wishes to sell his coal in the open market and sell some of it to these industries . . . cannot offend them by undertaking to go contrary to their wishes on wage negotiation policies" (323a).

It is the contention of Phillips that this powerful business group in the coal industry as above described by Mr. Lewis, collided with United Mine Workers in 1949-50, over the means of resolving the basic and chronic problem of the industry—periodic over-production and need for stabilization, and that they came out of their conflict in 1950 with a solution that has worked.

A. In the Struggle Between UMW and the Major Coal Companies in 1949-50, the Question of the Means of Stabilizing Coal Prices and Production Was an Important Issue.

The coal industry has been plagued with feast and famine and with peaks and valleys in demand (317a, 1431a). The industry need for stabilization to level out the supply and demand (1449a) cannot, we believe, be solved legitimately by a few in the industry to squeeze out the many by plan or concerted effort. The record in this case discloses that such a plan and concerted effort commenced in 1950, and that the most vital factor involved was a sudden switch in UMW's policy. The record establishes that in 1950 UMW ceased to be primarily a representative of the coal miners throughout the country but became, rather, an economic umpire favoring, by prearrangement, the large coal combines, working with huge machines in thick seams of coal, over the small mines using manpower with small machines and tools in the thin seams.

Mr. George Love of Consolidation Coal Company stated that the picture in early 1950 was beset with more competitive uncertainties than the industry had ever seen (542a). The Union's witness Scollon shows in Exhibit 149A (1717a) that the big mines were rapidly going down hill in the share of the production of the industry from 1945-1949 but in 1950, after the combination was formed they began increasing their position in the industry (1314a).

The Union's position before 1950, and particularly in 1948, upon the need for stabilization, was clearly stated by Mr. John L. Lewis at the UMW convention held in 1948:

> "The productive capacity of our coal industry exceeds at any normal time the consuming capacity of

our markets. For many long years the coal industry was developed to a degree that the work-time of the industry was intermittent, and in the majority of the coal-producing states was almost chronically under two hundred days per year work time opportunities. . . .

"The mine workers had a bitter experience in that matter and we have taken some profit from it. In the anthracite industry we made it an issue, and due solely to pressure from our organization and the policies which we suggested we were finally able in the anthracite region, covering Districts 1, 7 and 9, to put into effect a joint commission consisting of representatives of the operators, representatives of the three Districts of the United Mine Workers, and representatives of the State of Pennsylvania, to allocate the work time for the anthracite industry, so that such work time as was available would be shared by all of our members in as substantially equitable a manner as could be made effective. This arrangement has proven to be a great stabilizing influence in the anthracite industry. . . .

"I merely want to say this in connection with this matter. When this market condition comes to a point in the bituminous industry that it threatens the stability of our contract and the working conditions of our people, when the disparity of employment gets to a point where it constitutes a rank injustice and lack of opportunity for our members to work, the United Mine Workers of America, itself, may find it necessary to advise our members how many days a week they need to work. We have that contractual right, because the contracts are written to permit that. It is a matter of self-preservation for our Mine Workers; it is a matter of self-preservation for the investors in the industry. If the operators of this country can't give any leadership on the commercial

side of this industry, the United Mine Workers of America can and will.

"So next year, in 1949, or at any other time, when evil days come upon this industry, you will find the United Mine Workers of America moving in, and if there are only three days' work in this industry we will all have the three days' work. These things are of the utmost importance. . . ." (312a-314a).

In 1949-50 the Union applied its indicated approach to stabilization and over-production. Mr. Lewis made the following statement at the first session of the bargaining conferences of 1949-50:

"There comes up at this conference, we think, the question of some regulation of the working time, some stabilization in the industry. The Mine Workers have gazed at some degree with admitted apprehension at the tendency of the industry to reduce their prices in the face of increasing competition. Frankly, we think the industry has been too hasty. . . .

"There has been much talk lately about a stabilization plan . . . [W]e do have a segment of the coal industry operating under a plan that brings about a distribution of working opportunity (Mr. Lewis then explained a plan that had been worked out in the anthracite industry). We would like to talk to you in this conference on some improvements and stabilization which is a question of magnitude in the minds of the men as affecting the investment in the industry. We would rather deal with you when you are opulent rather than when you are poor. We like to negotiate with you when you are full, when you are satisfied, when you can pay your board at first class establishments, and we can too. . . ." (314a-315a).

Mr. Love testified that there was considerable discussion in these sessions on limited work week (538a-539a).

As the bargaining conferences of 1949-50 wore on, the Union commenced to apply the three-day work weeks which were forecast by Mr. Lewis in his 1948 speech. The three-day work weeks were applied repeatedly by the Union (314a, 539a).

The statements of Mr. Lewis in his deposition upon this subject are important because he later completely changed his testimony in this regard when, it would seem, he realized the effect under the issues here of proof that industry stabilization was a principal issue in the 1949-50 negotiations.

In his deposition we reminded Mr. Lewis of the statement he had made in 1948, which is quoted above, and in answer he stated:

> "Oh yes, and I may say that those observations merely relate to one thing: The equitable distribution of work opportunity in the coal industry and the desire of the United Mine Workers to have the work opportunity more equitably distributed. **It had nothing to do with any other subject.**"

Then Mr. Lewis was asked:

> "Q. And in 1949 and 1950, during the period that the negotiations for the 1950 contract were going on, you did set three-day work weeks and other types of work weeks in the industry?
>
> "A. We set a three-day work week, yes, to distribute the work and the opportunity for work; **and for no other reason**" (314a).

Mr. Lewis repeated again that the 1949-50 three-day work weeks were solely to get away from the feast and famine in the industry (317a). Again, he stated that the "sole consideration was equality of opportunity" in setting the three-day work weeks in 1949-50 (316a).

In spite of the foregoing testimony in the deposition, which was read at the trial, and in spite of the actual

history of the United Mine Workers sponsoring a spread-the-work plan in the anthracite industry to give more equal opportunities for work, when Mr. Lewis later was on the witness stand at the trial, he testified that the limited work week was not proposed as any permanent thing—that the United Mine Workers would refuse a limited work week—that it was absurd from an economic standpoint (1104a-1105a). He further testified that the three-day work week during 1949-50 negotiations was: "A small piece of strategy designed at the moment to create a little discomforture in the operators' rank while they were disinclined to make an agreement and abate the controversy" (1105a).

This testimony is to be compared with the testimony he gave earlier in his deposition. The jury was entitled to make this comparison.

The jury was entitled to reach the conclusions on the record that the question of over-production and the need for stabilization in the industry, as previously expressed in the Union's Convention Minutes and in the testimony of Mr. Lewis, was an urgent motivating factor in the negotiations conducted by the Union in 1949-50.

Incidentally, counsel for UMW and the Welfare Fund Trustees, inserted in the evidence in this case at page 1026a, Exhibit 128 which contained a history of the UMW Welfare Fund from 1945 to April 26, 1951. This history was included in this case in an appendix in the Court of Appeals and is part of the certified record filed in this Court in the companion case No. 39, October Term, 1964. This history included the following:

"June 8, 1949

"President Lewis authorized all members of the U. M. W. A. to stop work on June 13th. The stoppage was termed as 'a brief stabilizing period of inaction

during which cessation of all mining will occur.' The reason for this move, President Lewis wrote, was that 'magnificent production efforts' of miners so far this year has resulted in overproduction with consequent economic instability among the miners. 'This period of inaction will emphasize a lack of general stability in the industry and the dangers which will accrue therefrom if current harmful practices are not remedied. It will contribute constructively to the abatement of current economic demoralization; it will not adversely affect the public interest; it will help preserve property values in the industry; and it will help preserve the living standards of the mineworkers, their dependents, and the communities which depend upon mineworkers' income.'

"June 13, 1949

"385,000 members of the U. M. W. A. left the pits for one week stabilizing period. Talks with the U. S. Steel Corporation at Philadelphia began. After two sessions the bargaining groups adjourned until June 23rd.

"The New York Times disclosed plans for appointing a coal 'Czar' who would control and allocate some 200 million tons of soft coal annually among its members.

"June 14, 1949

"President Lewis asked Northern and Western Soft Coal operators who mine more than half the country's coal to meet with him. Mr. Love, President of the Pittsburgh Consolidation Coal Company, said that a 'Czar' for the bituminous operators' group would end 'chaos in the industry.' The purpose of the new group 'is not to establish a "Czar" or limit production or create an industrial monopoly to match the labor

monopoly; the purpose is simply to bring order and dignity into labor relations of the industry and to avoid chaos which has too often attended labor negotiations and inconvenienced the public.'

"June 16, 1949

"The Senate Banking Committee voted an inquiry sponsored by Senator Robertson of Virginia to find out whether the plans being sponsored by the operators' group for a coordination of labor relations would violate anti-trust laws.

"The U. M. W. A. Journal declared 'divide the orders, share the work' program is now a 'must' in the soft coal industry. 'Since the coal industry of its own accord, cannot get together and exhibit the business acumen necessary to protect its employees and the business and population of the mining communities, the duty of performing this public service devolves upon the only stabilizing force the industry has ever known—the U. M. W. A.'

• • •

"July 25, 1949

"Hearings began before Senate Banking and Currency Committee. Mine operators claimed union rights do not include right to restrict production, Mr. Moses charged the union with 'an arbitrary abuse of this economic power.' Senators who arranged hearing said they were thinking of repealing labor unions' exemptions from the anti-trust laws. Senator Robertson said the three-day week in the soft coal mines is more than an effort on the part of the miners to better their working conditions, 'it is a bold, overt act to control production and prices, the assertion of a power or right in the labor unions to stabilize the industry upon its terms through production control.'

"August 1, 1949

"Miss Josephine Roche, Director of the U. M. W. A. Welfare and Retirement Fund, and Dr. Warren Draper testified before Senate Banking and Currency Committee on 'effect of economic power of unions upon banking and credit policies, small business enterprises, consumer prices, and national economic stabilization.'"

As to the position of the operators in 1949, Mr. George Love, spokesman for the major coal companies in the negotiations with the Union in 1949-50, when asked about the growth of the non-union coal companies, said that it was about 25% of production in the Northern Districts, and added that there was a big volume of non-union coal in the Midwest. He said the Progressive Miners and non-union miners in western Kentucky mined about 2,000,000 tons of coal per year. It was reasonable for the jury to conclude that the in-roads being made by this non-union production and the decline of the big mines in the industry (1717a) was a significant matter in the minds of the 1949-50 negotiators.

The representatives of the major coal companies, particularly Mr. Moody, head of the Southern Coal Operators' Association, complained bitterly about the Union's effort to impose economic dictatorship, with its stabilization plan, and took the position that if the operators engaged in such a plan they would be in clear violation of the anti-trust laws. Mr. Lewis testified that he knew operators were taking that position but that he considered it "of little moment" (387a).

Mr. Lewis testified that the operators protested against the limited work week (316a, 386a). He testified that the representatives of the major coal companies were not interested in a limited work week (316a). Mr. Lewis

testified that the real reason the major coal companies objected was because it hurt them in their pocketbooks—"their left hip pocket" (387a-388a).

Mr. George Love, principal spokesman for the major coal companies in 1949-50 (534a), testified that the United Mine Workers exercised a strong economic force in the industry (534a); that the 1949-50 conferences dealt with the Union's limited work week plan of stabilization (538a-539a); that there was more coal than the market could absorb (538a) and that the operators resisted the UMW's three-day limited work week plan as a solution to the over-production problem (538a-539a).

The seriousness of the struggle that went on in 1949-50 in the bituminous coal industry is indicated by the intervention of the governors of various states and finally by the President of the United States and by the suffering that the country experienced through the shortage of coal (271a-276a).

The raft of cases brought by the operators concerning contract terminology (275a) deal with subjects that would hardly explain the critical condition brought about in the country. The Board of Inquiry appointed by the President got the impression that the disputes over contract terminology were merely tactical maneuverings overlying the basic economic questions (1492a-1493a). If the basic struggle was economic, and, in light of the later readiness of the large companies to grant increases in UMW contracts after 1950, it is reasonable to conclude that only a contest over the future of the industry and the solving of the problem of over-production could explain the critical condition that the country as a whole was thrown into by this struggle. There was substantial evidence in the record that a second major matter of dispute was the control of the UMW Welfare and Retirement Fund, as to which see Appendix II.

B. An Understanding on the Future of the Industry Was Reached in 1950 and This Resulted in a Great Change in the Relations Between the Major Companies and the Union and Between the Major Companies and the Smaller and Weaker Companies.

Upon the signing of the National Bituminous Coal Wage Agreement of 1950 on March 5, 1950, Mr. George Love stated:

> "This two and one-half year contract gives the industry its first real opportunity for stability in the last decade. Both the union and the operators made concessions. The Operators definitely established the right to control their production and their mining facilities. The union asked for a cooperative administration of the welfare fund, and we are giving it to them. We will help every way possible to make this huge fund a definite credit and benefit to the industry, however, the responsibility is squarely on the shoulders of the union, and if it fails, the public and ourselves will look directly at the union" (547a).

This language gives a clue as to how the two major issues, overproduction and control of the Welfare Fund, were settled. As to the course the Welfare Fund was to take, see Appendix II hereinafter.

Mr. George Love, spokesman for the operators, testified that the Union gave the operators the right to run their own mines and that this was an important economic consideration (545a-546a).

It was thus clear that any stability that was to be attained in the industry was not to be attained by pursuing the Union's plan of spreading the work or limiting the work week. After 1950 the Union said nothing more about a limited work week or a stabilizing plan in the bituminous industry. No more need be said if a plan had been reached.

There is a sharp contrast in the bargaining before 1950 and after 1950. The history of bargaining before 1950 is set forth in 262a-276a. It is characterized by one struggle after another between the major companies and the Union involving many strikes, seizures by the Government, all kinds of lawsuits, and a complete inability to see eye-to-eye on anything.

In 1950, after the signing of the UMW contract, the Bituminous Coal Operators' Association, which has asked to file a brief here as *amicus curiae*, was formed by the major companies (394a). Mr. Moses was appointed as a one-man negotiator for the operators who were members of the aforesaid association, and in 1951, long before the two and one-half year period of the 1950 contract had expired, Mr. Lewis and Mr. Moses sat down alone and negotiated increased wages in the form of the 1951 Amendment to the 1950 contract (395a). The same procedure was repeated in 1952 (395a-396a). After Mr. Moses died Mr. Fox took his place. Mr. Fox and Mr. Lewis followed the same procedure in negotiating successive contracts in private long before the expiration date of the preceding contract (396a-399a). UMW has referred to this procedure as simply being a compliance with the 60-day "cooling-off" period required by the Taft-Hartley Act, although the facts are undisputed that these successive contracts were negotiated and executed many months before the expiration of the preceding contracts. BCOA, in its brief *amicus curiae* in the Court of Appeals refers to this procedure as "arm's-length collective bargaining" and characterizes this as a procedure to be desired. However, BCOA, like the UMW, offers no explanation for the fact that, prior to 1950, the operators and the UMW engaged in constant economic struggles which virtually kept the nation short on coal for 8 critical years, from 1941 through 1949, and suddenly after 1950 the operators were willing to yield to all of UMW's demands in 1951, 1952, 1955, 1956, and 1958 with-

out even awaiting the expiration of the preceding contract. In this regard, BCOA makes the following statement in an earlier brief:

> "The record will show, however, that the negotiations since 1950 have not been without real issues between the parties. Each new union demand has been carefully analyzed for its legality and its economic impact on the members of BCOA. Many demands have been opposed and few have been accepted without compromises."

There is nothing in the record to substantiate this allegation. The record in this case discloses that, since Mr. Moses' death, Mr. Lewis and Mr. Fox are the only two persons who can verify such an assertion. Mr. Lewis, the only one of the two survivors who testified in this case, apparently did not choose to divulge the events which took place between him and Mr. Fox and Mr. Moses.

The UMW took the position at the trial, and, along with BCOA, takes the position on this appeal, that it had the legal right to negotiate contracts according to any procedure which it desired and that it negotiated the 1950 contract under court and NLRB compulsion. It then comes to the conclusion that, when the injunctions against UMW were dismissed after the 1950 agreement, the court and the NLRB necessarily put their stamps of approval upon the legality under anti-trust law of, not only the 1950 contract, but also upon all of the events which took place during the 1949-50 negotiations leading up to the signing of the 1950 contract, including any conspiratorial agreement made during such negotiations, and also all agreements since then. No explanation was offered for the dramatic change of attitude of the large operators toward UMW after 1950. The record strongly invites the inference that the large operators were willing to concede UMW's every demand subsequent to 1950

because of an agreement which was reached simultaneously with the making of the 1950 contract which was, together with subsequent concessions, economically beneficial to the large operators in the competition with thin seam small mines.

The statement in the 1956 prospectus of Consolidation Coal Company (548a-549a) typifies the change in the relations between the Union and the major coal companies wherein it is stated: "No material work stoppages or unusual labor difficulties" have been experienced by the companies "since March, 1950."

There was a sharp change in the attitude of major coal companies with respect to the Union's domination of the men in the industry. From 1947 to 1950 there was a very manifest attitude on the part of the major coal companies to keep out of collective bargaining agreements language which would facilitate the Union's domination over the men in the industry. The position of the major coal companies was frequently stated during the course of bargaining sessions before 1950 (302a-303a, 309a). There was a fight over the Welfare Fund language and over the Welfare Fund itself (268a-270a). There was a fight over the Union security language in the 1948 contract (271a). There were a number of cases brought by the major coal companies before the National Labor Relations Board in 1949 (272a). Cases were brought in 1950 with respect to terminology of the proposed contract by the major coal companies (275a).

Immediately after the signing of the 1950 contract the major coal companies and the Union combined to solicit the National Labor Relations Board to terminate the cases (326a). The major coal companies have no longer been interested in the contract terminology so far as it might infringe upon the limitations contained in the labor law. This has been true even though in 1951 the labor law was

amended to make illegal union security clauses in contracts with unions which had not complied with the reporting provisions of the law. The major coal companies did not protest the union security clause even though the non-compliance of United Mine Workers of America was a matter of public knowledge (337a-338a). Mr. Lewis made it abundantly clear that there was not going to be any compliance by his Union (1235a). The major coal companies left the questions of contract terminology up to small companies sued under the Welfare Fund to conduct a scattered and losing fight on the various questions presented (1493a-1494a). This attitude is to be contrasted with the attitude of the major coal companies before 1950.

There was a marked change in 1950 in the attitude of the representatives of the major coal companies toward the smaller coal producers. Before agreement was reached with the UMW in 1950, Mr. George Love, representative of the coal companies in 1949-50, stated in those negotiations that he was representing hundreds of operators, most of them small, with their backs to the wall; that these companies had to sell their coal before they mined it; that if the cost were increased many of them would be unable to open their mines; that the small operators had no margin in 1950 to absorb any increases in cost (541a-542a). Mr. Love stated then that he was under an obligation not to do something that Consolidation Coal Company could do but hundreds of other coal companies could not afford (542a). Mr. George Love testified that it was his position in 1950 that he, as a negotiator, had to actually and honestly represent everybody, including the mines in the thin seams of coal, and in all of the various geographical districts (543a-544a).

After 1950, the representatives of the major coal companies ceased to be concerned with the ability of the

smaller companies to keep up with the increases in the contract. The labor contract costs were repeatedly increased after 1950 (400a). These increases were made after the formation of the Bituminous Coal Operators Association and the appointment of the one-man negotiator teams, and there was evident a willingness to negotiate increases year after year without waiting for the termination of the preceding contract (395a-399a).

The financial and ownership tie-ups between the major coal companies and the dependence upon the major companies of the lesser companies in the industry in the period of 1949-50 were clearly shown by Mr. Lewis (319a-324a), as stated above. Under these conditions it would have been an easy matter for the representatives of the major coal companies and the Union to reach an understanding with respect to the question of stabilization and the manner of taking care of the pressing problem of over-production in the industry.

C. The Understanding Reached in 1950 Between the Major Coal Companies and the Union Is Reflected in Later Use of the National Bituminous Coal Wage Agreement to Force Out of the Industry the Smaller and Weaker Companies and Their Employees.

In October, 1950, after UMW and the major coal companies came to terms, an International Organizing Committee was set up by the International Executive Board of the Union to promote "an intensified and integrated organizing campaign in the non-union areas of the bituminous coal industry." Under the direction of this committee and the International Officers, considerable progress was made in both the strip and underground fields of the East. Some of the non-union operators appealed to the courts for injunctive relief against the Union. Although several of these injunctions were temporarily im-

peding the campaign in certain areas, they had not appreciably affected the Union's drive, and the Union anticipated success despite these legal bulwarks (414a-415a).

This drive was conducted especially in regard to strip pit operations and the operations of the smaller mines. The Union had very little difficulty in organizing the large units of production but the Union was having difficulty in organizing stripping operations. It was the intent of the Union to organize every mine and every strip pit in the United States (415a-416a).

In 1956 the International Organizing Committee, formed in 1950, was continuing its organizing campaign. Notwithstanding the liberal use of the injunction by the courts against the Union, the Organizing Committee and the International Officers were able to overcome such obstacles and conducted a decisively successful campaign. It organized many small mines and was successful in organizing all of the major non-union operations. Its intent was to organize all of the employees of the coal industry (416a).

Mr. Lewis testified that 82% of the production was placed under the contract (428a-431a).

The drive to put all production under the contract is characterized by the Union's ignoring the basic rights of employees to select for themselves the bargaining representative who would represent them in collective bargaining agreements. The Union organizers went directly to the operators of the small companies and demanded contracts without bothering to first sign up a majority of the employees (131a-132a, 157a, 158a, 166a, 222a).

The organizing reports of the Union indicated that UMW frequently encountered injunctions in the courts in the organizing drive (414a-416a). Since this was a conspiracy case rather than one primarily based on violence,

the District Court restrained us from going into the details of violence any more than necessary to establish our contention that contracts were being forced on operators and Union membership was being forced on employees of small companies (150a). There is not the sweeping proof of waves of violence such as is shown in a case based directly on violence as in **Flame Coal Co. v. United Mine Workers**, 303 F. (2) 39. However, the reason for these injunctions is made clear from the testimony in this case and the conduct of the Union organizers shown therein.

District 19 of UMW, wherein Phillips Brothers' mine was situated, is not a self-sustaining District (232a). The International Union funnels funds into District 19 as so-called sustaining "loans" and additional funds for organizing purposes (245a-250a). Ed Daniel and Taylor Maddox were representatives or organizers under District 19 (233a). Taylor Maddox testified that the President of the District put the organizers out in a field to organize. The President did not tell the organizers what to do each day but assigned them a territory and left it to each one to outline his work, and the job of the organizer was to find the unorganized mines and go ahead and organize them. They were all experienced men (852a-854a). Many of the small mines were in isolated territory back in the hills. The organizers frequently gathered together bands of men who would go in caravans of cars to these isolated mines to organize them and the expenses of these trips would be paid by the District (855a).

The manner in which these caravans of men would carry on the organizing work with violence and threats is sufficiently reflected in this record (119a-128a, 131a-136a, 138a-144a, 149a-151a, 155a-159a, 165a-169a, 184a-190a).

When these men got into trouble because of the mob violence, funds from the District, emanating from the International Union, bailed them out (233a-235a, 249a-250a).

It is no wonder that Mr. Lewis stated, with respect to the possibility of resistance by operators to demands of the Union that "it wouldn't do them a . . . bit of good" (1242a). In the organizing drive, the larger units of non-union production resisting the drive, were bought up by the major coal companies who proceeded to place these operations under the Union contract (416a-418a, 692a-693a, 1210a).

Each succeeding amendment to the National Bituminous Coal Wage Agreement after 1950 very substantially raised the labor costs (399a-400a). These increased costs were signed by the major coal companies before the preceding contracts expired (395a-399a). Mr. Lewis testified that the increased wages and costs were "the intent of the effort" (399a).

These increases were tailored to fit the ability of the major companies to pay the increases through mechanization. Mr. Lewis stated with respect to the 1955 contract: "It is based upon the economics of the modernized industry. It is tailored to fit the future requirements of constantly progressive industrial techniques" (401a). With respect to the 1956 contract Mr. Lewis stated: "This contract encompasses all that the industry is able to pay at this time—your officers know something about this industry. We know the status, the financial standing, and the market possibilities, and the operating costs and can project them far to the future of any major coal company in this country" (403a).

Mr. Lewis further stated: "The constant tendency in this country is going to be for the concentration of production into fewer units, with the best possible equipment, under the most modern plans that our engineers can devise, with less idle day loss because the more continuous operation is geared to standard, qualified, marketing outlets and practices; that is the tendency" (408a).

He further stated: "These great combines now being formed in the industry are able to save enormous sums of money in the production of coal, in the buying of supplies, on the part of managerial ability and administration in the reduction of the idle day time, because of their ability to make contracts with the great power consuming and manufacturing industries of the country, and enabling them to plot their production with the maxim number of days of operation per year and cutting down the unnecessary idle day drag that mounts the cost of production" (404a-405a).

Mr. Lewis testified: "We have a substantial knowledge of the form, structure, reserve, markets, and financial position of each of the important coal companies in the country" (401a).

We asked Mr. Lewis if the companies we charged with having been co-conspirators in this case were not the ones "that are following this tendency of binding up large combines to take over the production of coal in this country" and Mr. Lewis replied: "They are among those who are doing that" (450a-451a).

We asked Mr. Lewis if there was not "a concern by the Union that these large combines have the ability to pay these increased wages" and he answered: "Obviously they have the ability or they would not pay it and they couldn't pay it" (411a-412a).

The record reflects the ability of the major coal companies to produce gigantic tonnages with great machines with just a handful of men, making wage increases negligible with respect to the costs of operation. Consolidation Coal Company has spent $200,000,000 in modernizing its mines since 1947, and spent $20,000,000 on the Loveridge mine alone (478a-479a). Consolidation has thirty-three mines in five states, twenty-one of which produce over 1,000,000 tons per year (484a). It uses continuous mining

machines which advance the face 13 feet wide and 7 feet high at the rate of 60 feet per hour, each machine producing 1,000 tons per eight hour shift (484a-485a).

Peabody Coal Company has one deep mine near Taylorville, Illinois, employing 600 employees, producing 3½ million tons per year, with complete mechanization (716a, 747a-748a). All of the other Peabody Coal Company mines are strip operations (716a). In stripping, Peabody (during the period of this case) used shovels whose dippers had a capacity of some ten to seventy yards (735a, 476a-477a). A seventy yard dipper holds 105 tons which can be picked up by one of these shovels in just a matter of seconds (735a). At its Paradise mine Peabody had contracted to use 100-yard shovels (736a-737a), and had ordered 115-yard shovels (746a). It will also use continuous miners in this operation (752a).

Recently Pittston Company opened its Moss No. 3 mine at a cost of $50,000,000, to produce 45 tons per man per day against a national average of 11 tons per man per day. This mine has a production of 6,000,000 tons per year (487a).

All West Kentucky Coal Company mines are completely mechanized (599a).

Mr. Lewis testified that the major mines in the country are producing 28, 30 and 40 tons per man per day (1136a).

Another significant factor with respect to the execution of the repeated wage increases by the major companies is the circumstance that the major companies now obtain gigantic long-term contracts with the utility and other major markets for coal (404a-405a, 487a-488a, 590a, 715a-716a, 1271a, 1357a-1358a). These long-term contracts have escalation clauses which would eliminate these repeated increases in wage costs from being a cost factor so far

as the major coal companies are concerned (714a-715a, 728a).

We asked: "Mr. Lewis, the contract, the National Bituminous Coal Wage Agreement, contained terms which were included in each and every contract executed by the Union, with any and all coal operators throughout the country; is that not right?" Mr. Lewis answered: "That, sir, is the policy" (411a).

Mr. Widman, assistant to the President of the Union and for many years in charge of the International Organizing Committee which was formed in 1950, testified that there was "only one contract in our industry recognized by the Union—it is a matter of public record. It is not hard to find. That is it. That sets out the only wage scale we have" (786a). He further testified that there used to be differentials before in the various areas of the country. He further testified that the Union has been successful in making the contract uniform (786a-787a).

In the 1958 amendment to the National Bituminous Coal Wage Agreement the uniformity of the contract to be imposed on the coal production of the country was formalized in the contract itself in the following language:

> "During the period of this contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this contract on any basis other than those specified in this contract."

Mr. Lewis testified that the organizers in the field were not authorized to take any less wage than was the policy of the organization (1162a).

We asked Mr. Lewis if there was not an attitude upon the part of the Union that the Union did not care whether

the smaller units could pay these increased costs and he answered that the Union could not guarantee or undertake to "become the sponsor and the protector of thousands of inefficient and ill-operated uneconomic mining units" (412a).

Mr. Lewis further testified that why some companies could not or would not pay less than the minimum wage is something that he had no knowledge on (476a).

However, he had previously stated: "We've got many units of our industry that aren't modern, with low productivity and obsolete machinery, not well financed, no marketing outlets, mining a poor grade of coal, and with inefficient management. They are just a drag on the industry. . . . More and more of the obsolete units will fall by the board and go out of production" (408a).

He further testified: "So it is with these palid, underfed, ill-nourished operators of small coal mines who cannot keep up with the economic procession nor live under the rules of competition as it now exists" (407a).

The inability of the mines in the East Tennessee field to mechanize and keep pace with the mechanization in other areas is a circumstance that cannot be disputed on this record. This arises from physical conditions with respect to thickness of seam and the rough terrain (953a-955a, Exhibits 118, 119, 120, 1664a-1666a, 1307a-1308a, Exhibits 163, 164, 1316a, 1315a).

The statistics, from the Bureau of Mines, show Tennessee has four times the number of non-mechanical mines as the average of coal producing states due to the nature of seams and terrain (1315a-1316a). Tennessee has by far the thinnest average seam of coal (1664a). Tennessee has by far the longest average haul from mine to loading point (1665a). The seams and terrain make only small equipment, such as that used by Phillips, serviceable and Ten-

nessee has practically none of the large equipment that is found in the thicker seams and more favorable terrain (1666a). Yet there are many thousands of people who are dependent upon coal mining in this area in order to survive (961a-964a, 1513a). These people are told by the UMW to operate under the terms that were designed and tailored for production with the great machines or get out of the industry. The demand is obviously an impossible one.

D. Use of the Welfare Fund in the Conspiracy and the Participation in the Conspiracy by the Trustees of the Welfare Fund.

Before 1950 when the Union was contending with the major coal companies over the question of limited work weeks and control of production the Union very plainly manifested its intent and purpose to control the Welfare Fund. As a matter of history it was this effort of UMW that caused the Welfare Fund provisions of the Taft-Hartley Act to be enacted. **United States v. Ryan,** 350 U. S. 299, 304-305, 100 L. ed. 335, 341. After 1950 an understanding and purpose on the part of the major coal companies and the Union to put out of the industry hundreds of thousands of miners through mechanization and through forcing the smaller and weaker companies to close down would clearly be facilitated by the continuance of the Union's control over the Welfare Fund. When the miners left in the industry and left in the Union membership looked around and saw thousands of their co-workers being forced into unemployment the Union's maintaining of control over the administration of the benefits of this Fund would be an important asset in keeping discipline and allegiance in the thinning ranks of Union members.

The representation of Union control over the Fund would also facilitate the drive to bring the smaller mines

under the labor contract of United Mine Workers. We have discussed in our petition in the companion case, Number 39, October 1964 term, the manner in which the Welfare Fund has been used since 1950 to force the contract on all production and without repetition we refer to that discussion, which is incorporated as Appendix II to this brief.

E. The Small Companies Who Cannot Pay the Increased Cost Under the UMW Contract Have Been Boycotted From Coal Lands and From Coal Markets by the Major Coal Companies.

The impression could easily be gathered from the testimony of the Union Officers and the statements of counsel that the land-lease provision of 1952 was carried over from earlier contracts and that it had to do with subterfuge or, in other words, it had to do with efforts of operators to get around the contract by making bogus leases to third parties.

There are two sentences in the land-lease provision. The second sentence was always in the contract beginning in 1945, and has to do with "subterfuge." The first sentence in the present land-lease provision appeared for the first time in the 1952 contract and it has nothing to do with "subterfuge." The language added in 1952 is as follows: "As a part of the consideration for this agreement, the operators signatory hereto agree that this agreement covers the operation of all of the coal lands owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this agreement, or acquired during its term which may hereafter (during the term of this agreement) be put into production" (1200a-1201a).

It will be observed that this language may reasonably be construed to cover any later operation by any party

on any lease of coal lands held by the major coal companies regardless of whether or not they are in production at the time, and regardless of how remote they are from present operations of those companies.

There are many places in the record where tremendous reserve of the best coal lands are shown to be held under deed or lease by the major coal companies. For instance, Consolidation Coal Company has 1,300,000,000 tons of reserves in six counties in Pennsylvania alone. This company has properties and mines in four other states besides Pennsylvania (484a). The Clinchfield Division of the Pittston Company, alone, in one state, has 1,000,000,000 tons of reserves in a tract of 300,000 acres (487a). In 1958, the West Kentucky Coal Company had over 1,000,000,000 tons of coal reserves (589a-590a). Island Creek Coal Company had reserves scattered in several states (776a-777a). Mr. Lewis testified that the major coal companies have vast acreages of reserve coal lands tied up (490a). The Union loaned $1,500,000 to gather together leases on the ten foot Hazard seam in East Kentucky (530a). The provision added in 1952, called the "land-lease" provision, would bar small coal companies that cannot pay the Union scale and Welfare royalty from all this coal land.

The practical economic control which the Union holds over average mining companies that sign the contract and that have coal reserves of substantial size, by virtue of the land-lease provision, may be exemplified by the case of Black Star Coal Company. Black Star Coal Company was a Kentucky corporation and Mr. Albert B. Hill was president of that Company (668a). This company had a mine at Alva, Kentucky, just north of Tennessee. It also had 16,000 acres of coal reserves, most of which were located in other counties in Eastern Kentucky (669a). The new land-lease provision inserted in the 1952 UMW

contract made Mr. Hill go to Washington to talk to Mr. Lewis (681a). At the time the new contract came out in 1952, Black Star had new leases made out to non-union coal companies on some of its land and had a verbal agreement on two other leaseholds (682a). This land lay in an area of the coalfield where nothing but non-union operators were operating (688a). Mr. Hill conversed with Mr. Lewis at great length concerning his right to lease this land to non-union companies in spite of the land-lease provision, and after these lengthy discussions Mr. Lewis and Mr. Hill entered into a "gentlemen's agreement" that it would be all right to make the leases which had already been made and to make the leases with respect to the other two leaseholds as to which there was a verbal agreement already existing, but to no others (680a-685a).

When the next union contract came around for execution, Black Star Coal Company was confronted with the necessity of entering into new leases in the non-union area of the Black Star property which had not yet been developed at all (683a-684a). After another lengthy round with Mr. Lewis, Mr. Hill entered into another "gentlemen's agreement" that it would be all right to go ahead with these (683a). He discussed with Mr. Lewis the companies that were to be formed and the leases that were to be made (684a-685a). Mr. Hill abided by his agreement with Mr. Lewis that he would make no other leases than those which were the subject of the discussion (685a), and other companies would be rejected when applying for a lease (671a-672a).

As a postscript to this testimony, subsequently Black Star Coal Company was acquired by Peabody Coal Company (714a, 719a, 671a). After that, the matters with UMW were handled in the Peabody office in St. Louis (681a). Peabody closed up the Alva mine (720a). It

could not be operated profitably although there is sufficient coal left on the property (671a).

The application of the land-lease provision to mines operated by subsidiaries of Peabody Coal Company illustrates the manner in which that provision was used to impose the national contract of UMW upon operating units regardless of the will of the employees of those units. The Millstadt mine and the St. Ellen mine, both in Illinois, were acquired by subsidiaries of Peabody Coal Company in 1956 (718a). The Progressive Mine Workers of America is a labor organization which represents miners in some areas of the coalfields (759a). It is the principal competitor of the United Mine Workers of America (765a). Its membership consists presently of only 1800 working men (764a). It was organized in 1932 (765a). It had long represented the employees in the Millstadt and St. Ellen mines and represented them in 1957 (759a).

Peabody Coal Company received a letter from Hugh White, president of District 12 of United Mine Workers, dated July 10, 1957 (700a-701a). This letter formally advised Peabody Coal Company that the UMW contract was effective at any and all mining operations operated by Peabody Coal Company and that a compliance was expected, pointedly referring to the land-lease provision. Immediately letters were sent by Peabody and its subsidiaries to the Progressive Mine Workers notifying them that the Progressive contract was being cancelled effective September 30, 1957. At this time, Progressive Mine Workers had a valid contract at the two mines of Millstadt and St. Ellen (706a-707a). Ray Dupee was president of Progressive Mine Workers (758a). He was advised by the superintendent of Millstadt mine that the United Mine Workers were about to commence a drive on the mine and that the company would cooperate with the UMW (760a). Mr. Dupee sent letters to Peabody notifying

Peabody that Progressive had a valid contract at the two mines (705a-706a). Peabody did not reply to these letters (707a, 762a). Dupee could not reach any Peabody official on the telephone (762a). Then he received the termination of the contract from Peabody Coal Company (763a). In the meantime, Mr. McCollum, vice-president of Peabody Coal Company, gave District 12 of United Mine Workers a list of the company employees (707a). In the vacation period of June and July of 1957, neither the Millstadt nor the St. Ellen mine opened as scheduled at the end of the vacation period (767a, 771a).

Before the mine reopened, and after the 1957 vacation was scheduled to be terminated, the mine committee of the St. Ellen mine met in the mine superintendent's office. There was present at the meeting Mr. McCollum, vice-president of Peabody Coal Company (767a). Mr. McCollum was asked by a member of the committee if the men were sent out to join United Mine Workers of America. Mr. McCollum handed a letter to the pit committee, this being the previous letter which was received from the president of District 12, United Mine Workers, and was the letter in which Peabody was advised that it was expected to comply with the land-lease provision. Mr. McCollum told the mine committee members that they would not want trouble at their 27 other mines by trying to work these two mines. Mr. McCollum told the mine committee that the Progressive Mine Workers had been notified that on the expiration of the Progressive Mine Workers' contract there would not be another Progressive Mine Workers contract executed. The mine committee reported these matters back to the Progressive Local at the next meeting (768a-770a).

In the meantime, at the Millstadt mine, the pit committee of Progressive Mine Workers Local there held a meeting at the superintendent's office after the vacation period was scheduled to have been terminated. The super-

intendent of the company told the pit committee that the company could not operate these two mines and shut down 27 other mines. The superintendent would not comment upon the question of the pit committee as to whether the mines were not going back to work unless the men joined the United Mine Workers. The superintendent produced a copy of the District 12, UMW letter to Peabody which stated that Peabody was expected to comply with the land-lease provision and the superintendent said "that's the way it is." The pit committee reported these matters back to the Local at the next meeting (771a-774a). Peabody Coal Company recognized United Mine Workers at St. Ellen and Millstadt mines without any election (719a).

It is true that the Court of Appeals for the Seventh Circuit has ordered Peabody Coal Company to conduct elections at these two mines. However, this is small consolation to the employees of the St. Ellen mine, because St. Ellen was closed permanently and the equipment was stripped out of it (711a). Here, again, as in the case of the Alva mine, Peabody acquired, and closed a large mining unit that was causing UMW trouble. The St. Ellen mine was the largest mine with which Progressive Mine Workers had a contract (765a).

The protective wage clause added in 1958 effectively bars from the markets the coal of small mines that are unable to pay the costs contained in the National Bituminous Coal Wage Agreement. The protective wage clause says that the signatory operators will not buy, sell or deal in any way with coal mined by companies which do not pay the same labor costs as are set forth in the National Bituminous Coal Wage Agreement (1205a).

The major coal companies, signatories to the National Bituminous Coal Wage Agreement, are bound by the protective wage clause. These companies sell to the great markets for coal under large, long-term contracts. The

record has numerous references to these kinds of contracts.

The big combines referred to by Mr. Lewis make these kinds of contracts (450a-451a). The Pittston Moss No. 3 mine sells 1,250,000 tons per year under long term contract to American Electric Power Company, which is situated next to the mine (487a-488a). Peabody Coal Company has many large, long-term contracts (1271a). Peabody Coal Company organized an operating company, Simeo-Peabody Coal Company, to sell under term contract to Columbus and Ohio Electric Company (714a). Peabody Coal Company has an enormous long-term contract that covers three decades with the Commonwealth Edison Company (715a-716a). Peabody's contract with Tampa Electric Company is a twenty-year term contract (727a). The Consolidation Coal Company witness, P. B. C. Smith, testified that the electric utility markets, which are the principal markets for coal, are under long-term contracts for their coal. He testified that one reason for this is that in building steam plants the utilities must issue debentures, the sale of which requires that the utility make term contracts for its coal in order to establish costs; and the other reason is that these costs must be established in order to fix electricity rates (1357a-1358a).

These term contracts with the major markets include escalation clauses which provide that the price of coal under the contracts will be increased as costs, including labor costs, are increased over the years (715a, 727a-728a. 1454a). These escalation clauses explain, in part, why the major coal companies are in a better position to grant repeated increases to United Mine Workers.

The practice of major coal companies buying coal from smaller companies to apply on term contracts with the major markets is barred by the protective wage clause unless the small company has the ability to pay the labor

cost contained in the Union contract. Mr. Lewis demonstrated the dependence of smaller companies on sales to the major companies as far back as 1949 (320a-323a). The major companies have had the practice of frequently buying coal from other companies (1264a, 1360a). This market has been eliminated for those companies that operate under conditions that make it impossible to live up to the UMW contract.

Also of concern to small companies in the steam-utility market is the buying by the Union of stock of large coal consuming utilities including Cleveland Electric Company, Kansas City Power and Light Company, Union Electric Company of St. Louis, and Tampa Electric Company (580a-582a). How far the Union power will be exerted in this direction remains to be seen.

Of additional concern are the organized pensioners' drives to compel power companies to buy coal from approved mines. These have been discussed in Appendix II.

F. The Union Participated as Owner and Investor in Major Coal Companies in the Taking Over of Markets by the Big Combines.

While the Union was turning loose mobs on the coal fields and imposing conditions upon the small coal companies which were prejudicial to the small companies in the competitive race with the major coal companies, the Union itself participated in the taking over of markets of the country by the big combines as an owner and investor in some of the major coal companies. The UMW's position in this case is not confined to that of a labor union representing employees. It had many millions of dollars invested in major coal companies that were trying to take the markets being served by Phillips Brothers and other small companies of the area. While slanting labor policies

to cripple small, thin seam, companies and aid the major companies, UMW stood to gain directly as owner and investor. Mr. Lewis testified that West Kentucky Coal Company and Nashville Coal Company were a part of the big combines being formed to take over the production of coal in this country (450a-451a). These investments were a matter of rumor and UMW successfully resisted our efforts at discovery until after the passage of the mandatory financial reporting provisions of Landrum-Griffin. Thereafter the Trial Court permitted our discovery of this subject.

United Mine Workers of America used funds from its treasury to make investments in the West Kentucky Coal Company. Subsequently, it made investments in Nashville Coal Company. Of course, these funds came from the members of the Union who were working in the industry, including employees of the small mines and including, specifically, Phillips Brothers Coal Company employees (1162a-1163a). The record shows, as hereinafter described, that these investments have in no wise benefited employees in the small mines but that they have, rather, been disastrous to them, particularly those in areas of thin seams. The UMW endeavors to explain these investments by stating that it "had idle money that they wanted to put to work to invest." Yet, the record discloses that, during the time this "idle money" was being invested, UMW was making special assessments on all of its members, including Phillips Brothers' and other small company employees, upon the representation that UMW's funds had been depleted by wage negotiations and that additional sums were needed to replenish the Union treasury (1163a).

Mr. Lewis testified that these investments began about 1951, and that they were made to benefit Union members (1123a). He also testified that the investments were made to raise the employees out of their servitude (1126a). He

testified that the employees of West Kentucky Coal Company had always worked under substandard conditions. He said with respect to West Kentucky Coal Company that before these investments were made, "wages were always substandard, and the conditions of employment were always not up to the normal of the industry" (1164a).

Mr. Mark Eastin was president of West Kentucky Coal Company after UMW made its investments in that company and had been in the management of that company since long before. He testified in a deposition that West Kentucky Coal Company had a Welfare Fund for its employees into which the West Kentucky Coal Company paid a royalty in the same amount as that paid by signatory companies to the United Mine Workers Welfare Fund, and West Kentucky maintained this fund prior to ever signing any agreement with United Mine Workers (618a). Mr. Eastin further testified that before the Company ever signed any United Mine Workers contract it paid a wage scale equal to or higher than the scale of United Mine Workers (618a). On being questioned about this testimony of Mr. Eastin, and the inconsistency with Mr. Lewis' testimony about previous substandard wages at West Kentucky, Mr. Lewis resorted to the statement that the UMW purchase of West Kentucky had benefited the men because the company had previously operated a company store (1164a-1165a).

We do not believe that the jury was bound by Mr. Lewis' foregoing statement as to the reason for the investments in West Kentucky Coal Company. The number of employees employed by West Kentucky Coal Company has certainly not increased so as to spread employment (615a-616a).

We believe the jury was entitled to the conclusion that the Union officers made the investment simply as a busi-

ness arrangement, as Mr. Lewis indicated in later testimony (943a, 1125a).

The Union acquired outright some 85,400 shares of West Kentucky Coal Company common stock. It also acquired outright the entire 50,000 shares of West Kentucky Coal Company preferred stock (500a). In addition it held many thousands of common shares as so-called "collateral".

West Kentucky Coal Company had 857,264 shares of common stock outstanding in 1958 (591a). The shares which the Union bought outright, plus the shares which it held as collateral on the so-called "loans", far exceeded one-half of the outstanding shares (499a-500a). (Also see Exhibit 48, 1639a, the chart showing the interest of the Union in West Kentucky Coal Company and Nashville Coal Company.) In addition the preferred stock, owned entirely by the Union, is voting stock (602a-603a).

The record shows that the so-called "loans" were not really loans but rather direct investments by the Union in the West Kentucky Coal Company and Nashville Coal Company, regardless of UMW's stubborn insistence that they were loans in the true sense. Most of these loans were to Mr. Cyrus Eaton and companies owned by him or his children or business associates (550a-552a, 499a-500a). These loans are set forth in 499a-500a, and Exhibit 48, 1639a, 503a-506a. The notes evidencing these transactions are in the record at 510a-518a, and are referred to frequently in the deposition of Mr. Cyrus S. Eaton, 556a-586a, and of Mr. Barnum L. Colton, President of the National Bank of Washington, 623a-646a.

The Union officers acted as Trustees of Union funds in making these so-called loans (488a). **All of these loans were made on notes which relieved the recipient of the loans from personal liability upon surrender of the shares**

of stock held as collateral on each of the loans (488a-489a). The notes were renewed annually (557a, 575a). There was no understanding as to how long the renewals of the notes would continue year after year (575a). If the stock held as collateral declined in value there was no demand for additional collateral (570a-571a). If no dividends were paid on the stock, no interest was paid on the notes. This was the understanding (573a-574a). Several of the notes provided that one-half of the dividends on the stock held as collateral would be payable as interest on the notes (571a).

Mr. Lewis testified that it was his belief that these so-called loans would prove immensely profitable to the Union in a financial sense (493a).

After a great deal of confusing testimony delving into the nature of these transactions, Mr. Lewis' final testimony upon these so-called loans was that Mr. Eaton was invited "to make a joint venture with us in the West Kentucky purchase of stock, and we loaned him some money to buy stock." He also testified "any profits occurring from the joint enterprise in the investment were to be split mutually, fifty percent to each. We could not ask Mr. Eaton to do so and lose his own money, so we divided the profit like joint partners in any enterprise" (1125a).

We believe that the jury was entitled to the conclusion that the Union officers, in making these so-called loans, entered into a joint business enterprise with Mr. Eaton in making direct investments in West Kentucky Coal Company and Nashville Coal Company, as well as in C&O Railway and other companies, just as Mr. Lewis finally testified. The transactions are explainable by some sort of joint enterprise except one transaction that does not fit into this pattern with respect to "loans" on C&O Railway stock, this being the taking down of some $400,-

000 of this collateral stock which Mr. Eaton testified was taken by one of his corporations (565a-568a). He testified that none of the Union officers received any part of this collateral that was taken down and that no audit was made by Union auditors of this transaction (568a).

So-called loans were made to other individuals. The collateral stock held by the Union on the so-called loan to UMW's attorney, Harrison Combs, was foreclosed and is now owned outright by the Union (512a-513a, Exhibit 53, Letter 12/15/59 and Memorandum 12/30/59). The so-called loans to Mr. Colton, president of National Bank of Washington, on West Kentucky Coal Company stock follow the same pattern as the loans to Mr. Cyrus Eaton and must be taken to be the same kind of joint enterprise as was engaged in with Mr. Eaton. Here, again, there was no personal liability on Mr. Colton (643a). Mr. Colton did not even know about Nashville Coal Company (642a) and he attended no stockholders' meetings of West Kentucky Coal Company (644a). His notes are demand notes and there has been no demand even though the stock was purchased at prices of $35, $30 and $25 and the stock is now selling for $10 to $12 (643a). No interest was provided for except the payment over to UMW of any dividends that were received (644a).

The Union pledged $5,200,000 of its assets to support a loan by the National Bank of Washington to West Kentucky Coal Company in 1957. This transaction is interesting, shedding light upon who was actually running the West Kentucky Coal Company. The statement of the Union is that it gave this financial assistance "at the request of West Kentucky Coal Company" in order to "expand its holdings and operations" (501a). The loan made by the bank was "at our request," according to the letter written by the Union to the National Bank of Washington (644a-645a). The Chairman of the Board of the Company,

Mr. Cyrus Eaton, testified that he had no knowledge of the Union's pledge of $5,200,000 of its assets with respect to this bank loan (584a). Mr. Mark Eastin, president of the company, testified that he, likewise, had no knowledge of this transaction (1462a).

In the period that West Kentucky Coal Company, after the acquisitions of stock by the Union, was taking most of the largest TVA term contracts and was placing coal on the spot market of TVA at low and dropping prices in tremendous tonnages, the profit of the West Kentucky Coal Company showed a great decline and resulted in losses in 1958 and 1959.

In 1950, the last year before the Union began acquiring stock in West Kentucky Coal Company, the net income of the company was $5,645,919. This was according to the annual statement of the company in 1951. In 1951, according to the same statement, the net income was $4,223,814 (1461a).

According to the annual statement of 1958 of the Company (Exhibit 69, 588a), the West Kentucky Coal Company had a profit of $1,376,377 before taxes in 1957, and in 1958 it had a loss of $367,516 before income tax credit was applied (590a).

According to the annual report of the company in 1959 (609a), the company suffered a loss of $435,841 before income tax credit.

The decline in the coal business, suffered by the country as a whole from 1957 to 1959, does not account for the losses of the company. In 1958 the national production was down 18.8% from 1957 whereas West Kentucky Coal Company's production was down only 9.5% (589a). In 1959 West Kentucky Coal Company's production increased by approximately 500,000 tons as compared to a

drop in the national production (609a). The financial strength of the Union was a necessary support to keep the coal from this company flowing into the markets at such prices as were required to take the contracts.

We have given above some of the instances of the exercise of its financial strength by the Union in the coal industry. We make no representation that we have fully explored this field. We have done nothing to explore such companies as Lewmurken, Inc. (506a) and Hannah Company (597a). We have not explored the use of the financial resources of the UMW-owned National Bank of Washington in the coal industry, because there was a refusal on the part of witnesses to divulge this information (645a-646a). To pursue discovery in these fields would require lawsuits in a foreign jurisdiction which our small, broke client could ill afford. However, we should discuss briefly the National Bank of Washington and loans in industry which are readily apparent in the record. The National Bank of Washington made the $5,200,000 loan to West Kentucky Coal Company heretofore discussed (501a). The bank made the loan mentioned hereinafter to North Fork Coal Company of $1,500,000 (650a-651a). The witness Haley, secretary of the National Coal Association, treasurer of Coal Exporters Association, and vice-president of National Council of Coal Lessors, testified that these associations had their accounts in the National Bank of Washington (652a).

The United Mine Workers held 80% of the capital stock of the National Bank of Washington before the acquisition of the larger Hamilton National Bank of Washington (625a). The Union made so-called "loans" of many millions of dollars (1642a) to Mr. Colton, president of the bank, these loans following the same pattern as the loans to Mr. Eaton and to Mr. Colton with respect to West Kentucky Coal Company stock. The purpose was to acquire the Hamilton Bank (626a-627a). At the conclusion of ac-

quisitions of Hamilton National Bank stock by Mr. Colton with these "loans," Mr. Colton held 80% of the stock of the Hamilton National Bank (638a). Thereupon the Hamilton National Bank was merged into the National Bank of Washington. The National Bank of Washington also acquired Liberty National Bank of Washington (624a).

Returning to the part the Union-financed companies have played in the drive for markets, when West Kentucky Coal Company acquired Nashville Coal Company, West Kentucky assumed Nashville's contract with Tampa Electric Company to supply the coal requirements to that utility. Nashville Coal Company was acquired by West Kentucky October 1, 1955, and the contract with Tampa was to commence in March, 1957 (1436a). West Kentucky Coal Company had many things to do in order to get ready to ship coal to Tampa and it was crowded for time to accomplish this, although it began to get ready immediately upon acquisition of the Nashville Coal Company (1436a-1437a). These matters particularly pertained to the preparation of water loading and unloading facilities on the lower Mississippi and at Tampa Electric Company.

When time came to ship on this contract West Kentucky Coal Company reneged and claimed that the contract violated the antitrust law, because it had the exclusive right to supply the needs of the Tampa Electric Company utility (912a-913a). This was West Kentucky Coal Company's idea and not that of the Tampa Electric Company, and it was West Kentucky Coal Company's lawyers who came up with an opinion concerning the antitrust law violation (1438a). Vice-President Hoffman of West Kentucky Coal Company testified that the only consideration with West Kentucky Coal Company was that the contract was illegal under the antitrust act (1413a). President Eastin of West Kentucky Coal Company, testified that there were factors in the contract that were not satisfactory to West Kentucky Coal Company (1438a). It developed in Mr. Eastin's

testimony that the principal concern of West Kentucky Coal Company was the escalation provision in the old contract which tied price increases to a government index based upon average manufacturing wage increases rather than tying the price increases to wage increases in the coal industry (1454a). It is to be borne in mind that after the Nashville contract was signed, wage increases were granted to United Mine Workers in 1955 and 1956, and there was a later wage increase in 1958. A change in the escalation clause would affect the price of coal under the contract. It is to be borne in mind also that at the time West Kentucky refused to ship coal to Tampa because of these matters, West Kentucky had already spent considerable money and time in getting ready to ship and any other party who was interested in shipping coal to Tampa would have to likewise spend a good deal of time and money in doing so (1455a). West Kentucky was making a demand for more money with what seemed to be a lock on the market.

But, in the meantime, a rail shipper came in and obtained a reduced rail rate from East Tennessee and Southeastern Kentucky and commenced to ship coal by rail into Tampa Electric Company (918a-920a). It was under this arrangement that Phillips was able to ship coal to Tampa Electric Company (918a, 860a-861a).

Then Peabody Coal Company came into the picture. The witness Amos, the rail shipper to Tampa Electric Company, testified that he obtained a term contract from Tampa Electric Company December 23, 1957, for the requirements of the Gannan Plan of Tampa Electric Company amounting to very substantial tonnage (920a). He testified that shortly after this contract was disclosed to UMW lawyers, West Kentucky Coal Company removed the representative of that company who was stationed in Tampa, and a representative of Peabody Coal Company was moved into Tampa at which time officers of Peabody showed up on the scene in Tampa (921a).

The witnesses of Peabody Coal Company and West Kentucky Coal Company testified that West Kentucky resisted the effort of Peabody Coal Company to come into the Tampa market and would not even lease the coal unloading facilities at Tampa to Peabody (1261a, 1439a-1440a). Mr. Mark Eastin of West Kentucky Coal Company testified that when Peabody came into Tampa, West Kentucky Coal Company did not like it; that West Kentucky had bought that business and had pioneered it and they didn't like it when Peabody meddled in it; that they didn't want Peabody moving coal to Tampa (1439a). It is to be borne in mind that at the same time, West Kentucky Coal Company was basing the Tampa lawsuit entirely on the proposition that if West Kentucky was entitled to the whole Tampa market this was illegal and contrary to the antitrust law (913a).

At any rate, the following are the net results of the situation and the deals that were made by West Kentucky Coal Company and Peabody Coal Company.

Peabody Coal Company obtained a contract from Tampa Electric Company on February 16, 1959, to begin in October 1959, for a twenty year term to ship coal by water to Tampa at a price of $3.70 f. o. b. the mine, with a coal industry escalation clause (726a-728a). Peabody Coal Company leased the water transportation facilities of West Kentucky Coal Company (604a, 729a, 1264a). West Kentucky Coal Company was given the right to ship one-half of the coal under the Peabody contract with Tampa (606a, 730a, 1264a, 1440a). The Peabody contract shared by West Kentucky paid $3.70 per ton at the mine, whereas, the old contract of West Kentucky, which it refused to ship on, would have paid $3.20 per ton at the mine (1413a). The tonnage being shipped into Tampa by the rail shipper in which Phillips previously participated, has been drastically reduced (923a, 1661a, 926a). The rail shipper has been compelled to reduce his price and obtain a reduced

rail rate (924a). This is because the Peabody Coal Company and West Kentucky Coal Company coal being shipped by water to Tampa is taking the business (926a-927a). Phillips Brothers has not been able to ship any coal into Tampa since Peabody started coming into that market (858a-862a).

When the new steam plant at Memphis was opened up, four companies were involved in the coal contracts which were awarded, these being West Kentucky Coal Company, Peabody Coal Company, Pittsburg-Midway Coal Company, and Kirkpatrick Coal Company (606a, 730a).

The Peabody Coal Company witness, Jewell, testified that Peabody Coal Company officials may have talked to representatives of Kirkpatrick, West Kentucky and Pittsburg-Midway after the Memphis invitations came out and before the bids. He testified that the Memphis officials wanted to favor certain people with the business and that discussions may have been had. He said: "It would be a little natural because down there we run together down there and have a drink or two together and you get pretty talkative. We might have talked to any of them." He testified that "the competition was so hot that they split it up. We had so many friends behind us all that they split it up" (1277a). Mr. Jewell testified that Kirkpatrick Coal Company did not have an order but that they assisted Peabody Coal Company in getting its order and assisted in the administering of the contract and received a commission from Peabody Coal Company for this service (1278a).

Mr. Eastin of West Kentucky Coal Company testified in his deposition that Kirkpatrick Coal Company had an order on which West Kentucky Coal Company was shipping to Memphis (606a). He further testified that West Kentucky Coal Company was also shipping on the Peabody Coal Company contract with Memphis (606a-607a). Later,

Mr. Eastin testified that West Kentucky Coal Company's own order with Memphis Power Company was for 25,000 tons per month and that Peabody Coal Company and Pittsburg-Midway also had similar contracts with Memphis (1440a-1441a). He, again, testified that West Kentucky Coal Company was shipping on the Peabody Coal Company contract with Memphis (1441a). Mr. Eastin testified later that he has learned since the awarding of the contracts that Kirkpatrick Coal Company was a representative of Peabody Coal Company in the awarding of the Memphis contract (1458a). Mr. Eastin had testified that Kirkpatrick also represented West Kentucky Coal Company in obtaining that contract from Memphis. "They acted as sales agents in the thing. . . . [W]e agreed for their help in selling the order that we would pay them, I think it was 7½ cents a ton as a commission on one-third of our award" (1441a).

We believe that there is enough evidence here to show that, in spite of the previous testimony of Mr. Eastin to the effect that Kirkpatrick Coal Company actually had a separate order, Kirkpatrick really was an agent taking three orders—to Peabody Coal Company, West Kentucky Coal Company and Pittsburg-Midway Coal Company, and that Kirkpatrick Coal Company handled the matter for all three and that when the bidding was done and the splitting up of the awards was made that Kirkpatrick acted for all three companies. This is an example of how Union-financed companies work together with other major companies to take the contracts.

G. The Conduct of UMW Has Not Been Motivated by Concern for the Interests of Its Members; the Results of the Conspiracy Show Those Who Have Benefited Are the Major Coal Combines.

The Union officers and Union Welfare Fund trustees are aware of the misery in the coal fields. Mr. Lewis testi-

fied that hundreds of thousands of miners had been made idle (412a). Miss Roche testified that the most distressing problem in the coal fields is lack of work—unemployment (1045a). In 1949, there were 433,698 men gainfully employed in the bituminous coal industry (Exhibit 156A, 1724a). In 1960 there were 160,200 men employed in the industry (1217a). Virtually two-thirds of the men have been driven out of the industry during the course of this conspiracy.

The situation in the Tennessee coal fields was so bad that the Department of Employment Security of the State made a special report in 1957 upon this subject (961a-964a, 1513a). There are no other jobs open to the ex-miner. The unemployment figure in all coal counties climbs higher every year (961a-964a, 1513a).

The International Union officers received a letter written by the Jellico, Tennessee, Local of the Union to the President of the International Union (996a-997a). This letter advised that 2200 miners were out of work in Campbell County, alone, and that the only employment was in the small underground mines and in the strip mines, which could not pay the contract terms. It stated that an ex-United Mine Worker member would not be received in any other trade. The Union officers are on notice of these things.

Also, the Union officers have received notice from the men in the big mechanical mines as to the effect of the policy of the Union on them. Here the members attack the Union policy of not seeking shorter hours in the mines where the large machines are handled by a few men. Shorter hours would increase the cost of the mechanical mine. It would be spreading the work, a program which the Union agreed not to pursue in 1950.

In the 1956 Convention Delegate Brown said: "I think that according to the hazards in the mining industry and

the fumes and the noxious gases that we should now try to start negotiating and shorten our hours per day." Delegate Croyle said: "Just awhile ago Mr. Lewis said that the United Mine Workers cannot be destroyed by the Democratic Party, the Republican Party or the Communist Party. Yet he would bring the machinery into the mines without shortening the working day and they won't have to destroy us. There won't be any of us left" (433a). Delegate Matula said: "We jump on a belt line and ride maybe a 1000 or 2000 feet, put a respirator on and go up to the face and work. When we grab a drink of water or bite to eat, there is a man standing behind us with a stop watch. We work a machine and try to keep up with that machine. I wonder which wears out first, the man or the machine. In our mind a shorter work day would be of much greater benefit to us than a wage increase" (436a).

Delegate Dugan said: "These fellows at the faces are wearing masks and they are not getting the air. The heat is great from these machines and it is deteriorating their health" (438a).

In spite of these and many other similar protests, the 1956 and 1958 contracts were negotiated by the Union and the results were more increases in the wage without any reduction in the working time of the men working with the machines. Many local Union delegations have spoken out on this issue but the Union has not said a word since 1950 about shorter hours as an issue in a bargaining conference.

We think the jury was entitled to conclude that the purpose of the Union, in bargaining sessions since 1950, has not been centered on benefit to the men in the industry but has been to carry through on an arrangement made when UMW switched its policy in 1950. Increasing the wage rate hurts the small companies which largely

use men rather than machines. Reducing the working time means additional costs upon the major coal companies. It would mean a spreading of the work, the approach to the over-production problem which the Union abandoned in 1950 (440a) and has not even mentioned since.

The self-appointed power of the Union's International Executive Board (441a) and the lack of autonomy in districts of the Union (443a-444a) enable the Union officers to control the direction of Union policy.

With respect to these events on operating units in the United States, Exhibit 149A (1717a), shows that the mines in the category of middle-sized to small, have suffered greatly during the course of the conspiracy. Class 2 mines dropped from 27.3 percent of the production in 1949 to 19.2 percent; Class 3 mines dropped from 16.1 percent to 9 percent and Class 4 mines dropped from 10.9 percent to 6.6 percent. The very small mines of the country, as shown on this Exhibit, have almost held their own, although they have dropped slightly.

The picture in Tennessee has a somewhat different complexion. There are no Class 1 mines (mines producing in excess of 500,000 tons per year) in Tennessee (Exhibit 150A, 1718a). Exhibits 121 (1667a) and 150A both show that the Class 2 mines in Tennessee (the largest mines in the State, being 5 in number) have held their own in the State. Two of these mines are the Pittston Company mine and the Consolidation Coal Company mine (956a, 1363a-1364a). Exhibit 150A shows that the smaller mines, Classes 3 and 4, have dropped enormously in the period of the conspiracy. The very small mines have increased in Tennessee. This is because the middle-sized mines, being the old railroad tipple mines of the State, employed relatively large numbers of men and when they were closed, it threw great numbers of men into unemploy-

ment unless they were able to get jobs in very small mines in their vicinity. Many of these men opened up their own mines in partnership with each other in order to gain a livelihood (910a, 957a-958a, 1064a, 1316a). The identity of these small units of production frequently changes and they come and go constantly (850a, 957a). These are the creatures of the desperate economic plight confronting the unemployed miners.

It is the closing of the middle-sized rail tipple mines of the State, throwing great masses of men out of work, that has brought the havoc to the Tennessee coal fields. This picture is shown in various places in the record. The Phillips' employee, Arlo Hutson, testified that he previously worked in the Blue Diamond Coal Company's Royal Blue Mine in Campbell County, which was closed, throwing 400 men out of work. This mine had a contract with United Mine Workers (972a). The District 19 organizer, Taylor Maddox, testified about some of these conditions at 846a-850a, with respect to the closing of the middle-sized mines of the State. He stated that the ABC mine at Monterey, the Fentress mine at Monterey, the McCoy mine in Scott County, the Glenmary mine, the Gilchrist operation at Robbins, Osborne Mining Company in Jellico, the Morley mine of New Jellico Coal Company, the Hickey mine at Careyville, the Vasper mine at Careyville and the Blue Diamond Coal Company mine at Eagan were all abandoned.

The movement of men from these tipple mines over into the very small classes of mines is shown very graphically on Exhibit 152A (1720a), which shows that in 1953, three Class 3 mines and six Class 4 mines, in Tennessee, went out of business. In the same year some 180 were added to the number of the smallest class of mines (Class 6 category), the increase being from 279 to 453. The Bureau of Mines witness produced by UMW agreed that

this shows the movement of the men thrown out of the abandoned middle and small sized mines over into the very small mines to gain a livelihood, many of them opening up mines in partnership together (1316a).

It is upon these kinds of operations that the United Mine Workers of America would impose the National Bituminous Coal Wage Agreement, which was tailored to meet the ability of the great mechanical mines of the country to pay, mines producing as much as 45 tons per man per day.

The record shows that Mr. Lewis' statements that there would be a concentration of production into fewer and fewer units and that more and more of these smaller and weaker companies would be put out of the industry have come true (408a). The Union's problem has been in policing the unemployed former members who seek sustenance for themselves and families in very small mines that come and go. The repeated waves of mob violence have been a partial solution, but this could hardly be described as a traditional labor union activity.

Mr. Lewis testified that the big companies that we charged as being co-conspirators are among the big combines that are being formed to take over the production of coal in this country (450a-451a). In the period of this case Consolidation Coal Company acquired Jefferson Coal Company, Jamison Coal & Coke Company, Pocahontas Fuel Company, Mathies Coal Company, Harmer Coal Company (532a-533a). The Pittston Company has acquired Clinchfield Coal Company, Amigo Smokeless Coal Company, Minter Coal Company, Banner Fuel Company and Elk River Coal & Lumber Company (690a-691a). Peabody Coal Company has acquired the large Sinclair Mining Company property, Midwest Radiant and Perry Coal Companies, Poplar Ridge Coal Company, Peabody Southern Coal Company, Midco mines, River Queen Coal Company,

Kay Coal Company, Alva Coal Company and Simeo-Peabody Coal Company (714a-718a). Island Creek Coal Company acquired Pond Creek Coal Company, Red Jacket Coal Company and Algomma Coal & Coke Company (776a-777a).

H. Impact of the Conspiracy on Phillips and on the Markets It Supplied.

1. How the Phillips' Contract With UMW Came About.

As heretofore stated, the International Union established an International Organizing Committee in October of 1950, which conducted an intensified organizing campaign throughout the bituminous coal field, particularly in the unorganized section of the country. This campaign was highly successful in spite of the repeated use of injunctions in the courts (414a-416a).

In 1953 such a campaign was going on immediately north of Campbell County, Tennessee, in southeastern Kentucky. The drive was headed into Campbell County, Tennessee (178a). The Union Organizer, Ed Daniel, made several trips to the Phillips mine to talk to the mine officers (222a-223a). The partners reached the conclusion that they would have to sign the contract or quit, and they couldn't quit because they had everything they owned invested in the mine (178a). James Pennington testified that they were afraid not to sign the contract, and this was a man who participated in seven major campaigns in World War II in North Africa, Sicily, Italy and Europe (223a-224a).

The United Mine Workers of America had absolutely no authority to represent the employees of Phillips in the making of a collective bargaining agreement with that Company. Daniel made no representation whatsoever of representing the majority of the employees (179a). The partners had no reason whatsoever to believe that any of

their employees were members of the Union (183a). The employee, Arlo Hutson, testified that he had been a member of the United Mine Workers but was not a member after 1952. No one asked him to join the Union after he came to work for Phillips until the incident in 1955. No representatives came to see him. He authorized no one to sign a collective bargaining agreement for him (972a). The employee, Arvin Hutson, belonged to the Union at the time he came to work for Phillips, but he was told to turn in his card because he was working for a non-union mine (976a). The employee, Ralph Phillips, testified that he was never a member of the United Mine Workers until the incident in 1955. No authority was given by him for the Union to represent him in a collective bargaining agreement (981a, 982a).

At the time Daniel talked to the three partners about signing the contract he represented that Phillips could work out its own working arrangements with its employees and pay whatever it could on the Welfare Fund (179a, 223a). This was the testimony of the partners. Mr. Daniel did not testify in the case. It must be acknowledged that the partners did not take much stock in what Mr. Daniel said but that the real reason they signed was because they had to, or go out of business, and they could not go out of business with the investment that they had with all of their finances tied up in the Company (178a, 1466a).

We do not believe that it is necessary in this brief to dwell upon the campaign of violence which occurred at the time the employees were compelled to join the Union in April, 1955, months after the signing of the contract. We make reference here to the pages of the record where this testimony occurs (119a-129a, 131a-136a, 138a-143a, 149a-151a, 155a-158a, 166a-168a, 184a-189a, 224a, 964a-966a). The mob visited the property of Phillips in April, 1955 and told Raymond Phillips to keep the mine shut

down until he was told he could open it up. He was told to have all of the employees join the Union (186a-187a, 964a-966a). Subsequently, the partners went to Jellico to see Mr. Daniel and were told by him that they could not expect to run the mine when the men did not belong to the Union. They were told to go to Middlesboro and talk to the District Officers (187a-188a, 274a). They went to Middlesboro and talked to Albert Pass, Secretary and Treasurer of District 19, who was told about the visit of the mob to the tipple and that Mr. Daniel had told them to come see him. Mr. Pass told them to have all of the men join the Union and pay the back Welfare royalties and then they could go back to work (188a, 224a). Mr. Pass testified that the Phillips people did come to see him, but he said that there was no discussion about the mobs. That was about the only difference in his testimony from that of Phillips' partners (236a-237a). Even if there were no discussion about the mobs Pass acknowledged that stories about the mobs were spread all over the newspapers (237a), and the conclusion by the jury that he at least knew why these people had come to see him could hardly be questioned. Arrangements were made to have an organizer come to the tipple to sign the men up, and Mr. Maddox and Mr. Daniel did, in fact, come to the tipple and sign the employees up, including two of the partners (188a-189a, 224a-225a, 842a-843a, 974a, 978a-979a, 982a). The organizers advised that everybody had to join except one man who would be the boss, and that was Raymond Phillips (225a). The employees signed up because they had to before they could go back to work (973a, 977a, 982a).

2. **The Suit Brought Against Phillips by the Trustees of the Welfare Fund.**

The stipulation entered into at the beginning of the trial shows that the Trustees' claim against Phillips for

back royalties amounts to approximately $56,000. Phillips was in business from the middle part of 1952 through 1958. It had a loss of $2,438.04 in 1953, and a profit of $9,554.00 in 1954 (218a). It had a profit of $28,542.19 in 1955 and a profit of $17,325.79 in 1956, a loss of $20,385.20 in 1957 and a loss of $12,311.28 in 1958 (207a, 218a-219a,, Exhibits 13-21, 1591a). Thus the Trustees' claim for Welfare Fund royalty against the company exceeds its combined profits for its entire life without even subtracting any part of the losses which it suffered during three of the six years. This is a good example of the manner in which the wage contract, with its high costs, could be used as an instrument to drive smaller companies out of the industry. It is this type of situation to which the Trustees gave no consideration and upon which they would give no settlements except upon the basis of the payment of the last cent (see Appendix II).

3. **The Squeeze Exerted on Phillips in the Coal Markets.**

a. **The Prospects of Phillips When It Started Business in 1953.**

Each of the three partners in Phillips invested $9,000 in the capital of the company (175a). They obligated themselves personally for well over $100,000 for several expensive pieces of equipment (211a). These partners did not sit in the office running a coal company. They were actually laborers on the job. Raymond Phillips was the only mechanic in the company and had to attend to all of the equipment, in addition to bookkeeping chores (202a). Jim Pennington, a former UMW member, worked at the tipple weighing, loading and crushing coal. Burse Phillips, who died shortly before the trial, worked in the strip pits operating equipment (230a).

Phillips had two kinds of markets. They had the domestic market, and this was the coal that was hauled

from the tipple by truck (208a). Also, there was steam coal produced by Phillips, and this was the coal from the same mine that was crushed to steam size and hauled from the tipple by rail (209a). Phillips had a separator which separated the domestic sizes of coal, and it conducted a semi-retail, semi-wholesale, domestic business and received very good prices for this coal. The Union's witness, Elliott Adams, testified that Phillips had a relatively high percent of its coal sold on the domestic market in comparison with other companies (1471a). This is to be contrasted with the testimony of the Union's witness, Scollon, who testified that the domestic market was one of the two hardest hit, as far as the country as a whole was concerned (1291a).

In 1953, and prior years, the steam market in East Tennessee was not so good. The TVA steam plants had not yet been developed to any great extent, and electricity in the valley was generated by the large TVA hydro system (210a, 927a). However, before 1953 the price on the steam market was well over $4.00 in this area (895a, 994a). With respect to overall prices in Tennessee (not confined to the steam market) Exhibits 156A and 157A (1724a-1725a), show that the Tennessee market brought a better price in the years before 1950 than that in the United States as a whole. The Consolidation Coal Company witness, P. B. C. Smith, testified that the market here was good long before the Kingston Plant of TVA created a steam market (1324a).

b. **The Development of the TVA Steam Plant System.**

Exhibit 92 (1643a) shows the growth of the TVA steam plants. From 1953 to 1956 there was a tremendous increase in the number of units generating electricity by steam. The TVA witness, Hill, testified that the use of coal by TVA increased from 500,000 tons in 1950 to ap-

proximately 20,000,000 tons in 1956 (809a, 811a). In 1954 the TVA's purchase of coal amounted to 10,196,000 tons; in 1955 it was 14,377,000 tons and in 1956 it was 20,354,000 tons (811a). The Kingston plant, the nearest plant to Phillips, was started in 1954 and the last units were installed in the latter part of 1955 (799a, 1643a). Exhibit 115 (1662a) shows the tremendous increase in the steam market in Tennessee by reason of TVA's development of steam plants in the period of 1951 through 1957. This increase amounted to 40% (937a).

The great steam market that developed in the Tennessee Valley by reason of these plants of the TVA was free from competition of other fuels, such as gas and oil, since the TVA plants were designed for the use of coal only (1513a). The Government employee, Scollon, witness for the Union, testified that the competitive race between fuels for the market would not necessarily apply in Tennessee and that it was a state by state problem (1311a-1312a).

There was very limited production in Tennessee at the beginning of the growth of the TVA steam plant system to accommodate this great new market for coal (Exhibit 157A, 1725a). There was a substantial increase in Tennessee production from 1953 to 1956, but then the increase stopped, and a great decline ensued in the Tennessee production.

TVA is required to buy coal on bids (828a). The two main kinds of contracts for coal made by TVA are term and spot (806a). The spot market involves small orders of coal to be delivered in a short period of time, and this market offers definite advantages to small companies who desire to build up and develop a mine. According to the TVA witness, Hill, a small coal operator can feel his way along in the spot market without long term commitments or speculation (820a). At least seventy-five percent of TVA coal is bought on term contract and about twenty-

five percent on spot contracts. This policy has been in effect since the beginning of the steam plants (824a).

The Union witness, P. B. C. Smith, testified that the spot market allows a small coal company to open and experiment and develop a mine and then have a basis for longer range planning (1331a). He testified that the spot market provides an ample market for a small company—ideal for small companies commencing operations for the first time. He testified that small companies would risk considerable hazard on the term market, with respect to determining quality and availability of coal, and considering weaker financial resources. He testified that the spot market is vital to small companies in the Tennessee Valley and this is one of the reasons for its being conducted by TVA (1371a-1372a).

So it was that Phillips, a small company recently organized, was engaged in the spot market of TVA, but as any business people, they had hopes of some day developing into a stronger competitive position. However, the record does show that Phillips' partners were worried about investing any more money after they signed the contract with UMW, which held over the heads of these partners the threat of a lawsuit which finally did materialize with a claim that far exceeded their ability to make money (1466a).

c. Cooperation Between UMW and Major Coal Companies to Rid the TVA of Competition from Small Mines Through Walsh-Healey Minimum Wage Determinations.

After the TVA had gotten well along in its development of the steam plant system, in 1955, the United Mine Workers, Consolidation Coal Company and Pocahontas Fuel Company cooperated in obtaining a determination by the Secretary of Labor of a minimum wage in the coal industry under the Walsh-Healey Act (457a-460a). In pre-

senting this matter, the Union contended that the TVA was offending against the spirit of the Walsh-Healey Act and was buying coal at starvation prices, at intolerable and unjustified prices (459a-460a). The minimum wage determined in the bituminous industry by the Secretary of Labor was twice as high as the minimum wage determined in any other industry under the Walsh-Healey Act (1620a-1624a, which pages set forth Exhibit 41). The East Tennessee coal field is situated in the Southern No. 2 District which has as high a minimum wage as any of the major coal producing states and higher than the West Kentucky field where UMW has invested its money, and where mechanical mining can be used far more effectively.

At the 1956 Convention of the Union, Mr. Lewis introduced Secretary of Labor Mitchell. Mr. Lewis stated that Mr. Mitchell had been more cooperative with the United Mine Workers than any other Secretary of Labor (465a). Mr. Mitchell in his speech stated that he had worked together with the Union on many fronts and that he wanted to talk about some of these things. He said with respect to the determination of the minimum wage: "We purposely sought that determination in order to exclude from government bidding those non-union mines which are a detriment to the industry. And I think by and large we have succeeded, except for certain areas of government purchasing which still have to be, shall I say, investigated. Twenty-five percent, at the moment, of the TVA purchases are made under contracts less than $10,000 which excepts such purchases from the determination of the Walsh-Healey Act. I have set in motion a study of the TVA purchasing policy to see if there is any evasion of the Walsh-Healey determination on the part of the TVA" (466a). He further stated: "I propose to continue this enforcement policy, because I believe it is in the interest, not only of the worker, but is in the interest of the fair

employer to prevent the chiseling, non-union employer from competing in the market place with fair employers who hire union labor" (466a-467a). Mr. Lewis responded to this talk by Mr. Mitchell by expressing appreciation for the speech and for the Secretary of Labor's attitude (467a).

After 1955, the United Mine Workers' contract amendments brought about two wage increases in the industry increasing the pay by $4.00 per day or 50¢ per hour (471a). In 1958, the United Mine Workers, Consolidation Coal Company, Pittsburg-Midway Coal Company and Island Creek Coal Company cooperated together to obtain a re-determination of the minimum wage by the Secretary of Labor in the bituminous coal industry and succeeded in obtaining a 50¢ per hour increase in this minimum wage (470a-472a).

In view of the Walsh-Healey minimum wage, Phillips was never in a position to bid on the term market (857a). Their inability to survive as a coal operating unit on the spot market of TVA was because of the willful depression of that market as hereinafter shown.

d. **Dumping of Coal and Other Methods Used by the Union and Major Coal Companies in Eliminating Phillips.**

The record (858a-862a) shows the experience of Phillips on the TVA spot market. It graphically reveals the greatly improved conditions of the steam market heretofore described in the year 1956. Then toward the latter part of the year the price begins to decline and in 1957 and 1958 it hits the bottom and stays at a very low figure. Phillips was bidding very close to the market price of the TVA spot market (864a-866a, Exhibit 98, 1644a). I. E. Schmidt of the agency that sold Phillips' Coal testified that the cost per million BTU of the Phillips' bids were

kept within the high and low figures of the preceding awards of TVA (892a).

The monthly sheets of TVA spot coal awards are distributed to all producers and show full information about the size and cost of all bids submitted. Schmidt analyzed the great stack of TVA coal awards (which were exhibited at 788a-790a) and made certain charts from his analysis (863a). His chart, Exhibit 99 (1645a) shows the relationship of the BTU cost in the eastern plants of the TVA system against the cost in the system as a whole, and his Exhibit 100 (1646a) shows the tonnage in the eastern plants as compared with the tonnage in the western plants. These show that the western part of the system was dragging down the eastern part of the system. The TVA plant system is integrated. This means, according to the TVA witness Hill, that the system is considered as one whole in the development of the most economical power for the demand, and a more distant plant may be used to supply power to a customer located nearer to another plant (823a). The TVA witness Hochdorf testified that there is an electronic computing machine in Chattanooga that balances the factors of cost to determine the lowest generating cost from the various plants of the TVA System (835a-838a).

Schmidt's chart, Exhibit 101 (1647a-1651a) shows the large tonnage offered upon the spot market by Pittsburg-Midway and Peabody Coal Companies. The chart, Exhibit 102 (1652a-1655a), shows the large tonnage offered on the spot market by West Kentucky Coal Company and Nashville Coal Company. This witness analyzed the award sheets of the TVA to determine what companies were putting large tonnage on this market. A 10,000 ton bid is an extraordinarily large bid on the TVA spot market. The bids considered in the charts, Exhibits 101 and 102, pertaining to Pittsburg-Midway and Peabody and West Kentucky and Nashville, show prices based on cost

per million BTU (the only available figure of comparison), and deal only with these extraordinarily large bids. Schmidt did develop in his analysis of TVA spot awards that two other operating companies, Debardeleben and Truax-Traer offered coal on the TVA spot market on bids in excess of 10,000 tons but this chart, Exhibit 103 (1656a-1657a), shows that the prices on the bids of these two companies were not competitive, no awards were made, and that these companies did not repeatedly drop their price during the course of the making of these bids. The bid costs on Exhibit 103 might be contrasted with the bid costs on Exhibits 101 and 102.

Only one other operating company, Old Ben Coal Company, made several bids on the TVA spot market exceeding 10,000 tons, and this was only for a few times in 1958 (887a).

The chart, Exhibit 101, shows that Pittsburg-Midway and Peabody Coal Company made a large number of bids of 10,000 tons or over on the TVA spot market, and these show a gradual decline in the price bid by these companies on these large bids. Chart, Exhibit 102, of West Kentucky and Nashville Coal companies shows a great number of bids made at 10,000 tons, or over, many of them for as much as 60,000 tons, and these bids were made at low prices and were constantly dropped at intervals, quite a number of these bids being successful. These bids were made from the period of the middle part of 1956 to the middle part of 1958. This is the period of time that the spot market declined and that Phillips suffered a great decline in its price on the spot market as shown in Exhibit 97 (857a-862a).

UMW has prepared a chart in the back of its brief which incorrectly shows this dumping of coal was going on only a few months in late 1957. The clear record is to the contrary.

The Union witness, P. B. C. Smith, testified that the TVA spot market was subject to coal dumped upon that market that **temporarily** could not go elsewhere (1373a). This testimony would not mean that the market would ordinarily be subject to repeated offers of enormous tonnages such as were contained in the bids shown in Exhibits 101, and particularly 102, pertaining to West Kentucky and Nashville Coal companies.

Witness Smith also testified that the West Kentucky coal was sold extensively in the Midwest, up and down the Mississippi Valley and that that market of the West Kentucky coal has held up well and that the West Kentucky coal has been thrown into the TVA market rather than into the Middle Western market (1374a).

The West Kentucky annual statements show that that company has an impressive and diversified roster of customers in the Middle Western markets (590a). The West Kentucky Coal Company made no analysis of profit or loss on its sales to the Tennessee Valley Authority (596a). It was putting coal upon the TVA market without regard to the making of a profit. Peabody Coal Company, likewise, did not have an analysis of its profit or loss of coal for the TVA (733a). The president of Peabody Coal Company testified that he was afraid to look at some of the TVA sales (733a). The Peabody Coal Company, likewise, serves most of the Middle Western utilities (714a-716a).

While West Kentucky Coal Company was thus the big coal company that was dumping enormous bids on the TVA spot market at low and dropping prices, the Union, which was the majority investor in that company, as heretofore shown, was trying to induce the TVA to eliminate the spot market. In 1956 Mr. Lewis made a statement blasting the TVA for offering contracts of $1,000 to $10,000. He charged that the TVA was engaged in a conspiracy and was guilty of "contemptible double-dealing"

in making these small contracts for less than $10,000, which would necessarily refer to the contracts on the TVA spot market (474a-475a). The Union sent Mr. Widman, assistant to the president of the International Union, to a meeting with the TVA directors, called at the instance of the president of the National Coal Association, at which the representatives of the major coal companies were present (781a, 829a). At this meeting, the major coal companies suggested that the spot market be reduced from 25% to 10% and that spot coal that was not shipped at the time specified in the contract be automatically cancelled (831a-833a). It will be remembered that the Secretary of Labor promised in his speech in 1956 to the United Mine Workers Convention that he was going to investigate the practice of the TVA of buying coal in amounts of less than $10,000 (466a).

We believe the jury was entitled to conclude that it was more than coincidence, that it was the big Union-owned company, that was dumping the big tonnages on the TVA spot market at low and dropping prices when, at the same time, the Union was attempting to eliminate, or drastically reduce, that spot market. It will be remembered that the spot market was a market ideally designed for local small coal companies trying to develop and get started, and this was a reason for that market. We believe that the jury was entitled to the conclusion that the West Kentucky Coal Company and its subsidiary, Nashville Coal Company, were used as "fighting ships" on the TVA spot market to beat off and break the small local producers who were trying to get started on the market. These Union companies turned from profitable operations and suffered losses, and the Union backed them up financially during this period.

With respect to the effect that the West Kentucky Coal Company and Nashville Coal Company bids had upon the spot market, the TVA witness Hill testified that the bid

information sheets were distributed every month to all bidders on the TVA spot market (808a, 826a).

Mr. John L. Lewis stated that the utility market, and particularly the TVA market, was an evenly balanced thing, easy to upset (993a). The witness Amos, an expert in the coal business with long experience with the TVA market, testified with respect to Exhibit 102 (the spot bids made by West Kentucky Coal Company and Nashville Coal Company) that these bids would bear down heavily upon the price on the spot market (939a-940a).

The Vice-President of West Kentucky Coal Company, Hoffman, testified that the reason for the Uniontown Mine coal being put on the spot market in 1957 was because of the termination of the TVA term contract at the Colbert and Shawnee plants in September. But the Uniontown coal was scheduled to be shipped to the Tampa Electric Company under the contract which the West Kentucky Coal Company had assumed when it bought Nashville Coal Company. After reneging on that contract, West Kentucky Coal Company shipped 118,000 tons to Tampa on spot order from the Uniontown Mine in the summer of 1957 (1399a). It was after this (or about September) that the Uniontown coal in the largest amounts was offered on the spot market (1655a).

There is no explanation in the record with respect to the coal offered in large tonnage on the TVA spot market from the other mines of West Kentucky and Nashville Coal companies.

The record establishes that what actually occurred was that West Kentucky Coal Company, alone, had the facilities to ship coal to Tampa. In this position it sought to adjust the escalation clause in the old Tampa contract to raise the price there, and at the same time, it offered this large tonnage on the TVA spot market at low and

dropping prices over a period of seven months with an effect that was consistent with the Union purpose of knocking out the small coal producers supplying coal on the spot market of TVA. Hoffman testified that the production at the Uniontown Mine was decreased after the biddings of the Uniontown coal on the spot market of TVA, but this production continued for seven months in enormous quantities for sale at these low prices. The record shows that West Kentucky Coal Company had many other markets on which it could sell coal, and it has not had an opportunity to ship coal from the Uniontown Mine to Tampa under its agreement with Peabody Coal Company, because its coal has been needed elsewhere (730a).

In the meantime, on the TVA term market, the multi-million ton contracts being absorbed by Peabody Coal Company and West Kentucky Coal Company contained prices of $2.90 per ton (Exhibit 106, 888a, Exhibit 80, 743a). These prices are to be contrasted with the Peabody contract with the Tampa Electric Company which has a price of $3.70 per ton at the mine, even though the coal has to be shipped in a contest with rail coal thousands of miles down the river and across the Gulf of Mexico to Tampa (727a). Even the old Tampa contract on which West Kentucky reneged, seeking increases through change in the escalation clause, had a price of $3.20 per ton at the mine, and this was low quality coal (1413a, 913a). It is apparent that these companies will sit on this important TVA market with these big contracts until all the local producers give up and move elsewhere for a market or quit. The Union's witness, P. B. C. Smith, testified that the TVA market is a depressed market (1369a).

The John Sevier Steam Plant in upper East Tennessee has very largely been taken over by the Pittston Company, shipping coal from its mines in the western part of

Virginia. Two-thirds of the coal requirements of that plant are supplied by the Pittston Company (1366a).

When development started on the Kingston Plant just west of Knoxville, Pocahontas Fuel Company (later merged into Consolidation Coal Company) acquired mines in nearby Anderson County (1350a), and the Pittston Company acquired the Meadow Creek mine at Monterey, Tennessee (696a). These are two of the five largest mines in Tennessee (955a-956a, 1363a-1364a). The large TVA contracts for the Kingston Plant have mostly been awarded to these two mines (833a-834a, 888a, 1361a-1362a).

Another mine that commenced shipping to the Kingston Plant is the Kentucky Oak mine in the Hazard field in eastern Kentucky. This involves the loan of the National Bank of Washington to North Fork Coal Company of $1,500,000, secured by a pledge of the assets of the United Mine Workers to support the loan (502a-503a). The purpose of this loan was to purchase coal leases and operating units in the Hazard field, the land containing approximately 65,000,000 tons of mineable coal (650a-651a). Mr. Haley, president of North Fork, testified that this loan was used entirely to acquire leases (655a). He testified that Sturgill and Kelly are lessees on this property (655a). Sturgill and Kelly own and operate Kentucky Oak Mining Company (657a). This company leases from North Fork Coal Company and has other property (659a). The property contains a 10½ foot seam of coal in the Hazard No. 9 seam (663a). The company owns some of the largest augering equipment in the world, including a 7 foot auger (666a). Just before the 1959 term awards (five minutes before the opening of bids), a new freight rate from the Hazard field was announced. Consequently, Kentucky Oak Mining Company was awarded two large contracts for the Kingston Plant totalling 12,500 tons per week (1380a-1382a).

The Kingston market is saturated with these contracts with these companies. Yet, West Kentucky Coal Company is working on a reduced rail rate into this plant (607a).

The Widows Creek Plant of TVA, just southwest of Chattanooga, was long supplied by southern Tennessee mines. West Kentucky Coal Company obtained a rail rate reduction from its coal field to the Widows Creek Plant (607a, 1459a-1460a). West Kentucky Coal Company has begun to bid on the business of this plant (607a). The West Kentucky Coal Company coal is now competitive at the Widows Creek Plant, although the coal from the upper East Tennessee field where Phillips is situated, cannot move to that plant because of freight rates (1367a).

The Kingston and John Sevier plants are the eastern plants of TVA, and the Widows Creek plant is the eastern-most plant of TVA's western plants (Exhibit 145, 1713a).

The western plants of TVA have been saturated with coal from the west Kentucky coal field. In the last awards of TVA West Kentucky Coal Company was awarded 10,010,000 tons over a term of years, out of the total term award of 16,563,880 tons (886a, 888a). In September, 1959, Peabody Coal Company was awarded a 5,200,000 ton contract for the western plants (1273a). In 1959, West Kentucky Coal Company was awarded a contract for 850,000 tons per year for a period of fifteen years (1459a).

West Kentucky Coal Company has an assured base for many years of heavy tonnage to TVA under existing contracts (1459a). It has an advantageous freight rate now into Widows Creek Plant and is negotiating a reduced freight rate into the Kingston Plant.

In addition to other TVA contracts, Peabody Coal Company has virtually obtained possession of the newest TVA steam plant and one of the largest ones (1274a). This

contract calls for 65,000,000 tons of coal (744a-745a) which is by far the largest contract ever let by TVA.

Mr. Lewis stated that adjacent utility markets were influenced by the depressed TVA market. The witness Amos agreed with this statement (993a). He further testified that the depreciated TVA market would have an effect on the Carolina and Georgia utility markets which might have been open to Phillips (993a). An example is Duke Power Company which in 1958, switched from a policy of buying coal partly on term contract and partly on spot order to buying all of its coal on spot order (779a). In the latter part of 1958, Phillips, just before the partnership went out of business, shipped coal to Duke Power Company on spot contract, but could get no better price than $3.30 net to it, which, although better than the TVA price at the time, was still insufficient to be profitable (862a).

II. There Was Ample Evidence to Support the Amount of Damages Awarded by the Jury.

The jury awarded a verdict of $90,000 for Phillips against UMW.

Exhibit 22 (1592a) shows the tons of coal shipped on the steam market by Phillips in the years 1956 through 1958, and also shows the average price that Phillips received for the steam coal. These average prices were: $3.92 in 1956, $3.20 in 1957, and $3.13 in 1958. Exhibit 117 (1663a) shows the national average price of coal and what amount Phillips would have received in each of these three years, if it had received the national average amount on its tonnage. This aggregate amount was approximately $94,000 more than the Company actually received.

A. What a Fair Price Would Have Been for Steam Coal Were It Not for the Tampering With the Market by the Conspirators Comparative Prices.

The Union has advanced in the lower courts various arguments with respect to both the price of Phillips in 1956 for steam coal and the lower prices in 1957 and 1958. With respect to the price in 1956, the Union attempts to explain the fact that this was a much higher price than in the later years. The witness Smith, for the Union, testified that an emergency condition arose in 1956 by reason of a drought which decreased the hydroelectric power, thereby increasing the steam requirement of the TVA system, while at the same time testifying that the rainy weather in that period caused strip coal mines to cease production (1326a) causing a shortage of supply. This testimony is inconsistent. This witness overlooked completely, until cross-examination, the fact that the Kingston Plant was not in full use until early 1956, when the market and the demand materialized, and this must have had considerable influence on the price in 1956 (1370a-1371a). Prices for a market cannot be said to be abnormally high when they are the prices in existence at the time the market materializes. Moreover, steam prices in the area were over $4.00 (greater than Phillips' 1956 price) before the Kingston market materialized (895a-994a).

It is to be observed that the great drop in price in 1957 of Phillips' coal was in the same year that the witness Scollon stated was the peak year in the export trade of the coal producers of this country, the export being 76,000,000 tons (1295a). The years 1956 and 1957 were two of the coal industry's good years, and the national price rose in each of those years (1724a).

We have considered, above, the development of the TVA plants bringing the steam market in Tennessee to one of the six largest steam markets of the country from

an insignificant position (1662a). This occurred in just a short period of six years. By 1956 TVA was the largest bituminous coal purchaser in the country (800a). Exhibit 115 (1662a) gives ecomonic facts which would indicate that the Phillips' average prices for steam coal in 1956, 1957 and 1958, were far lower than they should have been. Tennessee's growth in steam utility use of coal was 450% in a period of six years. The State of Virginia's growth in the same period amounted to only 33⅓%. Virginia is far ahead of Tennessee in coal production, yet the cost of steam coal at the Virginia plants was $8.75 and in Tennessee it was $4.91. Tennessee was the lowest producer of coal of any of the six top users of steam coal (except New York), and yet, the Tennessee cost of steam coal was lower than any of those other states.

The witness Amos, who is probably more experienced in the coal markets than any other individual in this state, testified that the reason for this low price of steam coal in Tennessee was because of pressure from outside driving that price down (942a). In his opinion, the Tennessee price should have been **at least** equal to the national average price of coal in the United States (942a-943a). That there was an artificial condition depressing the TVA spot market price in late 1956 cannot be doubted, because at the same time that this was going on in this great new TVA market, Consolidation Coal Company and the other major producers of coal in the other parts of the country were raising the price of coal 40¢ per ton (549a).

Even a comparison of term prices at TVA Kingston plant with spot prices at the same plant shows a downward pressure was on the spot price.

The Union's witness, Smith, testified that he bid the 1956 $4.00 term price to TVA at Kingston, for Consolidation Coal Company on the lowest possible figure under

which he could come out with any kind of profit (1336a). This price was $4.00 in 1956 and remained at $4.05 in 1959 (1362a). The price did not go down in the term market of TVA at Kingston, and this price is to be compared with the great drop, from $3.92 which Phillips realized in 1956 on the Kingston spot market, to $3.20 in 1957, and $3.13 in 1958 on the Kingston spot market. The same witness, Smith, testified that the TVA term price was depressed (1369a), and he testified that Consolidation Coal Company makes its substantial profits at other mines in other parts of the country, Ohio, Pennsylvania and West Virginia (1370a).

The East-South Central region has a cost of steam coal of $4.61. This is the TVA region, including Alabama, Tennessee and Kentucky (1375a). The East-North Central region, including the Middle Western states with a considerably larger production of coal contained in those States, has a cost of $6.00 for steam coal (1376a). The figures for TVA, alone, with respect to cost of coal were $4.49 in 1958 and $4.54 in 1957 (1512a).

B. **The Quality of Coal Governs Its Price.**

Normally, the quality of a carload of coal is as important as the quantity on the price that the coal can command (891a, 943a). The Phillips Brothers Coal Company coal averaged 13,215 BTU's per pound (1515a). The witness, Amos, testified that Campbell County coal had an average BTU of 13,200, and the UMW witness, Scollon, testified that the average Tennessee BTU is 13,460. Mr. Scollon also testified that the average United States high volatile coal had an average BTU of 12,900 (1284a). The average, given above, for Phillips Brothers was for its steam coal on bids to TVA (1515a). The Peabody Coal Company witness Jewell testified that the East Tennessee coal was a higher quality coal than Peabody coal (1272a).

The Union has contended, (1) that steam coal should have a lesser value that other coals on the market, and (2) that strip coal should have a lesser value than deep mine coal. It is our contention that the quality of the coal is what counts. Witness Scollon produced charts showing a greatly increased steam use of coal in the country, whereas, in the same period of time, the price of coal has gone up rather than down. 11% of the coal production in 1940 was used in the steam-electric market and in 1958 the percentage was 42% (1291a). In the same period average coal prices rose from $1.91 to $4.86 (1724a). Some of the major coal companies live on the steam market. For instance, 80% of the Peabody coal goes to the steam market (1267a). Actually, the steam market includes the major uses of coal, including utility, industrial and railroad (1292a). The so-called premium metallurgical coal is not sold, particularly on the open market, but comes from captive coal mines and has no bearing on the quoted national average price of coal (1293a-1294a).

The steam market uses all grades of coal, from the highest quality to the lowest quality. It is our contention that the quality of the coal is what counts, regardless of the fact that it is steam coal. A consumer buys the heat value in the coal rather than buying just a ton of coal. This is illustrated by the Peabody Coal Company witness, Jewell, who stated: "You get down to your lowest, most difficult grades of steam coal to sell, which we call carbon, which is one-quarter inch by twenty-eight mesh, carrying very low price now. Something like $2.80 per ton" (1267a). This price is to be compared to the Peabody Coal Company price of $3.70 which Peabody gets for its regular steam coal to Tampa, although it has to ship that coal thousands of miles and is in a competitive race with rail coal in that market, the $3.70 being the price at the mine (727a).

Witness Smith testified that all coal, strip or underground, is bought on the utility markets on the basis of

quality—"the heat unit in the coal" (1350a). The TVA based its coal awards on the BTU, or the heat unit, in the coal, which is determined by the bidder's guarantee of quality (792a). This quality determines the cost of the heat from the coal and determines whether a bid price will be accepted.

The acceptance of coal on the market is not governed by the nature of the mine from which it comes, but by its quality and bid price. Determining the winner among competitive bids is a matter of arithmetic, with quality and price being the two essential factors.

A considerable amount of strip coal is put upon the market, together with a great deal of debris which is loaded with the coal when the loading shovel picks it up (1347a). Of course, this would affect the quality of the coal, but when the Phillips coal had an average BTU of 13,215, this circumstance has no bearing upon the issue. The BTU of Phillips coal indicates that its smaller shovels can pick up the coal more carefully and that Phillips was maintaining its coal in cleaner condition. If this were not so, it could certainly not have carried the high BTU that it did carry. Furthermore, two-thirds of the strip coal of the country comes from the stripping mines of the Central-Western basin (1350a-1351a). The East Tennessee coal is a higher quality of coal than the coal in the Central-Western basin (1354a-1355a). The steam coal in the Illinois utilities markets averages 10,971 BTU, and this coal comes from the Central-Western basin of Illinois, Indiana and West Kentucky (1355a). Indiana utility coal, likewise, comes from the Central-Western basin and it has an average BTU of 11,247 (1357a). With two-thirds of the strip coal of the country coming from this quality of coal the price of that coal could hardly be applied to the Phillips coal which average 13,215 BTU. It does not make any difference to the consumer whether the coal comes from a stripping machine or an underground mine, if the quality of the coal is the same (1357a).

The national average of all coal in the United States, according to Exhibit 156A (Bureau of Mines, 1958), was, for 1956—$4.82, for 1957—$5.08, for 1958—$4.86 (1724a). Only a small part of the coal contained in this average price would be sold on the open market as premium metallurgical coal (949a, 1293a-1294a). This average price includes lignite, a very low quality of coal, and sub-bituminous coal which is coal which is only partly formed (951a). This price includes all of the strip coal from the Central-Western basin, which carried a very low BTU, and it includes all the coal that was picked up with a lot of debris by stripping shovels as testified to by the witness P. B. C. Smith. It includes all the carbon which was mentioned by the witness Jewell, which carried a very low price. All these coals bore down on this national average price. It is to be borne in mind the circumstance that the steam market is far and away the biggest market represented in this average price and includes the utility, industrial and railroad uses (1292a). There is also to be borne in mind the fact that the higher priced domestic or retail delivery coal has fallen to a negligible part of the market for the country as a whole (1291a).

As a matter of fact, the UMW, in its publication United Mine Workers Journal, has taken the position that the TVA was not justified in paying less for its steam coal than the national average price for coal in the country. In the UMW Journal for July 15, 1954, page 13, Exhibit 124 (990a-992a), the United Mine Workers stated that the TVA was buying coal at starvation prices in the coal contracts awarded to a number of East Tennessee and East Kentucky coal companies which were listed. The prices at the mine were given, the cost of transportation to the Kingston Plant was given, and the total cost at the plant was given. This article stated that most of the established operators of the country were getting a price for coal equal to the entire cost of these awards at the

plant, including the price at the mine, plus transportation (992a). This was steam coal. The average of these contracts, considering the cost at the plant as suggested by this article, comes out to an average price higher (991a) than the 1954 average (1724a) for all coal sold in the United States. We believe that the jury was entitled to consider this position taken by the United Mine Workers in 1954, in determining the merits of the Union's contention in this case as to the applicability of the national average price for all coal as a proper figure to use in determining a fair price for Phillips' steam coal.

C. Computation of Damages.

Exhibit 22 (1592a) heretofore discussed, and Exhibit 117 (1663a), show the computation of damages based upon the national average price of coal, as compared with Phillips' average price for steam coal. This shows a total damage of $94,000 without consideration of the Welfare Fund money paid in by Phillips. The witness, Amos, testified that the national average price should have been exceeded by the Phillips Brothers' coal (942a-943a).

The approximate fairness of the above figure of $94,000 as damage resulting from TVA spot market activities of the co-conspirators in 1956-1958, may be demonstrated by a computation based upon Phillips' earlier profit-making ability. In 1955, Phillips made a profit of $28,542.19. Extending this same profit figure into 1956, 1957 and 1958 would produce a profit for the three partners for three years of $85,626. Actually, the company suffered a net loss for the three years of $12,727. The difference amounts to approximately $98,000.

APPENDIX II.

FACTS AS TO THE CONDUCT OF UMW TOWARD THE UMW WELFARE FUND TRUSTEES.

A. The Attitude of Mr. John L. Lewis, Chairman of the Board of Trustees, With Respect to the UMW's Control Over the Welfare Fund.

Mr. Lewis was asked in his deposition given in this case if he did not realize in the period of 1947 up until the contract of 1952 that the running of the Welfare Fund by the Union, itself, would be illegal, and his answer was "No." He was then asked:

> "Was it your concept all the way through that the Welfare Fund could properly be operated by the Union?
>
> A. 'Certainly'" (277a).

Mr. Lewis later said that it was merely a matter of negotiation so far as he was concerned (277a-278a). This was the first time in this case that Mr. Lewis was confronted with the question of control of the Fund by UMW, and his response on this occasion was therefore entitled to persuasive weight so far as the jury was concerned and could be weighed more heavily than later efforts of the UMW and the Trustees during the trial of this case to picture Mr. Lewis as a passive Trustee, merely taking advice from Miss Roche, the so-called neutral Trustee, so far as the management of the Welfare Fund was concerned (1060a-1061a).

B. The Plan Established by the UMW Prior to 1950 to Maintain Control of the Welfare Fund.

Before 1950 the UMW had openly set up a plan to keep control of the Welfare Fund. This was shown by the following evidence:

1. Before 1950 the benefits of the Fund were paid exclusively to UMW members and the resolution requiring UMW membership was printed in full and widely disseminated to the men throughout the industry (339a-342a, Exh. 33).

2. A system was devised to keep non-regular members from participating in the Welfare Fund benefits, using two methods:

a. In the 1948 UMW Convention the initiation dues were increased. The reason for this was to bar the part-time miners who would come into the industry for seasonal occupation and who would draw benefits from the Welfare Fund (283a-286a).

b. An International Membership Committee was established in 1948 (289a-290a). The establishment of this was part of the procedure set up whereby the Welfare Fund applications were processed through the UMW organization and into the hands of the Welfare Fund for the purpose of preserving the status of membership which carried with it valuable rights (372a-375a).

3. Pensioners under the Welfare Fund were required to maintain their UMW membership. This was accomplished by amending the UMW Constitution in 1948 to require the retired miners under pensions to maintain their membership and pay dues to the UMW (287a-289a).

4. Local and District officers of the UMW processed the Welfare Fund Forms, including the applications for benefits (286a-287a).

C. The UMW Sought to Name and Control the Trustees of the Welfare Fund in the National Bituminous Coal Wage Negotiations in 1950.

1. Fights Between Mr. Lewis and Mr. Ezra Van Horn and Between Mr. Lewis and Senator Styles Bridges Prior to 1950.

Even though the UMW controlled the Welfare Fund prior to 1950 by the above-named devices, Mr. Lewis had a long and bitter fight with respect to how the Fund should be managed with Mr. Ezra Van Horn, the Operators' Trustee under the 1948 National Bituminous Coal Wage Agreement (268a-270a, 281a-282a, 536a) and also disputes from time to time with Senator Styles Bridges, who was named to the Board of Trustees in 1948 as the neutral Trustee (298a, 300a).

2. Fight Between Mr. Lewis and Judge Charles I. Dawson in the Years 1949 and 1950.

In September 1949, Mr. Van Horn resigned as the Operators' Trustee. Mr. Lewis admitted this (295a) and confirmed the exchange of telegrams between Mr. Van Horn and himself, which telegrams were exhibits to the deposition of Judge Charles I. Dawson (296a, 524-525a). Upon the resignation of Mr. Van Horn the operators representing 51% of the tonnage of coal in the industry, as required by the 1948 National Bituminous Coal Wage Agreement, named Judge Charles I. Dawson as the Operators' Trustee. Mr. Lewis admitted this fact (294a, 296a). Mr. Lewis, as Chairman of the Trustees, refused to recognize Judge Charles I. Dawson as a Trustee (297a, 522a-523a, 1082a). The telegrams exhibited by Judge Dawson to his deposition and confirmed by Mr. Lewis as being the telegrams exchanged between Mr. Van Horn and himself (524a-525a) showed that Mr. Van Horn had resigned; that he had notified Judge Dawson of the latter's appointment

and had notified Judge Dawson of the meeting already scheduled for November 21, 1949 (525a). Mr. Lewis also testified that Judge Dawson attended two meetings of the Board of Trustees and that he assumed there were minutes of those meetings. Counsel for Phillips Brothers requested that these minutes be produced but none were forthcoming (297a-298a).

In an attempt to refute Judge Dawson's deposition and to explain the failure of the Trustees to produce minutes of the two meetings of the Trustees that Judge Dawson attended, Mr. Lewis endeavored in later testimony to say that Judge Dawson was merely given an opportunity to talk with respect to the question of seating him as a Trustee. However, almost in the same breath Mr. Lewis indicated that Fund business was transacted at these meetings (1121a-1122a).

Also endeavoring to explain the absence of the minutes of the two meetings, Mr. Val Mitch, General Counsel for the Trustees, testified that Judge Dawson had asked for the meetings; that Mr. Lewis had not called the meetings; and that no business was discussed except the seating of Judge Dawson and that this was the reason why there were no minutes of these meetings (1088a). Mr. Mitch's testimony was likewise conflicting on the question of whether Fund business was discussed (1081a-1082a).

The telegrams between Mr. Lewis and Mr. Van Horn show that the meeting of November 21, 1949, the first of the two meetings attended by Judge Dawson, had already been scheduled by Mr. Lewis as a regular meeting of the Board of Trustees (524a-525a).

Judge Dawson testified in his deposition that he was appointed by the operators as Trustee after Mr. Van Horn's resignation. Judge Dawson stated that Mr. Harry Moses, who was acting for the operators in the contract negotiations then taking place with the UMW, called him

and told him that the operators wanted him to serve. Judge Dawson informed him that he wanted to have three questions cleared up before he accepted the appointment. He met with Mr. Moses, Mr. Amos and Mr. George Love, the last two representing Consolidation Coal Company (520a). These questions were ironed out (1004a), and he accepted the appointment on November 5, 1949 (519a).

Judge Dawson attended the first meeting of the Board of Trustees on November 21, 1949 (521a), the regular meeting of the Trustees of which he had been notified by Mr. Van Horn. He testified that at this meeting Mr. Lewis instructed the Secretary of the meeting, Mr. Mitch, not to recognize anything that Judge Dawson said and not to take down any motions which he made or votes which he cast (522a). Mr. Lewis refused to recognize Judge Dawson at the second meeting which was held December 2, 1949 (523a). Mr. Lewis was contending that Mr. Van Horn had submitted a qualified resignation as Trustee and that, even though Judge Dawson had been certified by the operators representing 51% of the tonnage in the industry, the Trustees had the right to pass on a new Trustee (299a-300a, 1121a). Mr. George Love, however, confirmed in his testimony that Mr. Van Horn resigned September 14, 1949 (539a). Judge Dawson testified that he consulted with Mr. Love and Mr. Moses about the treatment which he was receiving at the hands of Mr. Lewis and that they insisted that he take action in the courts (525a). In accordance with their wishes a lawsuit was commenced (525a). Judge Dawson testified that the next occurrence was the signing of the 1950 National Bituminous Coal Wage Agreement on March 5, 1950. This contract, finally negotiated with Mr. Lewis by Mr. Love, named Mr. Charles Owen as the operators' Trustee of the Fund instead of Judge Dawson without any prior notice to Judge Dawson that this was going to be done

(525a-526a). Judge Dawson had previously notified Mr. Moses and Mr. Love of the pending lawsuit, but he testified that because they had been so treacherous toward him he felt no reason to continue the lawsuit after the 1950 contract was signed (526a-527a).

Judge Dawson testified that he did not intend to accept any compensation from the Welfare Fund for service as the Operators' Trustee, but rather, he intended that his compensation come from the Operators (529a) just as Mr. Lewis' compensation as the UMW Trustee has always come from the UMW (1120a). However, during the entire period that Mr. Owen served as the Operators' Trustee (From March 5, 1950, until his death on July 20, 1957) his compensation was paid by the Welfare Fund itself. His salary was $35,000.00 per year (1053a), an amount which Mr. Schmidt, his successor trustee, testified was an exorbitant and unreasonable amount for merely attending four or five meetings each year (1053a-1054a, 1062a).

The Trial Court, in setting aside the jury verdict as to the Trustees, made no reference to Judge Dawson's testimony. However, the jury was entitled to put full faith and credit upon the testimony of this former United States District Judge and was fully justified in concluding that Mr. Lewis' actions were motivated by the purpose of preventing a strong man like Judge Dawson, who would not tolerate the continued UMW control of the Welfare Fund, from being seated as Trustee and causing the operators to appoint a stooge as their Trustee who would cooperate with Mr. Lewis in allowing the UMW to continue in control of the Fund.

3. The Naming of the Operators' Trustee and the Neutral Trustee Was an Issue in the Negotiations of the National Bituminous Coal Wage Agreement of 1950.

In this regard, the jury had the benefit of additional evidence from statements and testimony of Mr. George

Love. During the 1949-50 negotiations, which culminated in the 1950 contract, Mr. Love, chief negotiator for the operators stated publicly that the UMW was attempting to name stooges of its own choice on the Board of Trustees as operators' Trustee and as neutral Trustee (292a, 541a). In his deposition in the present case Mr. Love admitted that the identity of the Trustees on the Welfare Fund was an issue in the 1949-50 negotiations (541a), even though this was not a proper issue for negotiation under the National Labor Relations Act, as amended, which Act (29 U. S. C. A. Section 186c) strictly requires that the employers name a Trustee, that the Union name a Trustee, and that these two Trustees select a neutral Trustee. Moreover, on March 5, 1950, a few minutes after the 1950 contract was signed, Mr. Love, in the presence of Mr. Lewis, stated the following with respect to the Welfare Fund: "The responsibility is clearly on the shoulders of the Union, and if it fails, the public and ourselves will look directly at the Union" (347a, 547a-548a).

In the light of this evidence the jury was completely justified in finding that, in the conspiratorial agreement entered into in 1950, between the UMW and the large coal operators the *quid pro quo* for the UMW's acceptance of the large Operators' plan for stabilizing prices in the industry was the agreement by the large operators that the Welfare Fund would remain in the control of the UMW as it had been from its inception in 1946.

4. Mr. Lewis Was Successful in 1950 in Obtaining Two Trustees Who Would Cooperate in the UMW's Continued Control Over the Welfare Fund.

The negotiators of the 1950 contract also named in the contract, itself, Miss Josephine Roche to be the neutral Trustee of the Welfare Fund, replacing Senator Bridges, even though both the contract and Section 302 of the

Labor Management Relations Act of 1947 (29 USCA., Sec. 186) required that the neutral Trustee be selected by the Union Trustee and the Operators' Trustee rather than by the negotiators of the contract. In an affidavit filed in the early stages of this case Miss Roche stated that prior to her appointment as Trustee she had no previous connection with the UMW (348a-349a). As the case developed, however, the UMW admitted that in 1946 the UMW purchased 222,000 shares of stock in the Rocky Mountain Fuel Company of which Miss Roche was president and chief owner (674a). Miss Roche testified that her father was president of the company before her and that the company was in financial difficulties (1011a-1012a). In 1947, one year after the UMW's unsuccessful attempt to bail Miss Roche's company out of its financial difficulties, Mr. Lewis employed Miss Roche as his personal special assistant in his position as Trustee of the Welfare Fund (351a). In 1949, Miss Roche was made director of the Fund at a time when it was operated exclusively for UMW members, a position which Miss Roche has continued to hold to the present time in conjunction with her position as the so-called neutral Trustee (350a).

There was, therefore, ample evidence to support the jury's conclusion that Miss Roche and Mr. Owen were the two stooges that Mr. Love had stated in 1950 that Mr. Lewis was attempting to put on the Board along with Mr. Lewis, himself.

The practical insignificance of the position of Operators' Trustee since 1950 was plainly shown in the testimony of Trustee Henry G. Schmidt, wherein it was shown that, upon Mr. Owen's death in July, 1957, a successor Trustee was not appointed until May, 1958, a period of some ten months, during which time the Fund collected and expended approximately $100,000,000; that the larger operators exhibited no particular interest in being repre-

sented on the Fund that was handling such huge sums of money, and Mr. Schmidt finally was forced to accept the position himself (1054a, 1061a, 1063a).

D. The Conduct of the Welfare Fund Since 1950 Has Been Consistent With the Policy of the UMW to Control the Welfare Fund as an Instrument of the Conspiracy to Restrain the Trade of Small Coal Companies.

The record in this case contains abundant proof to support the jury's verdict that the means adopted by the UMW to control the Welfare Fund prior to 1950, as set out hereinabove, have been continued since 1950 and that such means have been a prime instrument to carry out the conspiracy to restrain the trade of small coal companies entered into between UMW and the large coal companies of the country.

1. All Means Adopted by the UMW Prior to 1950 to Insure UMW Membership as a Prerequisite for Obtaining Welfare Fund Benefits Have Continued Since 1950.

The continued requirement since 1950 of UMW membership as a prerequisite for obtaining Welfare Fund benefits is shown by the following evidence:

a. Statements made since 1950 by the Chairman of the Board of Trustees and by the General Counsel for the Trustees show that the Trustees have continued to interpret the contract as requiring UMW membership for obtaining Fund benefits. In October, 1952, two and one-half years after the UMW claims the Welfare Fund was granted its independence, Mr. Lewis, Chairman of the Board of Trustees made the following statement at the 1952 UMW Convention:

> "Based upon present computations governing the life expectancy of individual members, $18,000.00

will be paid on the average under each pension award. Certainly we cannot continue to pay out that $18,000.00 over a long period of years without fully protecting the legal membership of that individual and causing him to maintain his constitutional membership in this organization."

In his deposition Mr. Lewis was asked about this statement. His answer was: "Those statements were predicated upon the conditions existing at that time and are not necessarily the law and the prophets in 1961."

Mr. Lewis was then asked: "But this was 1952, after the signing of the 1950 contract?" Mr. Lewis replied: "Exactly so, exactly so. But that whole question has been clarified since that time" (379a).

There was no effort made by the Trustees to show that this question was clarified at some time subsequent to 1952. On the contrary, the Trustees stubbornly insisted that the question had been clarified on March 5, 1950, when they say the Fund was liberated from the UMW (340a-343a, 1026a, 1119a). However, this insistence on the part of the Trustees should be compared with Exhibits 35 and 36, portions of which were read into the record in this case (363a-365a). Exhibit 35 is an article appearing in the *United Mine Workers Journal,* dated May 15, 1960, reporting a meeting of UMW District officers at the Welfare Fund office in Washington, D. C., where Miss Josephine Roche, Trustee and Director of the Welfare Fund, explained how to process the application for pension forms of the Welfare Fund (363a-364a). Particular attention should be directed to Exhibit 36, which is an article appearing at pages 3 and 4 in the *United Mine Workers Journal,* dated July 1, 1950, reporting the fact that Miss Josephine Roche had mailed to UMW District Officers new forms for obtaining hospitalization benefits from the Welfare Fund, together with instruc-

tions on how these forms were to be processed. This information mailed by Miss Roche states that these hospitalization benefits are available to members of the UMW and that in the event that a miner no longer is a member of the UMW in good standing he must turn his hospitalization authorization card (Form 85-HS) in to his local union (365a-366a). This action on the part of Misss Roche was taken four months after March 5, 1950, the date on which the Trustees now claim that the Welfare Fund was granted its independence from the UMW.

Mr. Val Mitch, General Counsel for the Fund, who furnished the legal advice to the Trustees, testified in a case in the United States District Court for the District of Columbia as late as 1956 that he construed the contract as follows: "I read it that 'all of the foregoing benefits are to be made available to members of the Mine Workers who are employees of the operators' signatory,' I don't think it could be any other way, in my opinion" (345a, 1083a).

Mr. Thomas A. Kennedy, Vice President of the UMW during the period covered by this case and currently President of that organization, referred to the Welfare Fund in a speech to the 1956 UMW Convention as being the "Welfare Department of the United Mine Workers of America." Mr. Lewis characterized this as a slip-of-the-tongue (382a).

b. The International Membership Committee established in 1948 for processing Welfare Fund applications (372a-373a) continued to function after 1950 and Mr. Lewis testified that the Committee continues to function at the present time (374a-376a). Vice President Kennedy pointed out in 1952 that the work of this Committee was important in maintaining the integrity of the UMW membership which had "become very valuable" (375a). Mr. Lewis had estimated the average value of membership

under Welfare Fund pension benefits alone at $18,000 per man (379a).

c. Pensioners under the Welfare Fund were required to retain their membership in the UMW and pay UMW dues after 1950. Mr. Lewis had made an address to the UMW Convention in 1948 stating that the requirement that the pensioners pay dues to the UMW was because of the "numerous statutory provisions and the punitive provisions of the Taft-Hartley Act, whether a man who pays nothing in the form of dues for an extended period of time to the organization could maintain a legal relationship and be adjudged a legal member" (288a). This question of dues of retired pensioners under the Welfare Fund was raised at the 1952 UMW Convention by some of the delegates (377a-380a), and Vice President Kennedy explained that the dues were necessary "in order to legalize beyond any question of doubt the membership of these individuals" (378a).

The question was never clarified in the record as to the origin of this erroneous interpretation of the law that the Taft-Hartley Act requires pensioners under a Welfare Fund to retain their Union membership.

This theory was not advanced by opposing counsel in this case. Rather they contended there was a complete change of policy in 1950 about the requirement of union membership under the Welfare Fund when the Courts had passed on that question (344a).

Nevertheless, these statements by the UMW officers about the requirement of retaining union membership made quite an impression upon the UMW membership, as shown by the statement of delegate Morris at the 1952 UMW Convention, where he stated:

> "It would not be healthy for our delegation not to get up and speak on this issue at this Convention.

When it came time for resolutions to be drawn to be sent to our International Secretary-Treasurer, the old men asked the Resolutions Committee to cut the dues. We told them and quoted from the proceedings of our last Constitutional Convention to the effect that our great leader, John L. Lewis, settled a big argument that it was only due to the punitive measures of the Taft-Hartley Act that we had to charge something and the dollar was the least we could charge" (380a).

The question was again raised by some of the delegates at the 1956 UMW Convention and this same representation was repeated to the membership by Mr. Lewis that there was a legal requirement that the pensioners retain their Union membership (381a).

d. The report of the UMW officers to the 1952 UMW Convention contained the following statement under the heading "UMWA Welfare and Retirement Fund":

> "Determination of the eligibility of an applicant is the sole responsibility and function of the Fund, with the one exception of certification of Union membership which is strictly the province of the Union" (359a).

Mr. Lewis attempted to explain this statement by testifying, in substance, that the integrity of applications was judged by the Welfare Fund upon the basis of certification of the Union membership by the Union officers (360a-361a).

e. The Welfare Fund application for benefits forms continue to contain spaces for certification of membership in good standing in the UMW. These Welfare Fund forms are set forth in the record at 357a-359a, introduced as Exhibit 34 (357a). There are numerous spaces on these forms for certification by UMW Local, District and In-

ternational officers of membership in good standing and spaces for the seals of the respective UMW organizations. If an applicant writes directly to the Fund he is sent a form asking for his Local Union number (1087a).

f. Hospitalization benefits are paid only to employees of signatory operators who are members in good standing of the UMW. This fact is apparent from the Welfare Fund form entitled "Request for Changes on Form 85-HS" which deals with the hospital card given to beneficiaries by the Welfare Fund, which card authorizes its holder to receive hospitalization benefits from the Fund. This form is part of Exhibit 34 (1606a) and is referred to at 359a. This form requires a change on the card or a surrender of the card for any one of the following situations: (1) the member has died; (2) the member has married or remarried; (3) *the miner is no longer a member of the United Mine Workers of America.* If a miner is no longer a member in good standing of the UMW he must return the hospital card to the Local Union (366a).

g. The Trustees have maintained the Resolutions of the Board of Trustees in secrecy since 1950. Before 1950 the Resolutions of the Board of Trustees, which formally required UMW membership to participate in benefits of the Fund, were reported and quoted verbatim in such publications as the *United Mine Workers Journal* (339a-342a). Since 1950 there has been no publication of the Resolutions in the *United Mine Workers Journal* (342a-344a). Even in his testimony in this case, Mr. Mitch did not introduce a copy of the Resolutions of the Trustees, but rather, he submitted as Exhibit 141 a "List of requirements for eligibility for benefits" (1074a). Resolutions of the Trustees are not available to the public and are not even available to applicants who write to the Fund (1086a). The Trustees will not show the Resolutions to anyone (1986a). The last time the men in the industry

were given an opportunity to see for themselves the eligibility requirements of the Fund was before 1950, when UMW membership was admittedly a requirement for receiving Fund benefits.

h. Statements in the annual reports of the Trustees contained illusory language with respect to UMW membership. The Trustees put great store in this case upon certain language contained in the elaborate annual reports prepared each year by the Welfare Fund and it was upon these reports that the Trial Court based its opinion that it is reasonably clear that UMW membership was not a requirement for obtaining Fund benefits. The language contained in these reports is found at 1030a-1031a. The language quoted at page 1030a is:

> "No benefit is authorized *solely* on the basis of Union membership." (Italics added.)

It is apparent from this language that membership is a requirement, but is not the *only* requirement. The language relied upon by the Trustees at 1031a is:

> "Trust Fund benefits are not authorized on the basis of Union membership, but only in conformity with Trustee regulations."

It is again apparent that UMW membership will not *alone* obtain the benefits but that there are more restrictive requirements than simply membership. This was the only evidence that the Trustees introduced to show that they had cleared up any misunderstanding among the employees in the industry about this subject. Moreover, these annual reports are not distributed to the employees in the industry (1029a).

i. There is a broad general understanding among the men in the industry that UMW membership is a requirement to obtain Fund benefits. Mr. Mitch, General Counsel for the Fund, testified that suits were being filed

against the Fund wherein claims were being based solely upon UMW membership (1079a). On cross-examination he testified that there were many of these suits being brought all over the nation (1090a). This is a clear indication of a broadly held view by the employees in the industry that membership is the basis upon which benefits are paid. Phillips Brothers' employees were under the impression that they were required to join the UMW in order to receive hospital cards (969a, 979a). Phillips Brothers' employees did not *in fact* receive hospital cards from the Fund until after they joined the UMW on April 25, 1955, even though Phillips Brothers had been a signatory to the contract since October 1, 1953 (974a, 979a, 982a). One employee, Arvin Hutson, had a hospital card when he went to work for Phillips Brothers in October, 1953, but he was required to turn it in after he let his UMW membership drop (976a).

The Court's attention is invited to Exhibits 138-143, the six files that the Trustees brought in, out of the thousands on file, attempting to show that pensions were awarded to non-union members. We ask the Court to consider particularly letters found in Exhibit No. 142 which perhaps illustrate more accurately than any other evidence how the Trustees have allowed the impression to permeate the industry that union membership is a prerequisite for obtaining benefits from the Welfare Fund (1699a-1700a, 1701a-1702a). Note that the first letter, dated March 19, 1958, from Bartha Mae Taylor to Mr. Lewis stresses the fact that her husband continued to pay his membership dues to the UMW, even though it was a great hardship to do so, after he lost his job in order that he would be eligible to receive benefits from the Fund. He continued to pay these dues until there was absolutely no money left. After receiving a reply from Trustee Roche, who did not enclose any application forms (1700a), Mrs. Taylor wrote to Trustee Roche a letter dated April 15,

1958 in which she went to great pains in setting out all the dues paid by her husband to the UMW after losing his job and informing Trustee Roche that her husband could not obtain application forms from his local union without first paying $70.00 (1701a-1702a). Mrs. Taylor pleaded with Trustee Roche to send Fund application forms which was done (1702a). It finally took a letter from U. S. Representative Elizabeth Kee one year later to obtain the pension from the Welfare Fund (1706a-1707a). The pension was granted two days after Rep. Kee's letter. At no place in the file is it shown that Mrs. Taylor was advised that payment of union dues was not necessary to obtain benefits. These letters from Mrs. Taylor are examples of the letters which the Trustees were receiving as shown in the other five files. The presence of such an impression in the industry would not have been tolerated by trustees who were more interested in the welfare of the beneficiaries of the Fund than in making the Fund subservient to the purposes of the Union.

j. The Trustees have failed to clear up any understanding among the employees in the industry that UMW membership is a requirement for Fund benefits. The Trustees filed answers to interrogatories in this case in which they stated that they were not advised that there was any such broadly held view in the industry (384a). However, Mr. Mitch, General Counsel for the Fund, finally stated in his testimony that the Trustees had done what they could to clear up the impression (1091a), but no evidence whatsoever was introduced to show that the Trustees have done anything in a practical way toward clearing up this broadly held understanding that membership is a requirement for receiving Fund benefits.

k. In spite of the Trustees' insistence that the Welfare Fund pays benefits to non-Union employees of signatory operators, the Trustees produced no documentary evidence

to support this assertion. Interrogatories were addressed to the Trustees asking for information as to one non-Union employee who had ever received a pension from the Welfare Fund. This interrogatory was objected to on the ground that it was oppressive and that it would cause too much work to find such a name (368a-369a). Another interrogatory asked if there were any persons who had received a pension in the years 1956-1957 who were non-Union employees and the same objection was interposed (369a-370a). Another interrogatory asked for the name of any non-Union beneficiaries in District 19, UMW, and the same objection was interposed (371a). However, Mr. Mitch, Counsel for the Fund, testified that non-Union men are frequently awarded benefits and that there are a substantial number of these in the Trustees' files (1076a-1077a).

Finally, at the trial, and without having disclosed these to Counsel for Phillips Brothers in spite of the previous interrogatories, the Trustees introduced the six files, heretofore referred to which they claimed contained the names of non-Union beneficiaries (1033a-1043a, Exhs. 138-143). One of these files (Exhibit 141) contained an application filed November 5, 1958; another (Exhibit 142) contained an application filed May 28, 1958; and a third file (Exhibit 143) contained an application filed December 1, 1960 (1042a-1043a). The applications in all three of these files were filed after the issue was raised in this lawsuit with respect to UMW membership being a requirement for receiving benefits. For this reason the contents of these three files were never fully revealed to the jury. These files as printed in the appendix do reveal that each of these three applicants was a member of UMW when he left the industry and their letters show that each considered it necessary to explain that he was unable because of unemployment to continue paying union dues after leaving the industry (1694a-1712a).

With respect to the other three files (Exhibits 138, 139 and 140) the contention of Phillips Brothers, that UMW membership was a requirement for receiving Fund benefits, was amply shown. Exhibit 138 showed that the applicant was no longer employed in the industry but that he was a UMW member at the time he left the industry. It showed that the Trustees ignored his application until he hired an attorney and that the Trustees then turned his file over to Mr. Mitch, their General Counsel, and left the decision with him as to whether or not the pension would be awarded (1516a, 1675a-1676a). In view of the fact that no other reason that the pension should not be awarded appeared in the file, the jury was justified in its conclusion that Mr. Mitch determined that it would be better to pay the pension quietly rather than risk a lawsuit over the Trustees' refusing to pay a pension to a retired miner who had allowed his membership to drop since leaving the coal industry. Exhibit 139, the second file, revealed that the applicant was a UMW member at the time he made application for benefits (1517a-1518a, 1678a-1680a). Exhibit 140, the third file disclosed that the applicant was sent forms of the Welfare Fund requiring him to fill in blanks with respect to his Union membership and requiring certification of membership in good standing by the UMW officers. When he returned these forms to the Trustees these blanks were not filled in. The Trustees then sent these forms to the District Office of the Union to have them certify that the applicant was a member in good standing. The District then wrote to the applicant informing him that he should address the Trustees directly (1519a, 1684a-1687a). The jury was amply justified, from this series of rather involved correspondence regarding UMW membership in good standing, in reaching its conclusion that the Trustees were fully cooperating with the UMW by doing their utmost to continue the extraction of dues from unemployed miners by UMW and to discourage non-Union men in the indus-

try from applying for the benefits which they had a right to receive, and at the same time avoiding a lawsuit which might result in enlightening the men in the industry that the law requires the Trustees to pay benefits to *all* employees of a signatory operator, regardless of Union membership.

None of these files deal with the question of hospitalization benefits. They all deal with pensions. The Trustees did not even attempt to produce any documentary evidence that a single non-Union employee of a signatory operator ever received hospitalization benefits from the Fund (1520a).

2. Pensioners Under the Welfare Fund Have Been Organized to Carry Out UMW Activities in Accordance with the Conspiratorial Agreement.

There was ample evidence to support the jury's conclusion that the UMW effectively controls the Welfare Fund and uses this control to force the National Bituminous Coal Wage Agreement upon the small coal operators who would not voluntarily sign the agreement whose terms they cannot afford to pay; that pursuant to the terms of the conspiracy between the UMW and the large coal operators the contract has been imposed on the small operators by the use of mobs which the UMW has been able to raise by holding the benefits of the Welfare Fund over the heads of the men in the industry as an enticement. That the UMW has succeeded in organizing pensioners under the Welfare Fund into picket duty and mobs is repeatedly acknowledged by the UMW.

a. Every pension awarded by the Trustees contains the following provision in bold-faced print:

> "Subject to the termination at any time by the Trustees for any matter, cause or thing of which

they shall be the sole judges and without assignment of reason therefor" (1520a).

As shown hereinabove, Mr. Lewis, Chairman of the Board of Trustees of the Welfare Fund, convinced the UMW membership, in his capacity as President of the UMW, that the law required pensioners to retain their UMW membership and the UMW Constitution has in fact so required since 1948 (290a). The jury was entitled to its reasonable conclusion that this bold-faced printed termination provision was calculated to, and did in fact, have a strong effect upon pensioners with respect to their obligation to the UMW.

b. Organized pension committees of pensioners under the Welfare Fund held regular meetings and conducted organizing drives under the guidance of the presidents of UMW Districts (422a-426a). Such activities were carried on to bring the non-Union coal miners into the UMW (424a). Bands of one hundred to three hundred of these retired men were organized to picket and to hand out leaflets in freezing temperatures for long hours in connection with efforts to boycott power companies that bought non-Union coal (425a-426a). These retired men were organized into picket lines for as long as two years, rain or shine, hot or freezing (425a-426a).

c. The organized pensioners have been used to force the small companies to sell out to the major companies. Organized pensioners were used to force the non-Union Banner Fuel Corp. to sell out to Clinchfield Coal Corporation, Division of Pittston Company, one of the UMW's co-conspirators (426a, 692a-693a).

d. Organized pensioners have been used to boycott coal markets supporting non-Union operations. Organized pensioners were used against Monongahela Power Company to compel it to patronize Union coal mines (425a-426a).

e. The Trustees have done nothing to stop the organizing of pensioners to carry on the drudge work of organizing drives. Mr. Lewis, Chairman of the Board of Trustees, testified that he knew about the organized pensioners' activities but that he did not know about it or discuss it in his capacity as Trustee of the Welfare Fund (426a). He said that the Trustees did nothing about it (427a). Trustee Schmidt testified that the matter of organized pensioners had never been discussed by the Trustees (1059a). Mr. Mitch, General Counsel for the Trustees, who attended all of their meetings, testified that there had never been any discussion about organized pensioners in his presence (1078a). At another place in the record, Mr. Lewis testified that when this matter *was discussed* by the Trustees it was concluded that there was nothing that they could legally do to prevent the men from engaging in these activities (427a). The jury was certainly entitled to conclude that the very least that the Trustees could have done would have been to have widely disseminated to the men in the industry the requirements of obtaining benefits from the Fund, as they did prior to 1950, especially the fact (if it be a fact) that, under the Fund resolutions, UMW membership had no bearing whatsoever upon their rights to receive benefits. The Trustees certainly missed an opportunity when they failed to make this explanation to Mrs. Bob Taylor and the other applicants who wrote about union membership and the payment of dues in the six files (Exhs. 138-143). The jury was fully justified in its conclusion that, if the Trustees had been persons independent of UMW control, they would not have tolerated such unlawful use of the Welfare Fund by the UMW. The jury must have been disappointed in this attitude. The jury was fully justified in concluding that, had the Trustees been concerned with the welfare of the beneficiaries of the Fund, means would have been found, or at least discussed, of informing the

pensioners that their Fund benefits would not be affected if they chose not to join in the much publicized UMW activities which involved considerable amount of activity on the part of these elderly men in all sorts of inclement weather.

3. The Trustees Have Used Lawsuits to Collect Welfare Fund Royalties From Small Coal Companies for the Purpose of Driving Them Out of Business.

The jury reasonably concluded that the Trustees have used lawsuits, such as the case at bar, to collect Welfare Fund royalties from small coal companies for the purpose of driving them out of business pursuant to the terms of the conspiracy. The evidence on this conduct is as follows:

a. The principal occupation of the Trustees appears to be the bringing of lawsuits such as this. The trustees meet four to six times per year (1018a, 1055a), each meeting lasting from two to four hours (1019a, 1056a). The Trustees testified that up to fifty percent of their time in these meetings is devoted to considering the bringing of lawsuits for royalties (1019a, 1065a).

b. The fixed and unvarying policy of the Trustees is to collect the last cent of the royalty, regardless of the condition of the small coal company or the effect which the driving of the company into receivership or bankruptcy will have upon the beneficiaries of the Welfare Fund who are employed by these small companies. Mr. Mitch testified that there can be no settlements; the Trustees will accept only the full amount due under the contract (1073a). Trustee Schmidt testified that the policy is to collect the very last cent (1065a). This policy is absolute; the fact that such a recovery means receivership or bankruptcy for the company and unemployment for the em-

ployee beneficiaries of that company, and the fact that the royalty amounts to more than the total profits of a company for its entire life, is not a subject for discussion by the Trustees (1065a). Trustee Roche went to great pains to show that the Trustees would permit no company to pay less than the last cent (1020a-1021a).

c. The Trustees have no concern for the employees of the small companies that are put into bankruptcy or receivership. Trustee Roche testified that the lawsuits are conducted to collect the last cent, regardless of anything about the company (1020a-1021a) and that no exceptions are made for any reason (1047a-1048a). Trustee Schmidt testified that the lawsuits are pressed even though it means that the employees who have mined the coal that paid the royalties theretofore are thrown out of the industry, thereby losing their beneficiary status under the Welfare Fund (1065a). As in the case at bar, the Trustees are not concerned with the circumstances under which the individual small company came to sign the contract. The jury was, therefore, justified in its conclusion that the Trustees were cooperating with the UMW in enforcing the Welfare royalty provisions of the contract as a prime instrument of the conspiracy to drive small operators out of the industry. When the competition for the TVA coal market reached a critical stage the Trustees brought forty one of these cases against the East Tennessee companies in rapid succession (1615a-1616a).

4. The Trustees Have Continued to Pass Resolutions Aimed at Keeping the Coal From Small Mines Off the Markets.

Since Trustee Schmidt has been on the Board of Trustees of the Welfare Fund, a resolution has been passed which bars from eligibility unemployed miners who get together and open up a small mine in order to gain a

livelihood in areas where they have become unemployed because the company which formerly employed them has gone out of business and there is no other employment available to them. There are many hundreds of these little mines over the country, many of them in Tennessee (1064a). The jury was entitled to reach the conclusion that this is just another device to keep small-mine coal off the market. A recent resolution of the Trustees was to reduce to one year the time limit for the obtaining of hospital care under the Welfare Fund by miners who have been forced out of the industry and who are unemployed (1077a-1078a).